

**TRIBAL RISK MANAGEMENT  
CONSULTATION REPORT**



**U.S. DEPARTMENT OF JUSTICE  
OFFICE OF TRIBAL JUSTICE**

**MARCH 2022**

## **PREFACE**

In October 2021, the Department of Justice’s Office of Tribal Justice hosted a Tribal consultation on risk management. In mandating this effort, Congress suggested that topics to be covered should include risk management, loss prevention, Tribal sovereign immunity, tort claims, and alternative dispute resolution. As the Tribal consultation took place, it became apparent that the issues involved were much broader than anticipated and that a continuing dialogue is needed with Tribes and across the federal government to understand this web of interrelated issues.

This report provides a potential framework for future discussions. It covers risks facing Tribal governments, Tribal sovereign immunity, waiver of Tribal sovereign immunity, and best practices identified by Tribes for risk management. However, it should be noted that these topics are multi-faceted, interrelated, and go much deeper than one might initially imagine. Further study is warranted.

I hope that readers of this report will be inspired to consider how best practices in Tribal risk management might be more fully explored to support Tribal sovereignty.

Sincerely,

Tracy Toulou  
Director  
Office of Tribal Justice  
U.S. Department of Justice

## CONTENTS

Preface	i
Overview	1
Tribal Consultation Background	1
Risks Facing Tribal Governments	3
Tribal Sovereign Immunity	5
Best Practices Identified by the Tribes	7
Comments and Responses from Consultation Sessions	10
Conclusion	12
Appendices	
A. Tribal Consultation Framing Paper	13
B. Tribal Consultation Participants	15
C. Acknowledgements	16

## **OVERVIEW**

Part I provides background information about the events that led to these consultations. Part II provides an overview of the risks to economic development that Tribal governments identified during consultations. Consistent with the appropriation language, Part III zeroes in on one particular risk identified by Tribes: tort liability and the intersection with Tribal sovereign immunity. Recognizing that Tribal governments are in the best position to identify solutions to Tribal problems, Part IV recounts best practices for risk management identified by the Tribes during consultations.

## **BACKGROUND**

### **A. Office of Tribe Justice**

The Office of Tribal Justice (OTJ) was initially formed in 1995 in response to requests from Tribal leaders for a dedicated point of contact for Indian country-specific legal and policy matters. The office was made permanent on July 29, 2010, with the passage of the Tribal Law and Order Act (TLOA). 25 U.S.C. § 3665a (2010). The duties of the Office as described in Section 106 of the Act include 1) serving as the program and legal policy advisor to the Attorney General with respect to the treaty and trust relationship between the United States and Indian tribes; 2) serving as the point of contact for federally recognized Tribal governments and Tribal organizations with respect to questions and comments regarding policies and programs of the Department and issues relating to public safety and justice in Indian country; and 3) coordinating with other bureaus, agencies, offices, and divisions within the Department of Justice to ensure that each component has an accountable process to ensure meaningful and timely consultation with Tribal leaders in the development of regulatory policies and other actions that affect the trust responsibility of the United States to Indian tribes, Tribal treaty provisions, the status of Tribes as sovereign governments, or any other Tribal interest.

OTJ reports directly to the Deputy Attorney General. The structure and responsibilities of OTJ are described in 28 CFR 0.134, which provides additional guidance related to the three primary duties described in the TLOA.

### **B. Risk Management**

Tribal governments have long been concerned about risk management and how it affects their ability to provide services to their Tribal members and the public in general. In

2019, the United South & Eastern Tribes (representing 33 tribes) passed USET SPF Resolution 2019 SPF:016 entitled “Protecting Tribal Sovereign Immunity by Committing to Risk Management Solutions for Tort Victims.”<sup>1</sup> The resolution urged Congress to work with Tribes to identify an appropriate process for resolving torts arising from Tribal governmental activities and urged the federal government to work with Tribes regarding risk assessments, insurance coverage, development of risk management programs, and establishing methods of mitigating loss.

That same year, the National Congress of American Indians passed Resolution REN-19-004 entitled “Affirming and Protecting Tribal Sovereign Immunity by Committing to Risk Management to Prevent Losses and Provide a System of Solutions for Claimants Alleging Torts or Other Economic Harms.”<sup>2</sup> Among other things, this resolution requested that the Office of Tribal Justice work with the Bureau of Indian Affairs Office of Indian Energy and Economic Development (BIA OIEED) to conduct a consultation with Tribes concerning risk management, loss prevention, tort claims, alternative dispute resolution, and preserving Tribal sovereign immunity.

In response to those concerns, Congress directed the “Office of Tribal Justice... to consult with Tribal entities concerning risk management, loss prevention, the resolution of tort claims, alternative dispute resolution, and protecting and managing Tribal sovereign immunity in the context of economic development.”<sup>3</sup> In addition, Congress directed OTJ to prepare a report describing best practices for Tribal risk management.

### **C. Tribal Consultations**

Following Congress’s directive, OTJ reached out to BIA OIEED and developed a framing paper, which established the scope of the Tribal consultation and suggested relevant topic areas for participants to consider addressing. See *Appendix A*. Because the ongoing COVID-19 pandemic limited the ability to safely travel and meet in person, OTJ sent an invitation and the framing paper to the leaders of all 574 federally recognized Tribes informing them that the Tribal consultation would be held telephonically on October 28 and 29, 2021. Attendees were encouraged to pre-register.

The two sessions were held as scheduled and conducted in compliance with the DOJ Policy Statement on Tribal Consultation (Aug. 29, 2013) and Executive Order 13175 (Nov.

---

<sup>1</sup> [https://www.usetinc.org/wp-content/uploads/2019/03/USET-SPF-2019\\_016-Protecting-Tribal-Sovereign-Immunity-FINAL.pdf](https://www.usetinc.org/wp-content/uploads/2019/03/USET-SPF-2019_016-Protecting-Tribal-Sovereign-Immunity-FINAL.pdf).

<sup>2</sup> [https://www.ncai.org/attachments/Resolution\\_oWUdASbgIUjmVjsTBeQAasPgZRvXqPAWtXcofVLqfE uNGwsDCFa\\_REN-19-004%20FINAL.pdf](https://www.ncai.org/attachments/Resolution_oWUdASbgIUjmVjsTBeQAasPgZRvXqPAWtXcofVLqfE uNGwsDCFa_REN-19-004%20FINAL.pdf).

<sup>3</sup> Fiscal Year 2021 Appropriations Bill Joint Explanatory Statement.

6, 2000). There were 58 participants in the October 28<sup>th</sup> session and 21 participants in the October 29<sup>th</sup> session, for a total of 79 attendees. Attendees included Tribal government leaders, Tribal council members, Tribal risk management officials, Tribal attorneys, and other officials. See *Appendix B* for a list of Tribes represented. After the conclusion of the telephonic Tribal consultation sessions, three entities submitted written comments.

## **RISKS FACING TRIBAL GOVERNMENTS**

As one consultation participant noted, Tribal economic development is key to the development of effective Tribal governments. A corollary to this principle is that risks to Tribal economic development pose risks to Tribes as governments.

During the Tribal consultation, participants identified and discussed risks facing Tribal governments and economic development. Some of those risks stemmed from external sources, while other risks were a byproduct of the exercise of Tribal governmental operations. Below is a brief overview of those risks identified by the consultation:

- **Tort claims** are one of the most common risks to Tribal governments. Common types of tort claims might include liability in public places (such as Tribal offices), automobile accidents involving vehicles owned by Tribal government agencies, or negligent acts by Tribal government employees. Many Tribes operate casinos, conference centers, hotels, or tourist attractions that create these potential risks.
- **White-collar crime** presents a unique set of risks for Tribal governments. Persons employed by Tribal governments and Tribal enterprises, such as casinos, may have control over significant financial resources which in turn creates opportunities for embezzlement. Tribally owned property presents a risk of theft.
- **Records management** presents unique challenges and opportunities. All Tribal governments maintain extensive records, which are generated by the routine operation of Tribal government activities. Tribal government-owned data might include records pertaining to Tribal membership, Personally Identifiable Information (PII), culture, history, land title, land use, financial accountability, housing, businesses, and other services provided to Tribal members and the public. Tribal records may be kept in hard-copy and/or electronic formats, and the loss of any such data can have wide ranging negative implications. Threats to Tribal data might be internal to the Tribal government, such as inadequate records management practices, or, as

discussed below, external such as cybersecurity threats. The importance of having robust records management policies (including data retention and data destruction standards) was discussed during the Tribal consultations.

- **Cybersecurity** is an evolving risk to Tribal economic development. Tribes reported that cyber threats have increasingly become a major risk to Tribal government operations and to Tribally owned enterprises, and during the Tribal consultations, cybersecurity risks received the most attention of the identified risks discussed. Ransomware attacks may be perpetrated by actors outside of the United States, which Tribes noted present numerous challenges in prevention, investigation, response, and recovery.
- Consistent application of the **Freedom of Information Act (FOIA)** was another risk identified during the Tribal consultation process. Tribes reported that some parties who have positions adverse to Tribes use the FOIA process as a work-around to obtain from the federal government sensitive information protected by Tribal law or information which should be available only with Tribal consent. Participants were particularly concerned that FOIA requests of federal agencies may seek Tribally sensitive information, such as Tribal proprietary information, financial data, and cultural information including sacred sites, in their possession. Some participants claimed that different federal agencies handle such FOIA requests in a non-consistent manner.
- **Climate change and natural disasters** are of great concern to Tribes, and the nature of such risks are as varied as Indian country is vast. Risks faced by climate change might include rising sea levels, increased incidence and severity of floods, droughts, wildfires, and severe weather including tornados. Participants in the Tribal consultation process discussed the advisability of Tribal governments to preplan and prepare for disaster response and recovery.
- The **COVID-19 pandemic** has also presented substantial risks to Tribes. During the COVID-19 pandemic, many Tribes that have casinos, conference centers, hotels, or tourist-oriented business operations experienced significant losses of income due to shutdowns and travel restrictions. Some Tribes found that those economic losses to Tribal government revenue streams were not covered by existing insurance policies. Tribes eventually received compensation via special funding legislation such as the Coronavirus Aid, Relief, Economic Security Act of 2020, and the American Rescue Plan Act of 2021. Some participants reported, however, that such funding did not



cover all economic losses incurred.

## TRIBAL SOVEREIGN IMMUNITY

In keeping with Congress's directive, this Part zeroes in on the risks of tort liability, and "protecting and managing Tribal sovereign immunity in the context of economic development."

### A. Background

Federally recognized Tribes are sovereign governments. As such, they have immunity from legal liability just as any other sovereign government. Because the status of Tribes as sovereigns predates the formation of the United States, this Tribal sovereignty, and by extension Tribal sovereign immunity, is not granted to Tribes by the United States, but is reserved as part of the inherent sovereign status of Tribes. The U.S. Supreme Court upheld the concept of sovereign immunity for Tribal governments in a series of supportive decisions. The first such case was Puyallup Tribe v. Department of Game, 433 U.S. § 165 (1977), which recognized a Tribes' claim of sovereign immunity for its on-reservation fishing activities as "well founded." *Id.* at 167-68. One year later, in Santa Clara Pueblo v. Martinez, 436 U.S. § 49 (1978), the Court upheld Tribal sovereign immunity but found an exception for Tribal government officials if they take actions beyond the scope of their authority under Tribal law. In Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Engineering, 476 U.S. § 877 (1986), the Court affirmed once more that Tribal sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance." *Id.* at 890.

The Supreme Court has held that Tribal sovereign immunity protected both Tribal governmental operations and Tribal commercial activities. In Kiowa Tribe v. Manufacturing Technologies, 523 U.S. § 751 (1998), the Court held that a Tribe is not subject to suit in a state court — even for breach of contract involving off-reservation commercial conduct — unless "Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754-55. In Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024 (2014), the Supreme Court reaffirmed Kiowa and held that Tribal sovereign immunity not only exists for commercial activities that occur within Indian country, but also extends to Tribal commercial activities that occur outside of Indian country. *Id.* at 2028 (holding sovereign immunity protected Tribe from suit for opening a casino outside Tribal lands).

Tribal sovereign immunity, however, does not always protect Tribal government employees, Lewis v. Clarke, 137 S. Ct. 1285 (2017). In Lewis, two plaintiffs were struck by a vehicle driven by a Tribal employee. They alleged that the driver negligently caused a vehicle



accident while working as a Tribal government employee. The U.S. Supreme Court allowed the claims to proceed, holding that under the facts of the case, the plaintiffs had sued the driver in his personal capacity, and he was therefore not entitled to a Tribal sovereign immunity defense.

**Waiver of Sovereign Immunity.** Because Tribal sovereign immunity is such a well-developed and accepted legal principle, it significantly affects the discussion about risk management and the allocation of risk. Tribes reported that businesses are reluctant to conduct transactions with Tribal governments unless Tribal sovereign immunity is addressed in a mutually satisfactory way. Tribes reported that this often takes the form of a waiver of sovereign immunity, usually in one of two forms: (1) contractual waiver; or (2) legislative waiver.

- **Contractual waiver:** The most typical waiver of sovereign immunity is by contract, which may allow partial waivers and or waivers limited to specific circumstances. The Supreme Court has held that “to relinquish its immunity, a tribe’s waiver must be clear.” *C L Enterprises v. Cit. Bd. Potawatomi Ind. Tribe*, 532 U.S. §§ 411, 418 (2001) (internal quotation marks omitted). In *C L Enterprises*, the Court held that inclusion of an arbitration clause in a standard-form contract, for example, constitutes a “clear” intent to waive sovereign immunity. *Id.* During the consultations, Tribes suggested that negotiations about the waiver of sovereign immunity should involve legal counsel by all concerned parties and care should be taken to ensure that such agreements are done in full compliance with applicable Tribal law.
- **By legislation:** Many Tribes have made a legal determination that Tribal sovereign immunity should not preclude common tort claims asserted by members of the public. These Tribes have enacted “Tribal tort claim laws,” which operate as a limited waiver of sovereign immunity and allow a Tribe to set forth on its own terms how tort claims against the Tribe and its agencies are to be addressed, including setting forth the appropriate forum for resolving such claims. Numerous Tribes, for example, have enacted tort claims act legislation that waives Tribal sovereign immunity for certain types of claims and caps such claims at a certain dollar amount. For instance, a Tribe could statutorily enact a law that waives sovereign immunity for tort claims no larger than \$50,000 involving claims of negligent driving by Tribal government employees operating a Tribal government vehicle. This type of waiver allows for members of the public to bring lawful claims against a Tribe, while protecting the Tribal treasury from claims larger than the Tribe is willing

to risk. For example, per Mississippi Choctaw Tribal Code Section 25-1-8(1), claims brought against the Mississippi Choctaw Tribe “...shall not exceed the sum of \$250,000 for actions arising from acts or omissions occurring on or after July 1, 1998, but before July 1, 2002; and \$500,000 for actions arising on or after July 1, 2002.” *See also*, 1 Navajo Nation Code 554(F)(1) – “No judgment, order or award pertaining to any claims permitted hereunder shall be for more than the limits of valid and collectible liability insurance policies carried by the Navajo Nation covering each such claim and in force at the time of such judgment...”. During the Tribal consultation process, participants noted that Tribal Courts should be prepared to effectively handle civil claims that may be brought pursuant to Tribal tort claims acts.

Finally, Congress has authority to waive Tribal sovereign immunity in specific circumstances. *See Santa Clara Pueblo v. Martinez*, 436 U.S. at 58. But, as the U.S. Supreme Court has explained, any abrogation of Tribal sovereign immunity “cannot be implied but must be unequivocally expressed.” *Id.*

## **BEST PRACTICES IDENTIFIED BY THE TRIBES ON RISK MANAGEMENT**

Tribes know what is best for their communities – indeed, that principle is axiomatic to an understanding of what Tribal sovereignty is all about. During the course of the Tribal consultation process, it became apparent that some Tribes have developed an extensive knowledge base about best practices regarding risk identification, effective management of risk, Tribal sovereign immunity, strategic waiver of Tribal sovereign immunity, and the role of insurance.

While OTJ does not have independent expertise regarding Tribal risk management matters—thus making the development or evaluation of comprehensive best practices difficult—it collected best practices from Tribal governments during its consultations. Below is a summary of those best practices.

### **A. Alternative Dispute Resolution**

During the Tribal consultation process, participants noted that alternative dispute resolution (such as arbitration or mediation) provisions can be included within contracts between Tribes and private entities. Parties that support the concept of alternative dispute resolution generally cite the benefits of avoiding costly litigation and the ability to mutually agree how and in what circumstances claims should be addressed.

One participant suggested that amendments to the Federal Arbitration Act (FAA) or other federal laws be considered to promote alternative dispute resolution in appropriate cases involving Tribes. While OTJ does not have independent expertise on the FAA, this recommendation might be explored in future studies on this issue.

## **B. The Role of Insurance**

As discussed above, some Tribes have made a legal determination that Tribal sovereign immunity should not preclude common tort claims asserted by members of the public. Some Tribes, for example, have enacted legislation that waives Tribal sovereign immunity for certain types of claims up to a certain dollar amount.<sup>4</sup>

To protect against risks from such waivers, Tribes report purchasing their own insurance policies and, in some cases, purchasing insurance policies with limitations in the same amount as what their Tribal tort claims act allows in monetary liability. In those circumstances, claimants can seek compensation from the Tribe's insurance provider and the Tribe itself is still protected by Tribal sovereign immunity from claims larger than what the insurance coverage provides. During the Tribal consultation process, OTJ received comments suggesting that Tribes should routinely review their insurance policies to ensure that they are adequately protected against losses and that such policies are purchased at a fair cost. One commentator noted during the Tribal consultation process that insurance to protect against cyber losses is difficult to obtain.

Some Tribes also work together to create their own intertribal risk pools. The most prominent example is Amerind, Inc. (<https://amerind.com>), which is an intertribal risk pool organized as a federally chartered corporation formed under Section 17 of the Indian Reorganization Act (25 USC 477). Amerind was formed in 1986 and is 100% Tribally owned. During the consultation process, participants discussed how intertribal risk pools could be further expanded to help more Tribes with effective risk management.

## **C. Corporate Structure**

During the Tribal consultation process, some participants discussed the importance of using corporate structures to protect the Tribe. For example, it is a common business

---

<sup>4</sup> The examples cited earlier are also relevant here: Per Mississippi Choctaw Tribal Code Section 25-1-8(1), claims brought against the Mississippi Choctaw Tribe "...shall not exceed the sum of \$250,000 for actions arising from acts or omissions occurring on or after July 1, 1998, but before July 1, 2002; and \$500,000 for actions arising on or after July 1, 2002." See also, 1 Navajo Nation Code 554(F)(1) – "No judgment, order or award pertaining to any claims permitted hereunder shall be for more than the limits of valid and collectible liability insurance policies carried by the Navajo Nation covering each such claim and in force at the time of such judgment..."

practice for Tribes to incorporate their non-profit or business arms as corporations under Tribal or state law.<sup>5</sup> These corporations are then protected by the applicable liability provisions of those laws.

Another strategy is to create a federally chartered corporation formed under Section 17 of the Indian Reorganization Act (25 USC § 5124). Under the Section 5124 process, the Secretary of the Interior may issue a charter of incorporation. The charter must be ratified by the governing body of the Tribe. Information about this process can be found at: <https://www.bia.gov/service/starting-business/choosing-tribal-business-structure#choosingtribalbusinessstructure-link-01>.

#### **D. Formal Risk Management Programs**

During the consultations, one recommendation was that Tribes consider establishing formal risk management programs. In fact, several of the participants during the live consultations identified themselves as Tribal risk management officials.

In written comments, one Tribal chairman noted that Tribes can help manage risk and prevent losses by taking proactive measures including: 1) conducting risk assessments that examine and determine the Tribal government's potential exposures and liabilities, 2) develop a meaningful governmental culture that promotes leadership to provide a safe and secure environment for employees and the public, 3) have effective and reliable communications about safety that is shared through all Tribal government agencies, 4) develop and maintain effective risk management policies to mitigate identified risks, and 5) monitor and continually review standards, goals, losses, and developing risks.

#### **E. Cybersecurity**

Although not one of the issues identified by Congress in the appropriation legislation, during the Tribal consultation process cybersecurity concerns came up as perhaps the highest risk facing Tribal governments today. Participants in the Tribal consultation process discussed the importance of Tribes having strong cybersecurity practices in place in order to prevent catastrophic loss of Tribal data, including the technical deployment of software requiring multi-factor authentication and the purchase of insurance that covers losses due to cyber events. Regular backups of systems and data are also essential to cybersecurity preparedness.

---

<sup>5</sup> See Ryan Dreveskracht, *Doing Business in Indian Country: A Primer*, Am. Bar Ass'n (Jan 20, 2016).

## COMMENTS AND RESPONSES FROM CONSULTATION SESSIONS

In accordance with DOJ's Consultation Policy it is our practice to respond to feedback received during consultation. During the live Tribal consultation sessions and from written comments which were submitted, several ideas were raised. They include:

**Comment:** Consideration should be given about whether a federal Tribal Risk Management Office with a liaison position should be established in order to provide technical assistance, conduct outreach, share best practices, and coordinate with Tribes.

**Response:** The BIA Office of Indian Economic Development (IED) was established in 2005 to promote the economic development of Tribes and individual Tribal members. IED consists of the Division of Capital Investment (DCI), the Division of Economic Development (DED), and the Division of Energy and Mineral Development (DEMD). DCI works to fulfill the mission of the Indian Financing Act of 1974 by reducing the disparity between the business capital available to AI/AN and non-AI/AN businesses.<sup>6</sup> While OTJ does not have expertise on this topic, DOJ will convey this report and recommendation to the BIA Office of Indian Economic Development for consideration.

~

**Comment:** The US could consider whether to provide litigation support to Tribes in appropriate cases involving the protection of Tribal sovereign immunity.

**Response:** DOJ currently supports Tribes in litigation efforts to defend Tribal sovereign immunity and will continue to do in appropriate cases.

~

**Comment:** DOJ could coordinate with DHS CISA to create a clearinghouse of resources Tribes can access to safeguard Tribal IT systems and data, provide intelligence about current and emerging cybersecurity threats, and provide Tribes with information about technologies available to prevent and mitigate cybersecurity threats.

**Response:** DOJ appreciates that cybersecurity is a significant contemporary issue, which poses evolving threats to Tribes, as it does for state and local governments nationwide. Moving forward, the Department looks forward to working hand-in-hand with Tribes to address this profound risk. As a result of these discussions, the Office of Tribal Justice also

---

<sup>6</sup> <https://www.bia.gov/as-ia/ied>

anticipates strengthening lines of communication between Tribes and the Department of Homeland Security (DHS) Cybersecurity & Infrastructure Security Agency (CISA).

~

**Comment:** A review could be done to determine the extent to which federal agencies handle FOIA requests involving information protected by Tribal law or which is culturally sensitive, in a consistent manner. Such a review could be done to aid in development of a policy that is standard across all federal agencies.

**Response:** As part of its oversight and guidance responsibilities, the DOJ Office of Information Policy (OIP) reviews inquiries made by the public raising issues regarding agencies' compliance with the FOIA statute and the Attorney General's FOIA Guidelines. We urge federally recognized Tribes to raise their specific concerns regarding agencies handling of their records in response to FOIA requests to OIP. Information for making a compliance inquiry to OIP can be found at: [FOIA Resources \(justice.gov\)](https://www.justice.gov/foia-resources).

~

**Comment:** Federal agencies could look at existing federal laws and develop recommendations as to how intertribal risk pools could be further expanded to help more tribes with effective risk management.

**Response:** OTJ does not have the expertise to comment on this position; DOJ will convey this report and that recommendation to the BIA Office of Indian Economic Development for consideration.

~

**Comment:** Congress should consider whether amendments to federal laws should be made to promote alternative dispute resolution in appropriate cases involving Tribes.

**Response:** DOJ encourages Tribes that wish to pursue legislative matters to work with their Congressional delegation. OTJ does not have the expertise necessary to comment on this recommendation, but it will convey this report and recommendation to the BIA Office of Indian Economic Development for consideration.

~

**Comment:** DOJ could continue to have an ongoing meaningful dialogue with Tribes about risk management, loss prevention, the resolution of tort claims, alternative dispute

resolution, and protecting and managing Tribal sovereign immunity in the context of economic development.

**Response:** OTJ looks forward to participating in future dialogue regarding these issues. DOJ will also convey this report and recommendation to the BIA Office of Indian Economic Development for consideration.

~

**Comment:** Congress could consider whether appropriations should be provided to Tribes to help recipient Tribes conduct their own risk assessments and develop strategies to address identified risks to Tribal governments and Tribally owned businesses.

**Response:** DOJ encourages Tribes that wish to pursue legislative appropriation matters to work with their Congressional delegation.

## CONCLUSION

The issues that were raised during the Tribal consultation process were broader than anticipated. This report may serve as a first step in a more thorough discussion of risk management; it is clear that further study and collaboration is warranted. In particular, Tribal participants identified additional federal agencies that should be involved in future discussions, including the Departments of Interior and Commerce. Such ongoing dialogue between Tribes and federal agencies might take the form of an intertribal working group on risk management.

Perhaps more importantly, participants stressed the importance of empowering Tribes to address this problem. They supported providing appropriations to Tribes through a federal agency to help recipient Tribes conduct their own risk assessments and develop strategies to address identified risks to Tribal governments and Tribally owned businesses. With proper resources, Tribal participants expressed a readiness to implement Tribally driven best practices to risk management.



## APPENDIX A

### Tribal Consultation Framing Paper

#### U.S. Department of Justice Tribal Consultation on Risk Management October 28-29, 2021

The U.S. Department of Justice (DOJ) welcomes opportunities to consult with Tribal governments, including as required by federal law and DOJ policy. Earlier this year, Congress passed the Fiscal Year 2021 appropriation bill, which directed the “Office of Tribal Justice... to consult with Tribal entities concerning risk management, loss prevention, the resolution of tort claims, alternative dispute resolution, and protecting and managing Tribal sovereign immunity in the context of economic development.”

In order to obtain information that would be helpful in developing this framing paper, OTJ coordinated with the Department of the Interior’s Bureau of Indian Affairs, Office of Economic Development. This coordination process led to the development of some specific topics for consideration in advance of the consultation sessions. These questions are not intended to limit feedback; although the legislation focuses on Tribal risk management, DOJ welcomes input on any related aspects of this multi-faceted issue.

- What are the risks that Tribal governments face that could negatively impact Tribal economic development?
- What are some of the best practices that Tribal governments can exercise in order to manage risk and prevent loss?
- Are there best practices regarding records management that Tribal governments should employ to protect records?
- Are there best practices for Information Technology (IT) security that Tribal governments should employ to deal with ransomware, protect data, and respond to data loss?
- What best practices could be employed to prevent and respond to civil tort claims?

- Should alternative dispute resolution play a role?
- What role should Tribal sovereign immunity play? When is partial waiver of Tribal sovereign immunity appropriate?
- Are there best practices for Tribes regarding insurance coverage to protect against loss?

DOJ strongly encourages submission of comments in advance of the scheduled discussion. Submission of feedback prior to our discussions will help ensure DOJ representatives are able to address specific concerns and, where possible, ensure the right agency representatives are in attendance to address specific topics of concern. Tribes are welcome to submit multiple times, before and after consultation discussions. Please submit advance feedback via email to [OTJ@usdoj.gov](mailto:OTJ@usdoj.gov).

## APPENDIX B

### Tribal Consultation Participants

There were approximately 80 representatives from 29 Tribes and intertribal organizations that participated in a Tribal consultation session and/or that submitted written comments afterwards:

Association of Village Council Presidents	Kootenai Tribe
Big Valley Band of Pomo	Lac Vieux Desert Band of Lake Superior Chippewa
Catawba Nation	Lumbee Tribe
Chippewa Cree of the Rocky Boys Reservation	Mississippi Band of Choctaw
Chitimacha Tribe	Navajo Nation
Choctaw Nation	Nez Perce Tribe
Citizen Potawatomi Nation	Nottawaseppi Huron Band of Potawatomi
Cow Creek Umpqua Tribe	Poarch Band of Creeks
Eastern Band of Cherokee	Pueblo of Acoma
Fort Sill Apache Tribe	Rappahannock Tribe
Grand Traverse Band of Ottawa and Chippewa	Santa Ynez Band of Chumash
Great Plains Tribal Chairman's Association	Sault Ste. Marie Band of Chippewa
Jamestown S'Klallam Tribe	Suquamish Tribe
Kalispel Tribe	United South and Eastern Tribes
	Wampanoag Tribe of Gay Head (Aquinnah)

## **APPENDIX C**

### **Acknowledgments**

The Office of Tribal Justice would like to thank all of the Tribal officials and others that took part in the Tribal consultation by attending the live sessions or that submitted written comments. We also acknowledge the following persons for their roles in this Tribal consultation process:

Chris Chaney – Senior Counsel, DOJ Office of Tribal Justice

Martin Earring – Staff Assistant, DOJ Office of Tribal Justice

Denise Edwards – Acting Director, DOI BIA Office of Indian Economic Development (OIED)

David Johnson – Acting Chief, DOI BIA OIED, Division of Capital Investment

Jon Christiana – Law Intern (William & Mary Law School), DOJ Office of Tribal Justice

Rachel Hill – Law Intern (Arizona State University College of Law), DOJ Office of Tribal Justice