



THE SECRETARY OF THE INTERIOR
WASHINGTON

JAN 14 2011

Dear Tribal Leader:

At the Department of the Interior, we continue to take significant steps to implement President Obama's November 5, 2009, Executive Memorandum on Federal Consultation with Indian Tribes. Our goal is to create a policy that replicates the best consultation practices, responds to the needs and constraints of Tribal leaders participating in future consultations, and promotes more responsible policy development for Indian Country. The success of this consultation policy depends greatly upon the depth of input received from Indian Country.

In November 2009, I asked Interior to host a series of national consultation sessions designed to discuss the best process for meeting the President's charge for greater consultation. The feedback from Indian Country led to the creation of a joint Federal-Tribal team, who collaborated to write the attached draft consultation policy.

Thank you for your continuing support of this effort and your valuable input. The Department of the Interior consultation policy will honor the government-to-government relationship with Indian Tribes and will be a model for other consultation policies. Forging a strong role for Indian Tribes' involvement in the decision making process will benefit Federal Indian policy for generations to come.

Sincerely,

Ken Salazar



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

JAN 14 2011

Dear Tribal Leader:

The Department of the Interior is instituting a Department-wide policy for consultation with Indian Tribes and we would value your input.

Enclosed you will find the Department's Draft Tribal Consultation Policy. Please review the document and send your comments by e-mail to consultation@doi.gov. You may also mail your comments to Ms. Mary Milam at 1849 C Street NW, MS 4141 – MIB, Washington, D.C. 20240. **All Tribal leaders' comments must be received by March 14, 2011.**

Following a close review of your comments, the public will have an opportunity to comment before the policy is finalized. This draft policy document will continue to undergo legal review and the joint Federal-Tribal team will help integrate the feedback we receive. Thank you for your interest and participation.

Sincerely,

Laura Davis
Deputy Chief of Staff

DEPARTMENT OF THE INTERIOR POLICY ON CONSULTATION WITH INDIAN TRIBES

I. PREAMBLE

The obligation for Federal agencies to engage with Indian Tribes on a government-to-government basis is based on the Constitution, treaties, statutes, executive orders, and policies. Federal agencies meet that obligation through consultation with Indian Tribes. The Department of the Interior satisfies its Tribal consultation obligations—whether directed by statute or administrative action such as Executive Order 13175 (*Consultation and Coordination with Indian Tribal Governments*) or other applicable Secretarial Orders or policies—by adhering to the framework described in this policy. This Policy reflects the Department's highest commitment to the principles embodied in this policy and the Secretary's support of Tribal sovereignty.

The Department's Bureaus and Offices shall review their existing practices and revise them as needed to comply with the Department's policy as described in this document. All Bureaus and Offices will report to the Secretary's designee on their efforts to comply with this policy and as described in a companion Secretarial Order.

II. GUIDING PRINCIPLES

This policy broadly defines provisions for improving the Department's consultation processes with Indian Tribes to the extent that a conflict does not exist with applicable law or regulations.

This policy requires that the Department's government-to-government consultation involve the appropriate Tribal Officials and appropriate Departmental officials. The appropriate Departmental officials are knowledgeable about the matters at hand, are authorized to speak for Interior, and have decision-making authority in the disposition and implementation of a policy or are a program manager or staff who can ensure that Tribal concerns will be brought forward to final decision makers in the event that the decision makers are not present at the consultation meeting. The appropriate Departmental official will have an obligation to identify consulting parties early in the planning process and allow a reasonable opportunity for Indian Tribes to respond and participate as described in Section VIII. Department officials will make the effort to fully participate in the consultation process, ensure continuity, and demonstrate commitment to the process.

Consultation is a deliberative process that aims to create effective collaboration and informed decision making where all parties share a goal of reaching a decision together and it creates an opportunity for equal input from all governments. Consultation promotes an enhanced form of communication that emphasizes trust, respect, and shared responsibility and should be an open and free exchange of information. Federal consultation that is meaningful, effective, and conducted in good faith makes the Department's operation and governance practices more efficient. Efficiencies that derive from including Indian Tribes at all stages of the Tribal consultation process and decision making process, help to ensure that future Federal action is achievable, comprehensive, long lasting, and reflects Tribal input.

The United States has established a long-standing and inter-governmental relationship with Indian Tribes. Appropriate consultation practices will honor the government-to-government relationship between Indian Tribes and the United States; and will comply with President Barack Obama's Executive Memorandum that affirms this relationship and obligates the Department of the Interior to meet the spirit and intent of Executive Order 13175.

The policy creates a framework for synchronizing the Department's consultation practices with its Bureaus and Offices by providing an approach that applies in all circumstances where statutory or Administrative opportunities to consult with Indian Tribes exist.

III. DEFINITIONS

- A. Bureau or Office – As defined in the Department of the Interior Manual.
- B. Collaboration –The Department of the Interior working jointly with Indian Tribes to develop and implement positive solutions on issues that have an effect on Indian Tribes.
- C. Consultation Policies – Those institutionalized policies established to comply with the procedures described in Section VIII of this document.
- D. Departmental Action with Tribal Implications – Regulation, rulemaking, policy, guidance, legislative proposal made by the Department, grant funding formula changes, or operational activity that may have a substantial direct effect on Tribe or Tribal members' traditional way of life, Tribal lands, Tribal resources, or access to traditional areas of cultural or religious importance on Federally-managed lands; or the ability of the Tribe to govern its members or to provide services to its members; or that may impact the Tribe(s) relationship with the Department or the distribution of responsibilities between the Department and Indian Tribes. This term does not include matters that are the subject of litigation or in settlement negotiations, or matters undertaken in accordance with an administrative or judicial order.
- E. Indian Tribe – An Indian or Alaska Native Tribe, band, nation, pueblo, village, 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.
- F. Tribal Consultation Team – The Secretary's designee has established and may develop a plan of action for the continued involvement of a joint Federal-Tribal Team including making recommendations on the implementation of this policy.
- G. Tribal Governance Officer (TGO)– An individual designated by the Department to assure compliance with the entire scope of this policy and any future policies related to the Executive Order 13175. The role of the TGO is to promote consultation as described in Section VIII of this policy and promote collaboration as defined in this section. The TGO will: be appropriately located within the Department so that the position shall be accessible to Tribal Officials; ensure tribal interests are considered by Bureaus and Offices in conjunction with TLOs; ensure that all Department consultation efforts as described in Section VIII are documented and reported to the Department's Point of Contact under the President's Executive Memorandum on consultation; and, in particular,

DRAFT Tribal Consultation Policy

oversee the effective implementation of this policy with coordination of consultations across Bureaus and Offices. The TGO will be identified as serving in the office named under the most recent Departmental Action Plan.

- H. Tribal Liaison Official (TLO) – Each Bureau or Office will have at least one person designated to fill the role of a Tribal Liaison Official. The TLO will: advocate for opportunities and positions of Indian Tribes consistent with agency missions; promote collaboration between Tribes and the Liaison’s Bureau or Office; when appropriate, reply to an Indian Tribe’s request for consultation as described in section VIII of this policy; and strive to enhance trusting and ongoing relationships with Indian Tribes consistent with applicable statutes, regulations, and executive orders.
- I. Tribal Officials – An elected or duly appointed Tribal leader or official delegate designated in writing by an Indian Tribe.

IV. TRAINING

Trainings will aim to improve the Department’s capacity for promoting collaboration with Tribes and executing the consultation provisions of Section VIII. Training will:

- a) Promote consultation, communication, collaboration, and other interaction with Tribes;
- b) Outline and reinforce Department duties concerning tribal interests; and
- c) Describe the legal, trust, and protective obligation of the Federal-Tribal relationship. Transfer the knowledge, skills, and tools necessary for collaborative engagement to Tribal and Departmental staff engaged in the consultative process;

The Department, through DOIU and other appropriate sources, will develop and deliver innovative training opportunities as described in the Section VII which includes training to improve sensitivity and understanding of traditional American Indian cultures and governments.

V. COMMUNICATION

Each Office or Bureau is responsible for meaningful communication with Indian Tribes that promotes regular and early consultation as described in Section VIII of this policy. Communication will be open and transparent without compromising the rights of federally recognized Indian Tribes and the government-to-government consultation process. Communication methods should avoid impersonal forms of communication, effectively gain the attention of individual Tribal leaders, build on best practices, and utilize appropriate forms of technology.

A Bureau or Office will notify Indian Tribes that an opportunity for consultation exists when considering a Departmental Action with Tribal Implications as described in Section VIII.

A Bureau or Office may appropriately communicate with Indian Tribes about a Departmental Action with Tribal Implications through the use of meetings, telephone conversations, written notice, or a combination of all three; and may enlist workgroups of Tribal leadership and representatives that are particularly useful for identifying issues. A Bureau or Office will identify

the participants in the consultation process including the decision makers and the affected Indian Tribes. A Bureau or Office will seek and promote cooperation and participation between agencies with overlapping jurisdiction, special expertise, or related responsibilities regarding a Departmental Action with Tribal Implications.

Following initial notification of the opportunity for consultation, on-going communications concerning issues affecting Indian Tribes are meant to promote regular consultation. On-going communication will include communication about the design of the consultation process, the execution of that process, and the process' conclusion. When consultation is appropriate, ongoing communication will continue until the conclusion of the requirements under this policy.

The Department recognizes the value of communicating through a regular gathering of Indian Tribes which are meant to continue the discussion on improving consultation practices and the government-to-government relationship generally.

VI. ACCOUNTABILITY AND REPORTING

Methods that ensure accountability and reporting are essential to regular and meaningful consultation. The heads of Bureaus and Offices will include in future annual performance plans, a standard performance measure consistent with this policy.

On an annual basis, Bureaus and Offices shall report to the Secretary the results of their efforts to promote consultation with Indian Tribes. Reporting is intended to be comprehensive and may include, but is not limited to, the scope of consultation efforts, the cost of these efforts, and the effectiveness of consultation activities. Bureaus and Offices should provide a comprehensive listing of the topics on which consultations were held, training, innovations, and the engagement of senior leadership in these efforts.

Reports will account for the documents and correspondence with Indian Tribes to satisfy the Implementation of Final Federal Action Stage described in Section VIII or alternatively, summaries of such documents and correspondence with information concerning how the complete documents might be obtained. Methods of reporting may be both a description of budget expenditures in the execution of consultation efforts, narratives describing significant consultation efforts, and anticipation of forthcoming consultation opportunities.

The Secretary of the Interior will provide an annual report to Indian Tribes and may use the Department's website to share the reporting information where appropriate.

For Federal block grants that only Indian Tribes are eligible to receive and in compliance with Federal statutes, a Bureau or Office will take special care to disclose actions it has taken to consult with Indian Tribes in the development of formulas to administer the block grants.

VII. INNOVATIONS IN CONSULTATION PRACTICES

The Department's leadership will strive to advance Federal consultation practices and offer examples for innovation across the Administration. The Department will identify and seek to address impediments, both external and internal, to improving its consultation processes. The Department may consider soliciting Indian Tribes' evaluation of consultation practices.

DRAFT Tribal Consultation Policy

The Department's Bureaus and Offices will be open to consultation opportunities initiated by Indian Tribes and seek opportunities to consult by communicating regularly with Indian Tribes. Communication outside of consultation is encouraged to the extent that a conflict does not exist with Federal statutes and does not interfere with Federal obligations under the government-to-government relationship.

The Department leadership may identify opportunities to inform Legislators and other Federal officials, where appropriate, of the benefits of meaningful tribal consultation.

Each Bureau and Office is to acknowledge and comply with existing processes for notifying its staff about the provisions in the Department's consultation policy and identify opportunities to train individual Federal staff as well as Indian Tribal representatives in a manner that promotes inter-governmental relationships. Bureau and Office leadership shall seek permissible opportunities to share trainings among Federal and Tribal representatives and to highlight Tribal leader involvement.

Where significant conflict occurs between Indian Tribes and a Bureau or Office in the consultation process, Bureau and Office leaders in conjunction with the Solicitor's Office are encouraged to promote the use of collaborative problem-solving, facilitation, mediation, and other existing processes for conflict resolution as tools to utilize in the consultation process.

VIII. CONSULTATION GUIDELINES

Consultation guidelines are meant to establish uniform practices and common standards, that all Bureaus and Offices will use, except when otherwise agreed to in writing by a Bureau or Office and Indian Tribe through an individual protocol conforming with the guidelines in this section. Consultation and individual protocols will provide greater efficiency and transparency in Department practices in order to maximize Indian Tribes' participation.

- A. *Initiating Consultation*— A Bureau or Office must notify the appropriate Indian Tribe(s), of the opportunity to consult, when considering a Departmental Action with Tribal Implications. The Bureau or Office will strive to ensure that a notice is given at least 30 days prior to a scheduled consultation. If exceptional circumstances prevent notice within 30 days of the consultation, explanation for the abbreviated notification will be provided in the invitation letter.

Adequate notice entails providing a description of the topic(s) to be discussed. Notification of a consultation should include sufficient detail of the topic to be discussed to allow Tribal leaders an opportunity to fully engage in the consultation. This does not mean that the Bureau or Office has reached a preliminary decision on the issue which is the topic of the consultation. However, the component should provide a brief discussion of the issues, a timeline of the process, and possible outcomes.

Beginning at the Initial Planning Stage, a Bureau or Office will consult with Indian Tribes on a Departmental Action with Tribal Implications.

An Indian Tribe may request the Department provide consultation when it believes that a Bureau or Office is considering a Departmental Action with Tribal Implications. Requests should be made in writing to the Department's TGO and describe the specific a Departmental Action with Tribal Implications. However, the fact that an Indian Tribe may choose not to engage the TGO does not relieve a Bureau or Office of its obligation to engage in consultation as described by this Policy. In the event that the Bureau or Office makes an attempt to initiate consultation and does not receive a response, the Bureau or Office should make reasonable and periodic efforts throughout the process to repeat the invitation.

- B. *Role of Tribal Governance Officer in Consultation Processes* — When a Bureau or Office provides notification of the opportunity for consultation, the Department's TGO will document the notice of consultation. The TGO may serve as the Department representative in requests by an Indian Tribe for consultation to occur. The TGO will encourage Indian Tribes to request consultation directly from the appropriate Bureau or Office representative and help to ensure the resolution of all requests. In consultation efforts that are of national significance or involve multiple Bureaus or Offices, the TGO will take steps necessary to facilitate a government-to-government relationship that is honored by all parties.
- C. *Guidelines for Response to Request for Consultation* —The TGO or appropriate representative will promptly confirm receipt of a request for consultation from a Tribal Official. When the request is directed to the TGO, the request is to be forwarded to the appropriate Bureau or Office. The TGO or appropriate representative will treat an official request for consultation in a manner similar to a letter received from a state governor and respond in writing, using the most expedient methods to communicate to the Tribe, that the Department has received their request.
- D. *Stages of Consultation*— Bureaus and Offices will carry out the stages described below in order to satisfy consultation for a Departmental Action with Tribal Implications. Consultation on a Departmental Action with Tribal Implications that are operational in nature—those that are regional and discrete actions, with impacts on a limited number of Indian Tribes—should be carried out consistent with this Section, but with discretion to utilize only those protocols of this Section that are appropriate to the operational action.

1. Initial Planning Stage

Each Bureau or Office will consult at this stage when possible in consideration of a Departmental Action with Tribal Implications.

Initial planning activities include efforts preparatory to issuance of draft regulations, administration proposals, legislation, and national or large-scale regional changes in procedures or policies. This would include project scoping, when incorporating the input of Indian Tribes is appropriate or required by statute or regulation.

A Bureau or Office may conduct a meeting or other forms of interaction with Indian Tribes in order to receive and evaluate comments received as part of the Initial Planning Stage.

2. Proposal Development Stage

The Proposal Development Stage begins once the Department discloses the scope of a Departmental Action with Tribal Implications. Indian Tribes should be considered as appropriate collaborative partners, particularly where negotiated rule-making or a Tribal Leader Task Force is created.

The Bureau or Office will select a process for the Proposal Development Stage that maximizes the opportunity for timely input by Tribes and is consistent with both Tribal and Bureau schedules. The Bureau or Office should work with Indian Tribes to structure a process, which to the extent feasible, considers specific Indian Tribal structures, traditional needs, and schedules of the Tribes and may proceed with the expectation that interested Indian Tribes will respond within a reasonable time period. If litigation or legal requirements impact a Bureau's or Office's schedule for conducting consultation, then the Bureau or Office should explain these constraints to the Indian Tribe.

Examples of appropriate processes for the Proposal Development Stage include but are not limited to the following:

- **Negotiated Rule Making.** Where appropriate, the Bureau or Office should consider using negotiated rule making for developing significant regulations or other formal policies in accordance with the Federal Advisory Committee Act (FACA).
- **Tribal Leader Task Force.** The Bureau or Office may use a Tribal Leader Task Force on matters that impact Tribes across the country where negotiated rule making is impractical. A Tribal Leader Task Force may also be used, in appropriate circumstances, on regional or issue-specific (e.g., timber) matters. In each instance, the composition of the Task Force shall be collaboratively determined by the Tribes, provided that the Task Force shall be a process open to all Tribes and, to the extent possible, represent a cross-section of Tribal interests with respect to the matter at issue. The number of meetings to be held and their location will conform to the expressed views of the Tribes, to the extent practicable and permitted by law and in accordance with FACA.
- **Series of Open Meetings.** The Bureau or Office may provide open invitations to Tribal leaders as part of a series of open meetings to consider action(s). Open meetings can be used for national, regional, or subject-matter specific issues.
- **Single Meetings.** The Bureau or Office may host Tribal leaders in a single meeting to discuss a federal action under consideration. Single meetings are particularly appropriate for local, regional, or single Tribe issues.

DRAFT Tribal Consultation Policy

The Bureau or Office will solicit the views of affected Tribes regarding the process' timeline to meaningfully consider a Departmental Action with Tribal Implications. The Bureau or Office should make all reasonable efforts to comply with the expressed views of the affected Tribes regarding the process timeline at this Stage, taking into account the level of impact, the scope, and the complexity of the issues involved in the Departmental action with Tribal Implications, along with the other factors driving the schedule. The process will be open and transparent. If the Bureau or Office determines that the Administrative Procedure Act or other Federal law or regulation expressly prohibits continued discussion at a specified point in the decision-making process, the Bureau or Office should so inform the Tribes at the outset of this Stage in the process. The Bureau or Office may proceed with the expectation that interested Indian Tribes will respond within a reasonable time period during this Stage.

3. Implementation of Final Federal Action Stage

In addition to any formal notice required by law or regulation, final decisions on Department Action should be communicated in writing to affected Tribes, with a short explanation of the final decision.

A Bureau or Office may consider implementing a post-consultation review process where it is consistent with law, regulations, and Executive Order 13175. Any review process shall not limit the Department's deliberative process or privilege regarding internal considerations or any other applicable privilege.

The Bureau or Office at this Stage will consider the need for training or technical assistance on a new regulation or policy.

- E. *Impact of Consultation* – Consultation as described in this section is not a basis for the Department to preclude requests or recommendations by Bureaus, Offices, or Indian Tribes to collaborate and foster trusting relationships between the Department and Indian Tribes outside of the processes described in this section. Exigent circumstances may allow the Department to take measures that deviate from this policy, but the Department should make every effort to comply and should explain to Indian Tribes as soon as emergency circumstances arise.

IX. SUPPLEMENTAL POLICIES

Bureaus and Offices, in collaboration with the TGO, are to review existing policies that may be impacted by this policy. All Bureau and Office policies are to conform to the Department policy. Where necessary, a Bureau or Office may develop a new policy in order to conform to this policy.

Consistent with Federal appropriations law, the Department shall develop a policy for consultation with Alaska Native Corporations. The policy will address when a Department action impacts an Alaska Native Corporation's interest. The policy will not conflict with the

requirements of this document. The Secretary's designee will provide a Plan of Action for developing the Alaska Native Corporation consultation policy.

Other entities that are not Bureaus or Offices as defined in this policy may develop policies that conform to this policy. Other entities may develop such policies in coordination with the Secretary's designee.

X. DISCLAIMER

Except to the extent already established by statute, this Policy is intended only to improve the internal management of the Department, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the Department or any person. The Department also does not waive any applicable privilege or immunity that it may hold by virtue of this Policy.