

# A Guidance Document for Characterizing Tribal Cultural Landscapes

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## REPORT AVAILABILITY

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## LIST OF ACRONYMS

ACHP: Advisory Council on Historic Preservation
APE: Area of Potential Effect
BOEM: Bureau of Ocean Energy Management
CEQ: Council on Environmental Quality
CLA: Cultural Landscape Approach
FAC: Federal Advisory Committee
FONSI: Finding of No Significant Impact
MOA: Memorandum of Agreement
MOU: Memorandum of Understanding
MPA: Marine Protected Area
NEPA: National Environmental Policy Act
NHPA: National Historic Preservation Act
NOAA: National Oceanic and Atmospheric Administration
NPS: National Park Service
NRHP: National Register of Historic Places
OCS: Outer Continental Shelf
ONMS: Office of National Marine Sanctuaries
PA: Programmatic Agreement
POCS: Pacific Outer Continental Shelf
ROD: Record of Decision
TCL: Tribal Cultural Landscape
TCP: Traditional Cultural Property
TK (or TEK): Traditional [Ecological] Knowledge
THPO: Tribal Historic Preservation Office/Officer

## I. Introduction

The following Guidance Document (Guide) presents a method for agencies to consult with tribes more effectively and appropriately in advance of any proposed undertakings. It also suggests a means for tribes and other indigenous communities<sup>1</sup> to relate their interests and concepts of landscape to federal agencies and other land and water management entities. The concept is rooted in a collaborative initiative related to offshore renewable energy development. This project—Characterizing Tribal Cultural Landscapes—was comprised of a team from the Bureau of Ocean Energy Management’s (BOEM) Pacific Outer Continental Shelf (POCS) Regional Office, the National Oceanic and Atmospheric Administration’s (NOAA) National Marine Protected Areas (MPA) Center and NOAA’s Office of National Marine Sanctuaries (ONMS), two independent Tribal Facilitators, and representatives from the Tribal Historic Preservation Offices (THPO) of the Makah Tribe of Washington, the Confederated Tribes of Grand Ronde Community of Oregon, and the Yurok Tribe of California. The team worked collectively to develop a transferable best-practices method to identify areas of tribal use and significance that could be impacted by offshore renewable energy siting. Funding was provided by BOEM through an Interagency Agreement with ONMS. Additional information on the project’s background and implementation can be found in the Final Report, and on the website [sanctuaries.noaa.gov/tribal-landscapes](https://sanctuaries.noaa.gov/tribal-landscapes).

This Guide is intended to be useful for indigenous communities as well as agencies and project applicants. It does not represent an official policy for any federal agency; rather it is designed to outline a proactive approach for resource management agencies and indigenous communities to work together in order to identify areas of tribal significance that need to be considered in planning and management processes. An approach of this nature can ensure that tribal governments are involved and responsible for the identification and protection of resources of interest to them. It can also assist agencies in fulfilling their responsibilities under numerous laws and policies, including, for example:

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<sup>1</sup> In this document, the phrase “tribe or indigenous community” is used to include all native tribes and native indigenous communities, regardless of recognition status. Recognition status does not impact these groups’ sovereignty, interests in ancestral territory and resources, or the validity of traditional knowledge and cultural practices. Throughout the rest of the document, the phrase may be shortened to “tribes” or “indigenous communities,” but the intent remains the same. See *Appendix I: Glossary of Terms* for further clarification.

- key provisions of the National Historic Preservation Act (NHPA):<sup>2</sup> Section 302706 of Title 54 [Section 101(d)(6)]; Section 306108 [Section 106] (and its implementing regulations, 36 C.F.R. 800); and Section 306101-306114 [Section 110];
- consultation under the National Environmental Policy Act (NEPA);
- the American Indian Religious Freedom Act (AIRFA);
- Presidential Memorandum of November 5, 2009 and Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the subsequent Department of the Interior Secretarial Order (SO) 3317, and Department of Commerce Departmental Administrative Order (DAO) 218-8;
- Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations); and
- Secretarial Order No. 3330 (Improving Mitigation Policies and Practices of the Department of Interior).

Although federal agencies are only required to conduct government-to-government consultation with federally recognized tribes,<sup>3</sup> the guidelines in this document are intended to apply broadly to indigenous peoples, and are critical and necessary for meaningful and effective engagement, consultation, and collaboration even when they are not required by policy or law. These guidelines are applicable to all indigenous communities “in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith” (UNDRIP 2008).

A key purpose of the Guide is to provide a method in which interests of an indigenous community can be recorded by that group, and summarized results and concerns can be applied in a culturally sensitive and relevant manner for use in planning and regulatory compliance by federal agencies. Using landscape<sup>4</sup> as the unit of understanding ensures a full coverage of interest areas and an opportunity for presenting a holistic understanding of a place and its resources as related by affected tribal communities. The methods suggested here are predicated on an understanding and acknowledgement of indigenous communities’ sovereign

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<sup>2</sup> In 2014, the National Historic Preservation Act was recodified under Title 54 of the United States Code (54 U.S.C. § 300101 et seq.). Some frequently used provisions and processes may still be informally referred to by their former section numbers, including Section 106.

<sup>3</sup> A federally recognized tribe is an American Indian or Alaska Native tribal entity that is recognized as having a government-to-government relationship with the United States, in accord with the Federally Recognized Indian Tribe List Act of 1994. Additionally, a number of federal statutes, including NHPA, require federal agencies to consult with Native Hawaiian organizations.

<sup>4</sup> This term encompasses areas with terrestrial, coastal, and offshore marine components, including related concepts such as seascapes and riverscapes.

rights, recognitions, and legal protections. To that end, the sources of information and methods by which information is gathered must be defined by each indigenous group. Likewise, the area, format, and type of information provided to agencies must also be defined by tribes, recognizing that multiple tribes and groups may have an affiliation with a single place. This approach is intended to be transferable and adaptable to any tribal community that may wish to document its own significant resources and places, in order to improve effectiveness and appropriateness of agency consultation in the future.

Although opportunities for implementing this approach are likely to be affected by federal legislation and regulations, areas of applicability are likely to be shared by tribes and agencies. The Guide ultimately outlines a framework for implementation that is compatible with existing policy and regulations, illustrating the respective roles of agencies and tribes in the process. Finally, the Guide also provides definitions for terms and topics that can assist agencies, tribes, and project applicants in communicating more appropriately and effectively.

## **II. Cultural Resources from an Indigenous Perspective**

### ***A. Guiding Principles of Self-Determination***

Many of the project's guiding principles align with those in Linda Tuhiwai Smith's *Decolonizing Methodologies* (2012), which reinforce tribal sovereignty and self-determination. Smith articulates the process in which many indigenous peoples and their supporters are engaged via revitalization of indigenous cultures at all levels. The concept conveys the widespread effort to re-focus the standard interpretation of history and status quo to be more inclusive and less ethnocentric. These principles include but are not limited to:

1. Indigenous determination of research needs and priorities;
2. Indigenous articulation of the ways research should proceed;
3. Training of indigenous researchers and extending opportunities for indigenous peoples;
4. Discussion of culturally appropriate ethics, and ongoing development of culturally sympathetic methods;
5. Increased collaboration among tribes;
6. Tribal development and dissemination of literature on research;
7. Continued self-reflection, evaluation and critique of the community of indigenous researchers;
8. Education of the wider research and government community, including scientific, academic and policy communities regarding principles 1-7 above; and
9. Accountability to and outcomes for tribes.

Grounding the project as well as the Tribal Cultural Landscape (TCL) approach in these principles expands the scope and reach of potential benefits far beyond the stated objectives. Adopting this approach during undertakings and initiatives serves to strengthen tribal capacity

in numerous ways, improve long-term relationships among agencies and tribes, and ultimately better preserve and protect shared resources and landscapes.

## ***B. A Cultural Landscape Approach for Integrated Resource Management***

Federal agencies may not fully understand that indigenous people do not draw clear lines between the “natural” and “cultural” resources of a place. As a result, agencies may not adequately appreciate this holistic perspective, which can adversely impact their capacity to address the complex issues of land management and regulatory undertakings. The TCL method uses a holistic cultural landscape approach (CLA), which integrates environmental science with historical, archaeological, and traditional knowledge to provide a robust and cost-effective procedure to document places and resources of past and present significance to tribal communities. CLA recognizes that places and cultural heritage resources can have different or multiple meanings and levels of significance based on how people from different cultures, times, or backgrounds have interacted with the respective landscapes (MPA FAC 2011). Implementing this approach increases the likelihood that cultural heritage resources will be found, recognized, and appropriately considered as decisions are made about federal actions or undertakings.

CLA represents an opportunity to integrate management of natural and cultural resources, and to incorporate multiple voices and perspectives into procedures and practices. At its most basic, CLA is based on the understanding that humans are part of the landscape, both shaping and being shaped by it. CLA considers cultural heritage and resources as part of the ecosystem and the broader landscape, and examines relationships among all the resources of a place and their environment over time. In this way, CLA integrates management of cultural and natural resources at the ecosystem and landscape level – similar and analogous to ecosystem-based management. Significantly, CLA can identify past and living cultural voices associated with a landscape, helping ensure the fullest possible public engagement in planning and management (MPA FAC 2011).

Generally, an indigenous worldview recognizes broad interconnections and does not consider a single artifact or a single species as existing without complex relationships. This perspective places cultural resources within a contextualized mosaic of a landscape. For example, an archaeological site can have culturally significant plants and modified trees above ground (peeled bark, coppiced [pruned to encourage new growth], etc.), a lithic component (stone tools) underground, and possess a viewshed of an important cultural or spiritual location, such as a mountain. The complexity inherent in these types of places is understood by the communities that inhabit and interact with them. By contrast, many studies tend to focus solely on the archaeological components of a site, rendering the interpretation of the place incomplete. Over-emphasis on material culture skews the understanding of a location by narrowly focusing on artifacts and potentially obscuring its cultural context. Additionally,

cultural resources have been damaged or lost because their meanings and connections with other resources found within the mosaic of cultural landscape have gone unrecognized.

Tribes and indigenous groups have an intimate and historical knowledge of place and should be engaged early to inform planning and future management. They hold a breadth and depth of understanding of the landscape to which they are connected. This knowledge reflects generations of engagement and interaction with the landscape. Indigenous peoples have long known that the interconnection between species ensures that management practices for particular resources influence the propagation and proliferation of other species. Additionally, geologic and seismic history may be held in oral tradition that guides and shapes settlement locations. The TCL approach recognizes that this information is valid and that it is held by tribal communities; the success of this process is therefore defined by participation of tribes and indigenous groups. The method provides tribal contextualization in a meaningful manner early in project processes, thus limiting delay and adverse impacts, and in turn reducing the need for mitigation measures.

Although the concept of CLA is not new (Sauer 1963; Westerdahl 1992), clear articulation of the process and pathways for implementation have been lacking, particularly regarding inclusion of tribal communities, resources, and places. The TCL approach outlined here can be used by indigenous communities to help recognize and record places and resources of cultural importance. It is intended to be transferable, and help tribes, agencies, and stakeholders to:

1. Properly engage with tribal and indigenous communities prior to the proposal of activities that may impact tribal resources and areas;
2. Involve tribal and indigenous communities in the identification of their own significant resources and areas of use; and
3. Clarify tribal interests in specific planning areas.

### ***C. Tribal Cultural Landscapes***

Archaeological sites, burial grounds and traditional use areas are imbued with special meaning to past and present indigenous communities. For these places, this connection is important for, and often inseparable from, a community's cultural identity. Connection to place is a nearly universal concept held by indigenous groups throughout the United States and its territories, and is embodied in the tribal cultural landscape (TCL) definition developed during this project:

**TRIBAL CULTURAL LANDSCAPE:** Any place in which a relationship, past or present, exists between a spatial area, resource, and an associated group of indigenous people whose cultural practices, beliefs, or identity connects them to that place. A tribal cultural landscape is determined by and known to a culturally related group of indigenous people with relationships to that place.

Specific relationships may vary from group to group and may be defined temporally or geographically through oral traditions and cultural practices. Some tribes were relocated due to displacement or treaties, and may be extant today in places other than where they originated. Therefore, multiple tribes may hold knowledge and connections to the same place. These place-based connections, when viewed as a TCL, enable agencies and project applicants to understand the greater context of a place, the complexity of indigenous identity, and how indigenous communities identify places and important resources.

Three similar concepts already exist in historic preservation that are worth differentiating from TCLs. First, the National Register of Historic Places (NRHP, or National Register) provides Guidelines for Evaluating and Documenting Traditional Cultural Properties (TCPs). Second, NHPA legislation and Section 106 implementing regulations (36 C.F.R. 800) identify "historic properties of religious and cultural significance to Indian tribes and Native Hawaiian organizations." Third, the Secretary of the Interior's Treatment Standards provide Guidelines for the Treatment of Cultural Landscapes. TCL shares many characteristics of these three concepts and adds important elements, including processes for implementation, as well as ongoing adaptive management grounded in traditional knowledge.

Regarding TCPs, the NRHP has transitioned to using "places" rather than "properties," and future publications will reflect this change (B. Wyatt, personal communication, July 16, 2015). Ultimately, TCP designation is linked to the National Register, which can limit its use in consultations outside of the NHPA Section 106 process. Beyond the site-level definition, TCL also refers to a holistic approach, and the National Register is just one way TCL can be applied.

A key difference between TCPs and TCLs is that the latter are defined as significant by indigenous communities, rather than by exterior criteria. Whether or not a TCP may be eligible for the National Register is largely at the discretion of the nomination evaluator. In the historic preservation community, there are some perceived shortcomings of the TCP concept. Although our intent is not to provide guidelines for designating TCPs, the Final Report for this project includes a summary of these principal points, provided in the interest of sharing what we have learned.

TCP can refer to places of importance to any community, not just indigenous communities. According to the Advisory Council on Historic Preservation (ACHP), "within the Section 106 process, the appropriate terminology for sites of importance to Indian tribes [and Native Hawaiian organizations] is 'historic property of religious and cultural significance to an Indian tribe [and Native Hawaiian organization]'" (ACHP 2008:19 and ACHP 2011:14a). TCL carries the same meaning and utility as this phrase, and encompasses indigenous communities more inclusively. Also, it is a holistic pre-consultation approach not limited to the Section 106 process.

Cultural landscape is another useful and appropriate concept for tribes. The National Register currently does not provide a definition of cultural landscape, and criteria for evaluating significance are therefore lacking. Typically, landscapes are nominated to the NRHP as districts

or sites, which must also have a defined boundary. However, in 2010, the determination of Nantucket Sound as a NRHP-eligible TCP set new precedent. The Sound was ruled to be a site with a defined boundary, and a contributing feature of a larger district and “culturally significant landscape” whose boundary definition would require additional documentation (Shull 2010). This unprecedented use of NRHP standards and criteria both reveals the under-used flexibility of the NRHP and TCPs, and expands the concept’s utility for indigenous communities.

The Secretary of the Interior’s Guidelines for the Treatment of Cultural Landscapes define a cultural landscape as “a geographic area (including both cultural and natural resources and the wildlife or domestic animals therein), associated with a historic event, activity, or person or exhibiting other cultural or aesthetic values” (Birnbaum and Peters 1996:4). Two types of cultural landscapes, in particular, share defining characteristics with TCLs. Historic vernacular landscapes “*evolved through use by the people whose activities or occupancy shaped them,*” and ethnographic landscapes “*contain a variety of natural and cultural resources that associated people define as heritage resources*” [italics added for emphasis] (Birnbaum and Peters 1996:4).

Recently, the National Park Service (NPS) has undertaken initiatives to better engage indigenous communities in identifying and categorizing cultural landscapes.<sup>5</sup> The TCL approach not only emphasizes these two key aspects of the concept—shaping of the landscape by people, and indigenous self-determination of significance—but also emphasizes ongoing adaptive management grounded in traditional knowledge, and includes processes for implementation, delineating clear roles for both tribes and agencies in planning and management.

In this way, TCL also refers to a holistic approach beyond the site-level definition. Typically, NHPA and NEPA are applied on a project basis, because an action or undertaking is proposed, with a major goal being determination of eligibility to the National Register of Historic Places. TCL starts broadly with tribes determining important places and resources, and being equipped to represent their interests in potential actions or undertakings. The approach is grounded in tribal sovereignty and self-determined epistemology. Agencies and project applicants can derive process value from pre-consultation and planning, which in turn has the potential to help NHPA and NEPA processes and government-to-government consultation.

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<sup>5</sup> Examples include [revising National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties](#), the [National Register Landscape Initiative](#), and the work of the National Park Service’s [Indigenous Cultural Landscape](#) team.

In response to “an increasing number of Section 106 reviews involving large scale historic properties of religious and cultural significance to Indian tribes or Native Hawaiian organizations (NHOs),” combined with increasing development pressures and the lack of existing guidance on cultural landscapes, ACHP released the Native American Traditional Cultural Landscapes Action Plan (ACHP 2011b:1). The plan contains two sets of action items: the first set focuses on raising awareness about the existence and importance of traditional cultural landscapes to ensure they are considered early in land management and project planning decisions; the second set focuses on the Section 106 process as well as NEPA reviews, and the development of tools to assist all participants in the recognition and consideration of Native American traditional cultural landscapes. The TCL approach can help fulfill both sets of these goals.

The TCL approach can also help minimize conflicts, controversy, legal challenges and procedural delays. The approach can assist in fulfilling Secretarial Order No. 3330, Improving Mitigation Policies and Practices of the Department of Interior. The Order created a Task Force charged with, among other things, identifying “any new policies or practices, revisions to existing policies or practices, or regulatory or other changes that could be implemented to incorporate landscape-scale planning into mitigation-related decisions” (Secretarial Order No. 3330:4). The TCL approach can assist with this goal as it would help “avoid potential environmental impacts from projects through steps such as advanced landscape-level planning that identifies areas suitable for development because of low or relatively low natural and cultural resource conflicts” (Secretarial Order No. 3330:2).

### **III. Culturally Sensitive Information**

Traditional Knowledge (TK) may be privileged or otherwise controlled or regulated by cultural constraints within a tribe. Although the term traditional ecological knowledge is commonly used (USFS 2011, USFWS 2014, Anderson 2015), we use the term traditional knowledge synonymously, to avoid reinforcing the non-existent divide between cultural and natural resources. The non-native definition of TK is “a cumulative body of knowledge, practice and belief evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment” (USFS 2011:1).

In general, indigenous ways of knowing about the environment may differ fundamentally from those of most non-native or industrialized societies. The non-native paradigm places humans at the top of a hierarchy of nature, implying that humans are separate from the environment. This can lead to the treatment of other living things as resources to be used to meet human needs, wants, and desires. Generally, the indigenous paradigm regards humans as an integral and inseparable part of nature, with a continuous duty of care for its sustainability. Indeed, Gisele Martin of Tla-o-qui-aht First Nation in Canada goes as far as portraying English as an invasive language, with words such as “resources,” “stewardship,” and “management” that do not have a translation into Tla-o-qui-aht, one of many indigenous languages. Martin explains that, “our

language has no word for 'environment'; the closest is 'tiičmis', a word meaning 'force that keeps us alive'" (Martin 2015).

As viewed by indigenous peoples, traditional knowledge is a cultural resource belonging to or associated specifically with an individual or a group, and may not be common or public property to be shared outside the tribe.<sup>6</sup> The disposition of information about tribes, their past and present lifeways, and cultural practices is of paramount importance in negotiating consultation and project protocols.

The traditional cultural significance of a historic property is derived from the role the property plays in a community's historically rooted beliefs, customs, and practices (Parker and King 1990). Some types of tribal information may be culturally privileged or otherwise controlled or regulated, often by gender, age, or cultural norms. Hence sharing knowledge with non-tribal members may be contrary to tribal practices. According to guidelines of the National Register of Historic Places, "culture" is understood to mean the traditions, beliefs, practices, lifeways, arts, crafts, and social institutions of any community (Parker and King 1990). Tribal culture, in general terms, is uniquely and inextricably tied to place; any of the cultural components listed above may also imbue a place with special meaning. Examples of such locations may include:

- A location associated with the traditional beliefs of a Native American group about its origins or cultural history, or the nature of the world.
- A location where Native American religious practitioners have historically gone, and are known or thought to go today, to perform ceremonial activities in accordance with traditional cultural rules of practice.
- A location where a community has traditionally carried out economic, artistic, or other cultural practices important in maintaining its historic identity.
- A location that is intentionally avoided by an indigenous community, for example, because of its association with certain traditions, events, or revered beings/powers.

Each tribe is unique, influenced by its local environment, as is its traditional knowledge. Agencies' scientific and resource management responsibilities can be greatly enriched through the incorporation of TK. At a tribe's discretion, TK may be shared through the consultation process, as well as through less formal collaboration. These interactions can help agency staff identify tribal individuals who hold TK, as well as the opportunities to ask whether and how TK may be shared.

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<sup>6</sup> Section 300101 of Title 54 [Section 304 of NHPA] provides protection from public disclosure of information about the location, character, or ownership of a NRHP-eligible resource, if disclosure may cause a significant invasion of privacy, risk harm to the resources, or impede traditional religious practice at a site (54 U.S.C. § 300101 et seq.).

A review of U.S. and international intellectual property law finds that although binding and enforceable, such laws “usually are not applicable to traditional knowledge given its intergenerational, communal nature” (Brewer and Kronk Warner 2015:41). Furthermore, other sources of non-binding law (such as the internationally recognized right to self-determination) may protect TK, but are not enforceable in the U.S.

Culturally sensitive information may sometimes be publicly available. However, respect for the nature of this information must be demonstrated when consulting with tribes. It will not always be possible to know in advance what type of information is culturally sensitive, and tribes will not necessarily be willing or permitted to speak of such information to agency representatives. While this poses challenges, awareness that there is likely to be culturally sensitive information, and respect for the privileged nature of this information, will help foster productive relationships with tribes (NOAA 2013).

A multiagency Memorandum of Understanding “Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites” calls for the signatory agencies to develop “recommendations for addressing challenges regarding confidentiality” (Sacred Sites MOU 2012:2). “One way to address confidentiality concerns is for contracts [or agreements] with tribes to treat documentation generated by a tribe as its intellectual property, in recognition, as provided in Article 31 of the Declaration [UNDRIP], that tribes ‘have the right to maintain, control, protect and develop their intellectual property over [their] cultural heritage, traditional knowledge and traditional cultural expressions’” (Suagee and Bungart 2013:5). In developing the TCL project, BOEM and NOAA deliberately stipulated in all fundamental agreement documents and contracts that control over cultural information would remain with individual tribal partners. The project team incorporated confidentiality language into both the Interagency Agreement and the contracts.

#### **IV. Implementing a TCL Approach**

The TCL approach consists of guidance for agencies and project applicants as well as tribes. The *Guidelines for Tribal Pre-Consultation and Engagement* are multipurpose: they are intended to assist agencies and applicants consulting with tribes for specific proposed undertakings, as well as to model a holistic approach to building positive long-term relationships among agencies and tribes who may need to work together over generations. The *Template for Indigenous Data Collection and Retention* outlines a method for tribes to collect and retain information from which appropriate summary results can be provided to external parties. This part of the TCL approach is recommended in advance of any proposed undertakings, similar to the inventory requirement of Section 110 of NHPA (54 U.S.C. §306102). Finally, the *Process for Application* illustrates how the TCL approach can be implemented within existing policy, and the potential benefits for both land management and planning, and regulatory processes.

## **A. Guidelines for Tribal Pre-Consultation and Engagement**

Synthesized and adapted from existing federal agency consultation guidelines (NRCS 2009; USFWS 2011; NOAA 2013), the following recommendations are best practices that should be followed by agencies and potential project applicants. They are intended to enhance the government-to-government consultation process, not to replace it.

In addition to these pre-consultation guidelines, the TCL project team took extra steps toward building constructive relationships, a critical factor in achieving project objectives. The TCL team was fortunate to have resources and agency support to enable these additional measures, and appreciates that not all potential project applicants may have the leeway to conduct these steps as thoroughly. However, these procedures should be followed as much as possible, since they are critical and necessary for meaningful and effective engagement, consultation, and collaboration, even when not required by policy or law.

### **DO YOUR HOMEWORK:**

As much as possible, information about a tribe should come from that tribe.

1. **Research the tribe's culture.** "Culture" comprises how a group's worldview influences their behavior. This includes a tribe's governance structure, food preferences, spiritual practices, natural resource values, wealth, family structure, education system, etc.
2. **Research the history of the tribe and its current and historical relationship to the Federal Government.** Books, tribal newspapers, websites, and other documents can provide information on the tribe's historical relationship with the Federal government. It is important to be aware of any relevant conflicts, wars, treaties, executive orders, case law, and statutes, and how these have evolved over the years.
3. **Understand what is and what is not appropriate within tribal culture.** Observation, reading, and discussions with designated tribal officials can provide pertinent information about a tribe's culture and help minimize cultural missteps. An initial phone call to a tribal point of contact (such as THPO, Executive Director, etc.) can provide a better opportunity for introductions and can help lay the groundwork for an initial formal meeting. Be aware of the tribe's decision-making process: not all tribes use the same process to make decisions. In meetings, be aware of protocols related to prayer, food, and gift-giving, and be prepared to act accordingly.
4. **Understand the tribal perceptions of time and allow enough time to form ongoing relationships.** Perceptions of time vary across cultures. The agency time rhythm is typically based on non-native culture, which may differ from a tribe's time rhythm. Agency staff should be aware of differences and work to accommodate tribal schedules when time horizons seem to be out of sync. Likewise, agency staff should be clear with tribal contacts about any exigent circumstances driving the agency's timing for action. It may also be

important to consider subsistence and ceremonial schedules, preparation times, and funerary rites and grieving periods before consultation begins.

## PROJECT PLANNING:

5. **Budget resources and time for building relationships before decisions are made.** Establish the formal and informal preliminary contacts and the appropriate authorities needed for proceeding. In many federal-tribal interactions, this phase is typically overlooked in the formation of working relationships. Take time to assess and define roles, organizational attributes, and explicit procedures.
6. **Work toward building tribal capacity.** Building institutional capacity should be a fundamental goal of potential projects within not only the office of the THPO and the tribal government, but also among the entire tribal community and the tribe's cultural and natural resource departments, and other partners.<sup>7</sup> As an example, funding for the TCL project accounted for necessary staffing, logistics, and supplies, as well as ongoing technical assistance necessary for the completion of the project; each tribe determined its own needs, negotiated the terms of its contract, and managed its allocated funds.
7. **Construct flexible protocols.** The protocols should allow tribes to implement their own contributions with due consideration of project resources and procedural fairness, as well as consider tribes' distinct treaty arrangements, varied formal and informal tribal governance structures, and unique views of their cultural legacies and methods for protecting them. A method to accomplish this is to begin to construct ground rules for the process and any associated meetings. (see *Appendix II "Procedural Considerations"*)

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<sup>7</sup> The Historic Preservation Fund (HPF) provides annually-appropriated funding to tribes having an approved Tribal Historic Preservation Officer (THPO) to assist THPOs in executing their tribe's historic preservation programs and activities pursuant to NHPA and other relevant laws. Federal agencies should understand that the amount of annual appropriations for the HPF can strongly affect the capacity of THPOs, and also that tribes with no THPO and non-federally-recognized tribes do not receive these funds. Tribes and agencies should work together to develop alternative means of funding the required research and management of the information. "One way to engage a tribe early in the planning process is to pay for the tribe's help in identifying historic properties. As explained in the ACHP Handbook [*Consultation with Indian Tribes in the Section 106 Review Process*], it is perfectly appropriate for an agency or applicant to pay a tribe for providing 'specific information and documentation regarding . . . individual sites, or . . . to request that a survey be conducted by the tribe. In doing so, the agency or applicant is essentially asking the tribe to fulfill the duties of the agency in a role similar to that of a consultant or contractor' (ACHP Handbook 2011:13). The Sacred Sites MOU calls for the signatory agencies to identify 'contracting mechanisms for obtaining tribal expertise'" (Sacred Sites MOU 2012:3, as cited in Suagee and Bungart 2013:5).

8. **Establish procedural neutrality when conducting meetings and workshops.** Independent facilitators, personally and professionally qualified by their experience with tribes, non-tribal governments and indigenous cultures, should be included as members of the project team in order to guide the process and facilitate meetings and workshops.

#### **CONSULTATION AND COLLABORATION:**

9. **Understand tribal authority and representation.** In any situation, understanding both formal and informal authority is profoundly important. Representation and authority can be nested in many layers: Who speaks for “culture?”; Who speaks with the legitimate authority of government?; Who possesses culturally-appropriate credentials, whether from the culture of academe or the culture of an oral tradition?; Who speaks for the past or the future?
10. **Respect tribal sovereignty, self-determination, and protocols.** Tribes must have discretionary control over their means of reaching desired outcomes according to their own cultural values and norms.
11. **Respect tribal representation of tribal interests and practices.** Tribal governments, tribally-recognized experts, and a tribe's view of itself as well as of its past, present and future, all legitimately represent a tribe's interests. Tribes and their THPOs, or a tribally appointed cultural officer, can best identify and define the authority of information sources from among elders, community members, oral histories, primary and secondary literature sources, academically trained tribal staff, consultants and other sources. Accordingly, each tribe has the discretion to collect and manage its data according to its own standards and appropriate practices. For example, the three tribes participating in the TCL project team use distinct approaches. The Yurok Tribe, as a cultural practice, conducts archaeological surveys but does not conduct archaeological excavations. By contrast, the Grand Ronde Tribe has an active survey and excavation program, and the Makah Tribe utilizes survey and excavation when necessary. All of these approaches are equally valid.
12. **Keep agency leadership (or funding organization) apprised of developments (if they are not actively involved in the process).** Agency representatives, often severely limited in their personal discretionary authority, need immediate and frequent access to managers, legal personnel, policy experts and signatory authorities. Decision-makers should be regularly briefed on project status, progress, and potential concerns.
13. **Adapt current information in light of new information from tribes.** The engagement process should be refined when tribal members and affiliates present information not typically used by agencies in decision-making. When tribal members and affiliates present divergent information to agencies, agency representatives should seek to clarify the divergent information with the governing body of the tribe.

## ***B. Template for Indigenous Data Collection and Retention***

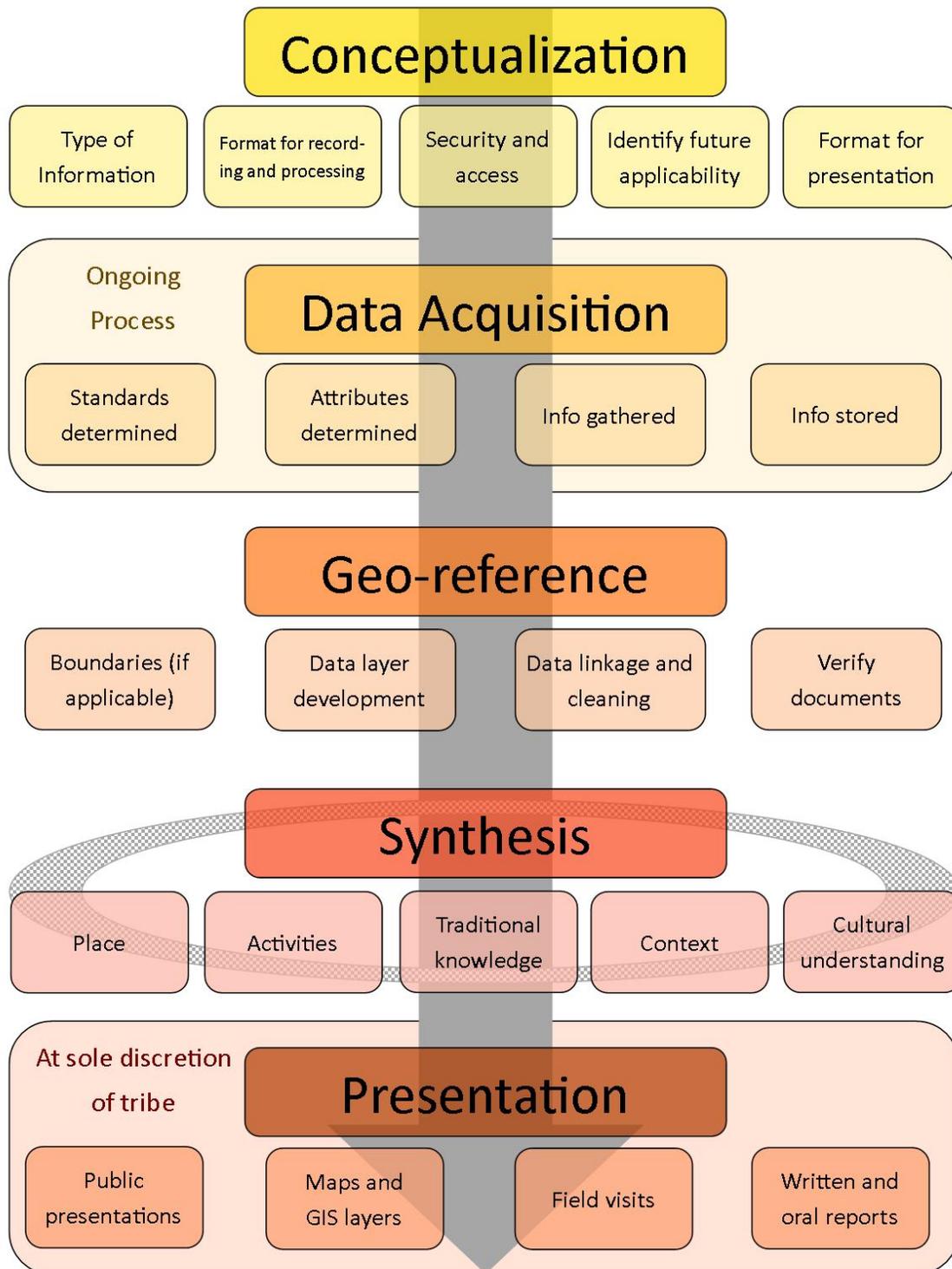
In the TCL Project, each of the three participating tribal communities conducted case studies to demonstrate how this process could be used to identify tribal cultural landscapes. The target study areas focused on the landscapes within the ceded and aboriginal homelands of each of the representative tribes and incorporated coastal and marine areas that could be impacted by offshore renewable energy development. The case studies focused on areas that include coastal land-based and offshore areas of tribal significance. Each case study incorporated an area of at least 6,000 acres (2,428 hectares) and was determined in coordination with the BOEM Project Officer.

The tribes began their case studies with Traditional Cultural Property (TCP) and Traditional Knowledge (TK) analyses of tribal sites and resources within representative tribal regions. The types of cultural resource information identified included TCPs, information related to traditional gathering, hunting, fishing and other subsistence and commerce activities, as well as those related to spiritual and ceremonial sites and activities. The tribes conducted such project activities as archival research, field investigations and visits to select type-sites, community outreach, the selection of oral history candidates, collection and transcription of oral histories, and development of draft and final reports.

The various intra-tribal outreach activities were decided upon by participating THPOs and included meetings with tribal members to identify potential TCPs, TK, cultural use sites and use activities within the defined study areas. When appropriate, notices and surveys were also placed in tribal newsletters/newspapers, and mailings sent to tribal member households. Outreach activities were also conducted in roundtable discussions, open houses, and presentations to elders. Additional information pertinent to each tribe's outreach activities is included in the Final Report.

Data collected and analyzed by each tribe is retained by each tribe. Case study information that tribes conveyed to BOEM and NOAA was at the discretion of each tribe, and represented the minimum amount of information needed. The following template provides a method for tribes to collect and hold information that can be queried internally, with the ability to provide summary results to external parties (Figure 1). These broad steps outline the general activities undertaken by each TCL project team tribe during their case studies. Additional discussion of successes and challenges encountered is included in the Final Report.

This template is not intended as a detailed instructional manual, but should be adapted by individual tribes undertaking the process. The method can help set benchmarks and provide conversation points between agencies, applicants, and tribes.



**Figure 1. Template for Indigenous Data Collection and Retention.** This process provides a method for tribes to collect and hold information that can be queried internally, with the ability to provide summary results to external parties.

The steps for indigenous data collection are as follows:<sup>8</sup>

1. **Conceptualization:** Tribe identifies an objective or research question, then determines types of information to be collected and analyzed, formats for recording and processing, and ways to ensure security and access. Tribe may also identify format for presentation and discuss future applicability of data.
2. **Data Acquisition:** This can be an ongoing process; tribe determines data standards and attributes, and gathers and stores information. Tribe gathers and stores information according to its individual tribal access policy.
3. **Geo-reference:** This analysis step includes boundaries (if applicable), data layer development (including metadata), data linkage and cleaning, and document verification.
4. **Synthesis:** This analysis step can include information on—and illuminate linkages between—place, activities, traditional knowledge (TK), context, and ultimately cultural understanding.
5. **Presentation:** At the sole discretion of the tribe; tribe may choose to present any of the above findings via public presentations including non-sensitive data, maps and GIS data layers, field visits, and written and oral reports.

### ***C. Process for Application***

The TCL approach has numerous potential benefits. The approach can enhance the overall planning process under the National Environmental Policy Act (NEPA), key provisions of the National Historic Preservation Act (NHPA) – Section 302706 of Title 54 [Section 101(d)(6)], Section 306108 [Section 106] (and its implementing regulations, 36 C.F.R. 800), and Section 306101-306114 [Section 110] – as well as broader government-to-government consultations. Indeed, the Council on Environmental Quality (CEQ) and the Advisory Council on Historic Preservation (ACHP) have recently illustrated how NEPA and Section 106 processes can be integrated (CEQ and ACHP 2013).

A useful model comes from New South Wales, Australia, where the Office of Environment and Heritage has created the guidebook *Cultural landscapes: A practical guide for park management* (Dept. of Environment, Climate Change and Water 2010). Intended to assist protected area managers in the identification, assessment, management and interpretation of cultural values, the guide provides a framework for values-based planning that has broad utility.

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<sup>8</sup> Case studies in the Final Report illustrate how this process was used by each tribe.

It outlines a stepwise process for applying a cultural landscape approach, which generally parallels the process followed by the TCL project.

Combining and adapting CEQ and ACHP's integrated process model for NEPA and NHPA with the stepwise process for applying a cultural landscape approach outlined in the New South Wales guidebook yields the following framework (Figure 2). This model shows how the TCL approach can be feasibly implemented under existing federal policy and regulatory framework. The steps for conducting NEPA and NHPA Section 106 analyses are also included for comparison, to illustrate how the steps in the TCL approach align, and at what points they could be implemented. The TCL approach does not substitute for the other regulatory compliance structures but should be used to inform these processes.

The steps in adopting a TCL approach are as follows:

1. **Identify clear management objectives:** Agency determines the proposed action/undertaking through its NEPA/NHPA process. This includes identifying potential tribes for government-to-government consultation as well as non-government-to-government engagement, identifying the initial area of potential effect (APE), and potential impacts to resources.
2. **Engage tribes:** Agency should follow the steps outlined above in Section IV.A. *Guidelines for Tribal Pre-Consultation and Engagement*. Agency sends formal letter to tribal leaders requesting government-to-government consultation, including NEPA/NHPA requirements. First consultation meeting begins by identifying protocols for consultation during proposed action/undertaking and clearly describes how sensitive information will be handled. The initial APE and known resources may be identified by the agency, but neither of these should be presented as final information. *Definition of the final APE, reasonable and good faith identification effort, and potential resource impacts must be developed through the consultation process.*
3. **Identify places/landscapes/values:** This step is conducted by tribes, following the steps outlined above in Section IV.B. *Template for Indigenous Data Collection and Retention*. This process is not dependent on a proposed undertaking, and should ideally be completed by tribes in advance of any proposed undertakings.<sup>9</sup> During the TCL process, the tribe reviews project information, identifies landscapes that could be affected by a proposed

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<sup>9</sup> If an undertaking *has* been proposed, NHPA Section 106 requires federal agencies to take into account the effects of their undertakings on historic properties. Information gathered during federally funded work is the property of the U.S. government, so confidentiality language should be incorporated into agreement and contractual documents.

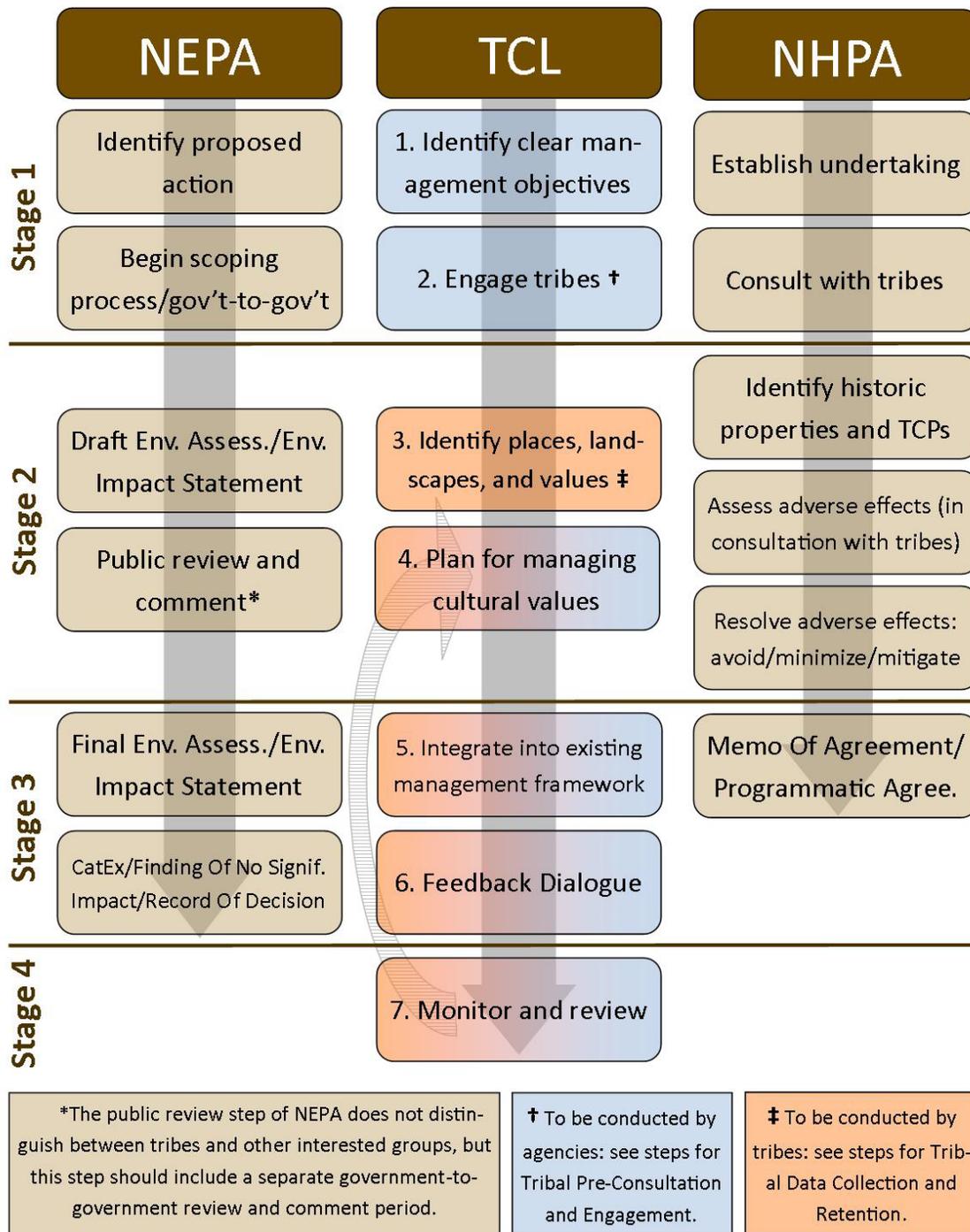


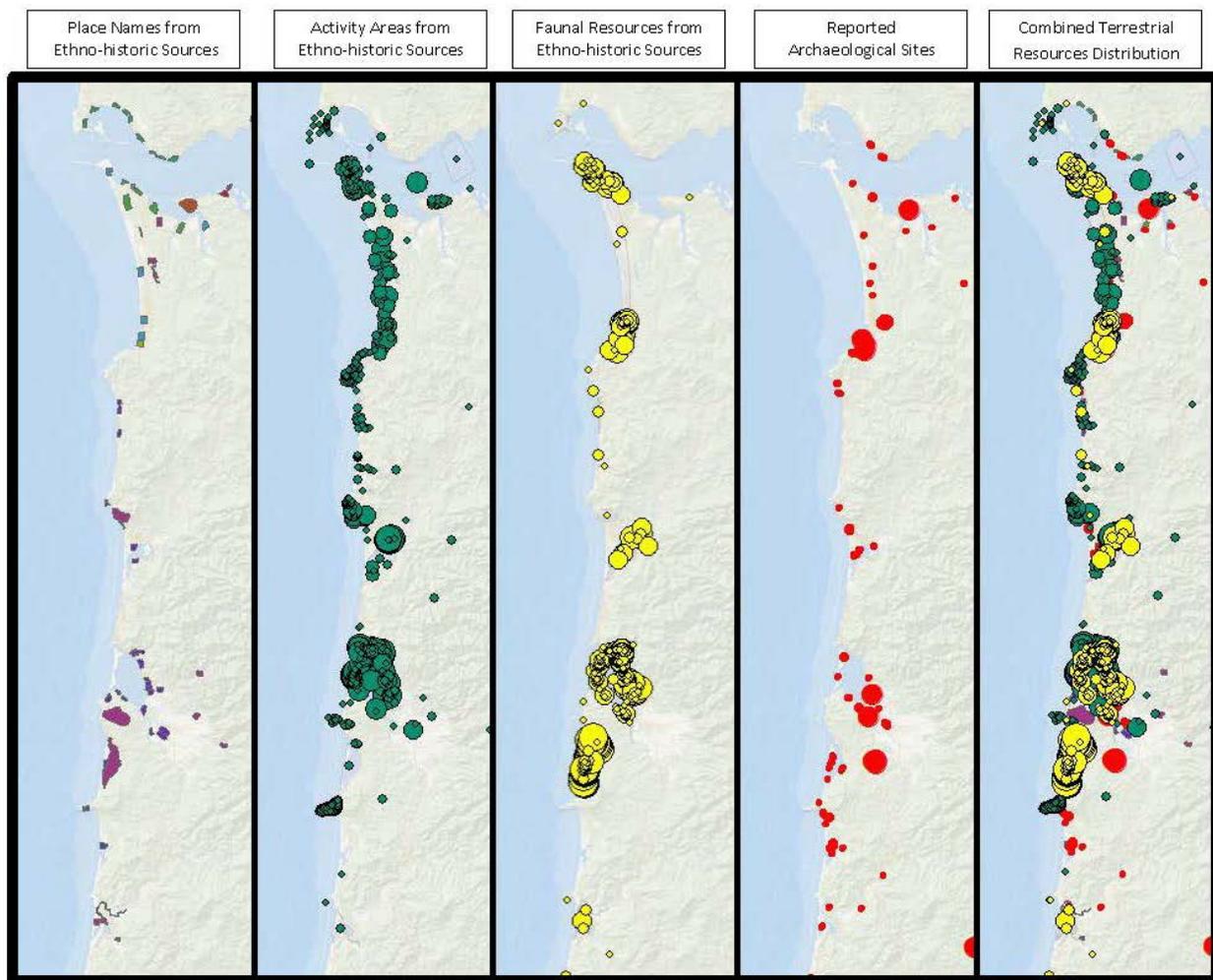
Figure 2. Process for application of TCL approach, showing how it can be feasibly implemented under existing federal policy and regulatory framework. The steps for conducting NEPA and NHPA Section 106 analyses are also included for comparison, to illustrate how the steps in the TCL approach align, and at what points they could be implemented.

action/undertaking, determines what information will be shared with the agency, and reviews/refines protocols for sharing sensitive information.

4. **Plan for managing cultural values:** Tribe and agency meet to develop a plan to incorporate TCL information into the decision process, protect sensitive information, and determine how agency will provide feedback under Step 6. Under the NEPA process as typically conducted, the public review and comment step does not distinguish between tribes and other interested groups, but this step should include a separate government-to-government review and comment period (CEQ... 1978). Under the NHPA Section 106 process, the agency would assess, evaluate, and resolve any potential adverse effects on historic properties (on or eligible for listing on the National Register) as needed in consultation with tribes. The TCL approach shifts the focus to managing resources based on cultural values, in a truly collaborative manner where tribal input is integral to decision-making—being both incorporated earlier in the process and verified by tribes as appropriately represented in outcomes.
5. **Integrate into existing management framework and/or review process:** Tribes outline steps to ensure that agencies incorporate tribal input into NEPA and NHPA documents, and memorialize through Finding of No Significant Impact/Record of Decision (FONSI/ROD) and, if needed to resolve adverse effects, Memorandum of Understanding/Agreement or Programmatic Agreement (MOU/MOA or PA).
6. **Feedback Dialogue:** Agency reports back to tribe informing them how their input was used in the decision-making process, and facilitates tribal review to ensure appropriateness of use.
7. **Monitor and Review:** Agency and tribe review the process to ensure that all parties are satisfied with outcomes. Project applicant provides opportunities for agency and tribes to monitor activities related to the undertaking. If necessary, loop back to Step 4 and repeat. **When consensus is not reached:** When the parties acknowledge that agreement is not being reached, adopt the positive view that areas of disagreement are problems to be solved together. Assess the process used, clearly describe the areas of disagreement, and discuss among appointed representatives in order to clarify as well as to deepen understanding of any barriers. Based on mutual understanding, formulate a plan for working together in the future.

Most agencies have projects that generally fall into two different categories. These are 1) land management and planning processes, and 2) regulatory undertakings. The TCL approach has the potential to provide meaningful contributions to both sets of processes.

For land management and planning actions, this process will have the most immediate impact. During these types of undertakings, indigenous groups will be able to identify areas of cultural and spiritual importance to them, as well as the types of resources throughout the planning area that are important in developing more nuanced management schemes. The map below



**Figure 3. Map showing some of the points of interest identified during the Grand Ronde case study. This format illustrates how significant areas can be expressed in a generic manner to an agency while allowing targeted consultations to look at specific locations and the management proposals that may affect them.**

shows some of the points of interest identified from the Grand Ronde case study (Figure 3). This map illustrates how areas can be expressed in a generic manner to an agency while allowing targeted consultations to look at specific locations and the management proposals that may affect them.<sup>10</sup>

A TCL approach can assist indigenous communities and agencies in communicating about areas of mutual interest to ensure that both parties have meaningful interactions concerning places and resources. Additionally, it can also allow indigenous groups to focus consultation as they

<sup>10</sup> Viewsheds are not illustrated in the map, but they are considered in the Grand Ronde case study.

see fit and work with agencies to identify and work toward appropriate management of these places and resources.

As agencies and the indigenous groups with which they are consulting identify areas where ecosystem-scale management will take place, including vegetation management, infrastructure development, road improvement, aesthetic improvements or other potential undertakings, the two parties can find mutual understanding in the indigenous concepts of landscape, and focus on holistic planning that will benefit agencies in their responsibilities. This will assist agencies in complying with NEPA and fulfilling their fiduciary responsibilities of consulting, and can assist in compliance with the NHPA. This also transforms a planning and pre-planning process from one of mere notification to one of more holistic, meaningful, and effective consultation.

For regulatory undertakings, this process will be useful as part of the Section 106 NHPA process and potentially useful in identifying areas eligible for National Register listing as TCPs, or as properties of “traditional religious and cultural importance to an Indian tribe or Native Hawaiian organizations” under Section 101(d) 6(A) of NHPA (54 U.S.C. §302706).

Using the TCL approach will assist indigenous communities in recording information of importance to them. When notification is sent to these communities during regulatory undertakings, this tool will enable them to provide meaningful comments in a timely manner to agencies overseeing regulatory reviews. It will also enable project consultation to be targeted and reviewed quickly so that potential issues and pitfalls can be addressed early. If avoidance of impacts is not an option, the use of these kinds of studies will provide indigenous communities a way to recommend mitigation and minimization measures to agencies, as well as enable agencies to evaluate the recommendations in a timely manner.

Importantly, agency representatives should understand that the information developed under this TCL process will typically be proprietary to the participating indigenous group unless agreements are developed to identify data sharing responsibilities. As such, this is not a replacement for the normal government-to-government consultation process, but an enhancement of it. Some indigenous groups may not have the infrastructure or capacity to participate in this process, but through consultation it may be possible for agencies to assist these indigenous groups in conducting this process by providing technical assistance, funding, and internship opportunities or by assisting in the development of agreements with institutions of higher learning.

It should be noted that this process is intended as a means for indigenous groups to convey their areas of concern and the types of resources that could potentially be impacted by agency undertakings. These types of studies, while extremely useful for agencies, should be developed and implemented by indigenous groups who may then assist agencies in developing and refining planning and regulatory actions via consultation.

## V. Conclusions

The Tribal Cultural Landscape approach provides a way for agencies and project applicants to be proactive in working with indigenous communities to identify areas of tribal significance that should be considered in planning and management processes. This approach represents a method for indigenous communities to record their own cultural resources and places, and convey necessary information to agencies and project applicants for appropriate use in planning and regulatory compliance activities, including for offshore renewable energy development. Additional information on the project's background and implementation can be found in the Final Report, and on the project website ([sanctuaries.noaa.gov/tribal-landscapes](https://sanctuaries.noaa.gov/tribal-landscapes)).

From its inception, the TCL process should involve indigenous communities in the identification of areas and types of resources that are important contributing factors to their continued identity and cultural practices. When communities can identify their own resources and places under the rubric of their cultural understanding, agencies can more appropriately plan large-scale management, and employ the information in continued consultation with the indigenous community during regulatory actions or undertakings. As a result, the underlying NHPA and NEPA analyses of cumulative impacts and synergies can be made more efficient and minimize conflicts, controversy, legal challenges and procedural delays.

The proposed definition of Tribal Cultural Landscape represents a departure from the current historic preservation model. TCLs do not depend on strict boundary delineation, and they emphasize indigenous self-determination of significance. Additionally, TCLs can expound the worldview of an indigenous group, enabling consideration of contemporary cultural practices, and a clearer understanding of past and future uses of a given area, especially of the value it has to that group. The TCL approach is grounded in guiding principles of indigenous autonomy, which can serve to strengthen tribal capacity in numerous ways, improve long-term relationships among agencies and tribes, and ultimately better preserve and protect shared resources and landscapes.

As a variation of a cultural landscape approach (CLA), currently the subject of much discussion by historic preservation professionals, the TCL approach integrates environmental science with historical, archaeological, and traditional knowledge to provide a robust and cost-effective procedure to document places and resources of past and present significance to tribal communities. This approach also represents an opportunity to integrate management of natural and cultural resources, based on the understanding that humans are part of the landscape, both shaping and being shaped by it.

By offering guidance for agencies and project applicants as well as tribes, the TCL method enables appropriate treatment of culturally sensitive information, which may sometimes be publicly available, but should nonetheless be approached respectfully. The *Guidelines for Tribal Pre-Consultation and Engagement* can assist agencies and applicants consulting with tribes for specific proposed undertakings, and also help to model a holistic approach to building positive

long-term relationships among agencies and tribes who are likely to work together over generations. The *Template for Indigenous Data Collection and Retention* outlines a method for tribes to collect and retain information from which appropriate summary results can be provided to external parties. Finally, the *Process for Application* illustrates how the TCL approach can be implemented within existing policy, and the potential benefits for both land management and planning, and regulatory processes.

The TCL approach has applicability as part of overall planning processes under NEPA, and as part of planning and regulatory compliance activities under NHPA. The stepwise framework outlined in this Guide provides a method for values-based planning that has broad utility. This model shows how the TCL approach can be feasibly implemented under existing federal policy, illustrating how the steps in the TCL approach align with NEPA and NHPA processes, and at what points they could be implemented. The TCL approach can assist indigenous communities and agencies in communicating about areas of mutual interest to ensure that both parties have meaningful interactions concerning places and resources. Additionally, it can also allow indigenous groups to target consultation as they see fit and work with agencies to identify and work toward appropriate management of these places and resources.

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## Appendix I: Glossary of Terms

*This list of terms and topics is intended to enable agencies and project applicants to use appropriate terminology when communicating with indigenous communities, thereby increasing effectiveness of consultation and collaboration, and building relationships based on mutual trust and respect.*

**Alaska Native Corporation:** Any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq.).

**Associated group:** Indigenous people with a connection to a place or resource. This includes all native tribes and native indigenous communities, regardless of recognition status, which does not impact these groups' sovereignty, interests in ancestral territory and resources, or the validity of traditional knowledge and cultural practices.

**Consultation:** Per the implementing regulations of NHPA Section 106, consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process (36 C.F.R. § 800.16). Pertaining to Indian tribes, consultation means the process of government-to-government dialogue between the Federal Government and Indian tribes regarding proposed federal actions in a manner intended to secure meaningful and timely tribal input. It is a deliberative process that aims to create effective collaboration and informed federal decision-making. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility. The U.S. Government conducts consultation with Indian or Alaska Native tribes, bands, nations, pueblos, villages, or communities that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a. **Coordination** and **collaboration** are essential for effective consultation, but they do not satisfy the requirement of legally mandated government-to-government consultation.

**Cultural landscape:** A geographic area (including both cultural and natural resources and the wildlife or domestic animals therein), associated with a historic event, activity, or person or exhibiting other cultural or aesthetic values. There are four general types of cultural landscapes, not mutually exclusive: historic sites, historic designed landscapes, historic vernacular landscapes, and ethnographic landscapes. Historic vernacular landscapes evolved through use by the people whose activities or occupancy shaped it, and ethnographic landscapes contain a variety of natural and cultural resources that associated people define as heritage resources (Birnbaum and Peters 1996).

**Cultural Landscape Approach:** A management approach that uses cultural landscapes as a framework to understand places and their associated resources. This approach is analogous and complementary to ecosystem-based management, and examines the relationships among living

and non-living resources, and their environment. This approach enables a better understanding of the human connections to places, as well as the important human influences on ecosystems over time (MPA FAC 2011).

**Cultural resources:** The broad array of stories, knowledge, people, places, structures, and objects, together with their associated environment, that contribute to the maintenance of cultural identity and/or reveal the historic and contemporary human interactions with an ecosystem. This can include both tangible and intangible cultural heritage. According to UNESCO, **tangible heritage** includes buildings and historic places, monuments, artifacts, etc., which are considered worthy of preservation for the future. These include objects significant to the archaeology, architecture, science or technology of a specific culture. **Intangible heritage** includes the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.

**Culturally sensitive information:** Information that is culturally privileged or otherwise controlled or regulated, often by gender, age, or cultural norms. Sharing this knowledge with non-tribal members may be contrary to tribal practices. Even though culturally sensitive information may sometimes be publicly available, respect for the nature of this information must be demonstrated when consulting with tribes.

**Federally recognized Indian tribe:** Indian tribe, band, nation, or other organized group or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a, including a native village, regional corporation or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (36 C.F.R. § 800.16). Historically, most of today's federally recognized tribes received federal recognition status through treaties, acts of Congress, presidential executive orders or other federal administrative actions, or federal court decisions. The Federal Government has a unique relationship with Indian tribes derived from the Constitution of the United States, treaties, Supreme Court decisions, and federal statutes. Consultation with a federally recognized Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes, and should be conducted in a sensitive manner respectful of tribal sovereignty (36 C.F.R. § 800.2 and Executive Order 13175).

**Indigenous community/group:** Descendants of peoples who inhabited the area now encompassed by the United States and its territories at the time of Euro-American colonization, or the establishment of present political boundaries, and who retain some or all of their own social, economic, cultural and political institutions, irrespective of their legal status. "Although such groups lack recognition as sovereigns, they may have environmental and public health concerns that are different from other groups or from the general public. These differences may exist due to a subsistence lifestyle and/or unique cultural practices. Agencies should seek to identify such groups and to include them in decision-making processes. Although they do not

have a unique political relationship with the Federal Government, non-federally recognized tribes may be comprised of ‘racial minorities’ and therefore benefit from the full range of civil rights law protections” (NEJAC 2000:10).

**Means/manner of connection:** It is the responsibility of the tribe or indigenous group to provide a contextual statement regarding connection to place. Connection is likely to be widely varied between tribes and even within tribes. For instance it may be based on ancestral ties to prominent landforms, or to a relatively recent landscape dating to relocation-era displacement but which now holds multigenerational interactions and modified practices such as basketry, hunting, etc.

**Distinguishing between MOA and MOU<sup>11</sup>:**

**Memorandum of Agreement (MOA):** A written agreement that describes in detail the specific responsibilities and actions to be taken by each of the parties so that their goals may be accomplished. Per the implementing regulations of NHPA Section 106, MOA means the document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties (36 C.F.R. § 800.16). In general, an MOA is legally enforceable. As used by the U.S. Army Corps of Engineers, for example, an MOA is a “conditional agreement” between two or more parties where the transfer of funds for services is anticipated.

**Memorandum of Understanding (MOU):** In general, a writing that describes a very broad concept of mutual understanding, goals, and plans shared by the parties. An MOU is usually not legally binding, and does not involve the transfer of funds.

**Native Hawaiian Organization:** Any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are culturally significant to Native Hawaiians. The term includes, but is not limited to, the Office of Hawaiian Affairs of the State of Hawaii and Hui Malama I Na Kupuna O Hawai'i Nei, an organization incorporated under the laws of the State of Hawaii. The NHPA requires the agency official to consult with any Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. (36 C.F.R. § 800.2 and § 800.16).

**Programmatic agreement:** A document that records the terms and conditions agreed upon to resolve the potential adverse effects of a federal agency program, complex undertaking or other situations in accordance with 36 C.F.R. § 800.14(b) (36 C.F.R. § 800.16).

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<sup>11</sup> Per DOI guidance, these terms are used interchangeably based on the preference of the parties. Some parties may differentiate between them, and preferred terminology should be clarified early in project planning.

**Project applicant:** An applicant for Federal assistance or for a Federal permit, license or other approval is entitled to participate as a consulting party. The agency official may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official. Federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes (36 C.F.R. § 800.2).

**Relationship:** The way or manner in which people (tribes, indigenous group, or others), things, actions and/or place are connected. This is most often based in practices held by a community. These practices are likely to have been modified or changed over time and are likely to continue to develop into the future.

**Resource:** A feature, material, or supply that can be drawn upon to enhance or contribute to life. This applies to purposes of sustenance and/or quality of life. Most often this encompasses tangible items of importance held by indigenous communities and could include but not be limited to: the flora and fauna of an area, as well as hunting, fishing, and gathering locations, archaeological sites, rock features, villages, and burial locations. However, intangible items are also important resources for indigenous communities and may include sacred spaces or places such as creation or prayer areas. Natural phenomena such as wind, water currents, lightning, and thunder are potential attributes associated with resources.

**Spatial area:** An area of interest defined by a tribe or other indigenous group. It is deliberately all-encompassing and intended to include the diverse and complex understandings of the world held by tribes that pertain to airspace, land surface and below surface dimensions and can be defined by but not limited to: oral traditions, ratified or non-ratified treaties, executive orders, statutes (federal or state), cultural use or based on historical documents.

**State-recognized Indian tribe:** Native American tribes that are recognized by individual states either informally, based on certain dealings with a state over time, or through a formal process instituted by the individual state. State recognition confers limited benefits under federal law and may offer some protection of autonomy. However, this is not the same as **federal recognition**, by which the Federal Government acknowledges a tribe as a sovereign nation. Currently, there are 567 federally recognized tribes and approximately 400 non-federally recognized tribes, many of which are state-recognized.

**Traditional Cultural Property (TCP):** A property type on the National Register of Historic Places (buildings, structures, sites, historic districts, objects, landscapes) may possess traditional cultural significance, derived from the role the property plays in a community's historically rooted beliefs, customs, and practices. That property would be eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community. Because a TCP is a National

Register property type, it must have a defined boundary. This can apply to non-indigenous traditional groups (Parker and King 1999).

**Traditional [Ecological] Knowledge (TK or TEK):** A cumulative body of knowledge, practice, and belief, evolving by adaptive processes and handed down through generations by cultural transmission. It concerns the relationship of living beings (including humans) with one another and with their environment.

**Treaty Tribe:** A Native American tribe that formally negotiated a treaty with the United States government between 1778 and 1871, which was subsequently ratified by the United States Senate. A treaty is a constitutionally recognized contract between sovereign nations. These legally binding contracts are protected under the U.S. Constitution, which states that they are the “supreme law of the land.” Under these treaties, tribes ceded millions of acres of land while retaining certain rights such as fishing, hunting, and gathering, as well as rights to determine use of reserved land and its resources. As federally recognized tribes, treaty tribes retain a sovereign status and maintain a government-to-government relationship with the United States. The treaties obligate the Federal Government to protect tribal treaty rights, lands, assets, and resources—commonly referred to as a trust obligation.

**Tribal Cultural Landscape (TCL):** Any place in which a relationship, past or present, exists between a spatial area, resource, and an associated group of indigenous people whose cultural practices, beliefs, or identity connects them to that place. A tribal cultural landscape is determined by and known to a culturally related group of indigenous people with relationships to that place.

**Tribal Historic Preservation Officer:** In accordance with Section 302702 [Section 101(d)(2)] of the National Historic Preservation Act, THPOs formally assume the responsibilities of the State Historic Preservation Officer (SHPO) for purposes of Section 106 compliance on their tribal lands (all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities). These duties include identifying and maintaining inventories of culturally significant properties, nominating properties to national and tribal registers of historic places, conducting Section 306108 [Section 106] reviews of federal agency projects on tribal lands, and conducting educational programs on the importance of preserving historic properties. Federal agencies consult with THPOs in lieu of the SHPO for undertakings occurring on, or affecting historic properties on, tribal lands. The decision to participate or not participate in the national historic preservation program rests with the tribe.

**Undertaking:** A project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out by or on behalf of a federal agency; those carried out with federal financial assistance; and those requiring a federal permit, license or approval (36 C.F.R. § 800.16).

## Appendix II: Procedural Considerations for Project Planning and Conducting Meetings

<b>Who:</b>
Team members, alternates, as well as spokespersons. Resource personnel, including professional facilitator/s. Observers. Brief bios and specific role function, expertise, background.
<b>Where:</b>
Location of site—Consider alternating between agency and tribe. Logistics and expenses, including meals, snacks, other. Breakout rooms for caucusing. Table and seating arrangements.
<b>When:</b>
Dates, times, frequency, timeframe. Project completion date and other deadlines.
<b>Agenda and ground rules development:</b>
How, when, who? Parameters of subject matter? Rules of behavior and courtesy. Revisions and additional items.
<b>Decision-making:</b>
Decision-makers present? Overall ratification, as well as whether ratification process needed outside table process? What are the “decision rules”? E.g., consensus, majority, a mixture?
<b>Records and information-sharing:</b>
Confidentiality issues. What methods for official recording of process? What format? How, when, and with whom will official records be shared? Personal note taking. Notices (including proposed agendas) and schedules (timely!).
<b>Media:</b>
Confidentiality and sensitivity issues. Press contacts and releases. Inquiries. Joint presentations.
<b>Process for table meetings:</b>
Cultural considerations, e.g., opening and closing prayer. Seating configuration. Discussion format and “Decision rules.” Meeting roles, e.g., facilitators, chairpersons, timekeepers, note-takers, etc. Dispute resolution agreement and breaking impasse – formal/informal processes & conditions. Breaks.





### **The Department of the Interior Mission**

As the Nation's principal conservation agency, the Department of the Interior has responsibility for most of our nationally owned public lands and natural resources. This includes fostering sound use of our land and water resources; protecting our fish, wildlife, and biological diversity; preserving the environmental and cultural values of our national parks and historical places; and providing for the enjoyment of life through outdoor recreation. The Department assesses our energy and mineral resources and works to ensure that their development is in the best interests of all our people by encouraging stewardship and citizen participation in their care. The Department also has a major responsibility for American Indian reservation communities and for people who live in island territories under US administration.



### **The Bureau of Ocean Energy Management Mission**

As a bureau of the Department of the Interior, the Bureau of Ocean Energy Management's (BOEM) primary responsibilities are to manage the mineral resources located on the Nation's Outer Continental Shelf (OCS) in an environmentally sound and safe manner.