

**CONSULTATION WITH ELECTED LEADERS OF FEDERALLY
RECOGNIZED INDIAN TRIBES**

1. PURPOSE

This Directive:

- a. States the Animal and Plant Health Inspection Service's (APHIS) policy concerning consultation with Native American Tribal Governments. This Directive implements Executive Order (EO) 13175 regarding consultation, collaboration, and coordination with Tribes. This EO directs agencies to provide federally recognized Tribes the opportunity for government-to-government consultation and coordination in policy development and program activities that may have direct and substantial effects on their Tribe. Its purpose is to ensure that tribal perspectives on the social, cultural, economic, and ecological aspects of agriculture, as well as tribal food and natural-resource priorities and goals, are heard and fully considered in the decision-making processes of all parts of the Federal Government.
- b. Sets forth the duties and responsibilities for APHIS personnel administering this Directive.
- c. Includes definitions for terms associated with Native Americans and government-to-government consultations.
- d. Sets forth criteria that all APHIS programs will use to identify actions that require an invitation be extended to federally recognized Tribes to engage in consultation.

2. AUTHORITIES

- a. Presidential Memorandum of November 5, 2009, Tribal Consultation and Collaboration.
- c. Presidential Memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments.
- d. EO 12875, Enhancing the Intergovernmental Partnership.

- e. EO 12866, Regulatory Planning and Review.
- f. EO 12898, Environmental Justice in Minority Populations and Low Income Populations.
- g. EO 13175, Consultation and Coordination with Indian Tribal Governments.
- h. Title VI of the Civil Rights Act of 1964, as amended, Nondiscrimination in Federally Assisted Programs
- i. Title 7, Code of Federal Regulations, Part 15d, Nondiscrimination in Programs or Activities Conducted by USDA.

3. DEFINITIONS

- a. **Accountable Process.** A process by which an agency is able to track and report on the efforts on any given consultation, from initial outreach and consultation activities to how the results of consultation were used by the agency.
- b. **Agreements.** Documents approved by two or more parties that identify their respective roles and responsibilities in achieving mutual objectives, e.g., Memoranda of Understanding, Cooperative Agreements, Grants, and Contracts.
- c. **Alaska Native Corporation.** Any Alaska Native village or regional corporation established pursuant to the Alaska Native Claims Settlement Act (ANCSA), Public Law (P.L.) 92-203.
- d. **Alaska Native.** As defined by section 3(b) of ANCSA, a citizen of the United States, who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlaka Indian Community), Eskimo (Inuit), or Aleut blood, or a combination thereof. The term includes any Native, as so defined, either or both of whose adoptive parents are not Native. It also includes, in the absence of proof of a minimum of blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or Native group of which he/she claims to be a member of whose father or mother is (or, if deceased, was) regarded as native by any village or group.
- e. **American Indian.** An individual who is a member of a Native American (American Indian) Tribe, band, or community.
- f. **APHIS Native American Working Group (ANAWG).** A group of line- and support-program personnel who volunteer to represent their Deputy Administrator in dealing with policy and programmatic issues around APHIS' even-handed delivery of goods and services to the federally recognized Tribes.

- g. **Bureau of Indian Affairs (BIA).** An agency of the U.S. Department of the Interior. BIA is the principal agent of the United States in carrying on the government-to-government relationship that exists between the United States and federally recognized Native American Tribes and carrying out the responsibilities of the United States as trustee for property it holds in trust for federally recognized tribes and individual Native Americans. Since its inception in the 1820s, BIA's role has evolved from removal of eastern tribes to the West, to reservation confinement, to land allotment and assimilation, through a period of termination, and finally to its present role of supporting tribal self-government and self-determination.
- h. **Consultation.** Timely, meaningful, and substantive dialogue between USDA officials who have delegated authority to consult, and the official leadership of federally recognized Indian Tribes, or their designated representative(s), pertaining to USDA policies that may have tribal implications.
- i. **Coordination.** The orchestration of the activities of different entities.
- j. **Collaboration.** When two or more people or organizations work together in an intersection of common goals by sharing knowledge, learning, and building consensus. Collaboration is the mutual development of perspectives or actions that are of mutual interest, as in a Tribe and a USDA agency, working together on a USDA policy that benefits both the agency and the Tribe.
- k. **Consulting Official.** Consultation conducted only by employees who have delegated authority for consultation. The Secretary of Agriculture delegates the authority to his/her Under Secretaries, and they in turn delegate it to the leader of each agency. Whether the consulting official is the Secretary, Deputy Secretary, Assistant Secretary, Under Secretary, agency head, or another agency official depends on the nature of the regulation, policy, program or planning decision and how it may affect the consulting Tribe(s). For the Tribes, consultation is conducted by elected Tribal leaders or Tribal employees or their representatives who have delegated authority from their Tribal leader for consultation. This delegation is determined by the Tribes themselves as sovereign governments. The consulting official is usually the Tribal Chief/Chairman/Governor/President, though he/she could delegate the responsibility to a member of the Tribal Council or even a Tribal employee with specialized knowledge of the topic of the consultation.
- l. **Consultation Record.** Created and maintained written records on every tribal consultation conducted by any Federal agency. For reporting and oversight purposes, APHIS is responsible for entering select components of the consultation record into the USDA Tribal Consultation Database maintained by the Department's Office of Tribal Relations. The entry of reporting data into that database does not affect the agency's obligation to maintain the full consultation

record in accordance with this Directive and any other applicable statutory or regulatory requirements, such as the Federal Records Act.

- m. **Federally Recognized.** A relationship that is traceable to the U.S. Constitution, specifically to the Indian Commerce Clause (Article I, Section 8, Clause 3) and the Treaty Clause (Article II, Section 2, Clause 2). The U.S. Government acknowledges that a Tribe and its members exist as a unique political entity that has a formal relationship with the U.S. Government. "Recognition establishes that a 'federally recognized' Tribe, an independent sovereign, has certain inherent rights and powers of self-government and, as such, is entitled to specific benefits and services enumerated in various Federal laws and rights reserved/granted to Tribes by treaties, executive orders, or special acts of Congress, or other judicial processes. For example, health and education benefits flowing from the trust relationship or off-reservation hunting and fishing rights as they relate to treaties with special Tribal Governments. The process, regulations, and criteria for attaining Federal recognition are located in 25 Code of Federal Regulations (CFR) 83."
- n. **Government-to-Government.** In Federal Indian law, the term used to characterize the unique legal relationship that exists between federally recognized Tribes and the Federal Government. This relationship evolved from the recognition of tribal sovereignty expressed in treaties between Tribes and the Federal Government and in the U.S. Constitution. This relationship is the basis of the government-to-government consultation requirement and has been expressed through numerous statutes, executive directives, and court decisions.
- o. **Indian Country.** All the land under supervision of the U.S. Government that has been set aside for the use of Native Americans. This includes Native American reservations, as well as other areas under Federal jurisdiction and designated for Native Americans' use. As a general rule, State jurisdiction does not extend to Indian country; rather, tribal and Federal law govern (exception P.L. 280). The Indian country designation is the benchmark for approaching the allocation of Federal, tribal, and State authority with respect to Native Americans and their lands.
- p. **Lands.** All uplands, wetlands, and open waters, such as streams, lakes, estuaries, and bays.
- q. **Native American.** A person who is a member of any Native American Tribe, band, group, or nation in the "lower" or conterminous 48 States of the United States and peoples indigenous to the United States, including Alaska, i.e., Alaska Indians, Eskimos (Inuits), Aleuts, and Alaska Natives.
- r. **Native American Tribe (or Tribe).** Any Native American Tribe, band, nation, pueblo, or other organized group or community which is recognized as eligible

for the special programs and services provided by the U.S. Government to Native Americans because of their status as Native Americans. With regard to consultation, a Tribe is a group of Native Americans that has been "federally recognized" as constituting a distinct and historically continuous political entity for at least some governmental purposes. Legally, no universal definition exists. The term "Tribe" may apply to a distinct group within a Native American village or community, the entire community, or a large number of communities or may refer to several different groups or villages speaking different languages but sharing a common government, or a widely scattered number of villages with a common language but no common government. Tribe is shorthand for "Indian tribe" as used in EO 13175, which means 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.

- s. **Negotiated Rulemaking.** A technique used to bring interested parties into the rule-drafting process at an early stage. Rules are developed by reaching consensus among interested parties. If consensus is achieved, the agency ordinarily publishes the draft rule based on that consensus in a notice of proposed rulemaking. Negotiated rulemaking is endorsed in EO 12866 and in the Negotiated Rulemaking Act of 1990 (5 U.S.C. 561-570).
- t. **Office of Tribal Relations (OTR).** The USDA office that serves as the primary point of contact for tribal issues, including those dealing directly with tribal governments and ANCSA corporations, as well as those impacting tribal members as individuals. OTR is responsible for serving as the single point of contact within the Department on tribal affairs, advising the Secretary concerning tribal issues and concerns, and working cooperatively and collaboratively across all agencies of the Department to build an integrated approach to issues, programs, and services addressing the needs of American Indians and Alaskan Natives, including the conduct of tribal consultation.
- u. **Principle of Agency Executive Authority.** The requirement for agencies to take the Tribes' views, information, rights, and interests into serious, deliberative consideration during consultation - it does not require agencies to do everything a tribal representative requests. Consultation should be part of an effort to cooperate and collaborate in good faith with tribal partners. Consultation and collaboration with Tribes helps APHIS better serve tribal communities.
- v. **Principle of Mutual Concurrence.** Within APHIS, consultation that occurs only when the agency and tribal officials mutually agree that consultation is taking place. Agency consulting officials and their staffs should be clear in identifying, in collaboration with the relevant tribal official(s), when an action or set of actions constitutes government-to-government consultation.

- w. **Policies with Tribal Implications.** Policies that have tribal implications which include regulations, legislative comments or proposed legislation, and other policy statements or actions. Actions, in turn, include deliberations, decisions, and implementation of APHIS programs and services.
- x. **Reservation.** "Trust assets" including areas of land "reserved" or "held in trust" and protected by the U.S. Government for a Native American tribe(s), band, or village to live on and use pursuant to treaties, statutes, and executive orders. The term "reservation" refers to the early practice whereby Native American tribes were coerced, enticed, or otherwise persuaded to relinquish or "cede" the majority of their homelands by treaty to the Federal Government, while "reserving" a portion of their original lands or natural resources for their use. There are about 300 Federal Native American reservations, also known as Indian pueblos, rancherias, communities, or colonies, located in 33 States. Properties located outside the contiguous boundaries of reservations, as well as lands conveyed under the Alaska Native Claims Settlement Act, that are held in fee title by Native Americans, as private property, generally are not considered to be reservations.
- y. **Sovereign.** A body of persons or a State having independent and self-governing power, status, or authority. An 1831 Supreme Court decision confirmed that Native American nations were distinct, self-governing political entities, dependent upon the United States as their trustee. Tribes are described as "domestic dependent nations," coining the term "Nations within a Nation."
- z. **Substantial Direct Effect.** An uninterrupted causal connection between the action and the group or individual being affected. *Effects* may be positive, neutral, or negative. These elements should be considered: If there is definitely potential for an effect that is substantial and direct, APHIS must offer consultation. If there is any potential for an effect, the offer of consultation may be required, depending on the extent (significance) of the effect. If APHIS does not know the significance of the effect, or even whether there will be an effect, the agency should inquire of potentially affected Tribes whether the Tribe thinks there would be an effect, how significant such an effect may be, and whether they would like to consult. If there is no potential for an effect, the offer of consultation is not required (but may still be valuable).
- aa. **Title VI of the Civil Rights Act of 1964, as amended, Non-Discrimination in Federally Assisted Programs.** An Act prohibiting discrimination in federally assisted programs on the basis of race, color, or national origin.
- bb. **Title 7, CFR, Part 15d, Non-Discrimination in Programs and Activities Conducted by USDA.** The regulation prohibiting any USDA agency, officer, or employee from discriminating against any individual on the basis of race, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, or disability; or because all or part of an individual's income is derived from any public assistance program, in conducted programs or activities.

- cc. **Treaty.** Any agreement, compact, alliance, convention, act, or contract between two or more independent (sovereign) nations with a view to the public welfare, including terms of peace, alliance, boundary establishment, trade, or other issues of mutual interest. Under the U.S. Constitution (Article II, Sec. 2, Clause 2) the term "treaty" refers to international agreements concluded by the President with the advice and consent of the Senate, provided that "two thirds of the Senators present..." ratify the treaty. Treaties are binding on the States and others as "the supreme law of the land" (Article VI, Clause 2).
- dd. **Tribal Government.** The governing body of a Native American Tribe that has been officially recognized as such by the Federal Government. Native American Tribes are sovereigns, i.e., governments, and State law does not apply to trust lands within reservation boundaries without Congressional consent.
- ee. **Trust Relationship.** A trust relationship or partnership resembling that of a "beneficiary to a trustee." Native American Tribes are not foreign nations but constitute "distinct political" communities "that may, more correctly, perhaps be denominated domestic, dependent nations" whose "relationship to the United States resembles that of a ward to his guardian." This language, in *Cherokee Nation v. Georgia (1831)*, reaffirmed the doctrine of Federal trusteeship in Native American affairs.
- ff. **Trust Responsibilities.** Treaties and agreements entered into by Native American tribal governments with the U.S. Government to "hold in trust," protect, and support Native American lands, sovereign rights, resources, and traditional-use areas. The U.S. Government acknowledges a unique legal relationship with Native American tribal governments that is traceable to the Indian Commerce Clause and the Treaty Clause of the U.S. Constitution (Article I, Section 8, Clause 3 and Article II, Section 2, Clause 2), treaties, statutes, and court decisions.

4. BACKGROUND

The United States has recognized Tribes as sovereign governments since the first decades of America's existence. A unique legal relationship exists between federally recognized Tribes and the Federal Government which evolved from this recognition of tribal sovereignty. This relationship is the basis of the "government-to-government" consultation requirement. The treaties in which many Tribes ceded lands to the United States in exchange for protection and provisions for their tribal citizens were based on the premise of two sovereign governments interacting on an equal basis, just as foreign governments negotiate and sign treaties with the United States today. This relationship is incorporated in the Constitution, and has been expressed through numerous treaties, statutes, executive directives, and court decisions as well as political, legal, moral, and ethical principles. Explicit rights and privileges, including livestock grazing, hunting, subsistence fishing, and gathering of plant resources, are associated with treaties and

agreements between specific Tribes and the Federal Government. In addition, land and resources hold a special and unique meaning in the spiritual and everyday lives of many Native Americans.

American Indians, Alaska Natives, Eskimos, and Aleuts, herein referred to as Native Americans, are people with distinct cultures and traditions. Most reside in rural areas west of the Mississippi River, but there are Native Americans living in every State of the Union. Approximately 28 percent live on reservations. Presently, 53 million acres of land in the United States are "Indian" lands. After the Alaska Native land selections are completed, almost 5 percent of all land in the United States will be in Native American ownership.

On April 29, 1994, a Presidential Memorandum was issued reaffirming the Federal Government's commitment to operate within a government-to-government relationship with federally recognized American Indian and Alaska Native Tribes, and to respect self-governance for such Tribes. This Presidential Memorandum directs each executive department and agency to consult with tribal governments prior to taking actions that would affect them. It states that, in order to ensure that the rights of sovereign tribal governments are fully respected, all such consultations are to be open and candid so that Tribal governments can evaluate for themselves the potential impact of relevant proposals.

On May 14, 1998, EO 13084, "Consultation and Coordination with Indian Tribal Governments," was issued. This EO was revoked and superseded on November 6, 2000, by the identically titled EO 13175, which sets forth guidelines for all Federal agencies to (1) establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications; (2) strengthen the United States' government-to-government relationships with Tribes; and (3) reduce the imposition of unfunded mandates upon Tribes. EO 13175 directs each executive department and agency to consult with tribal governments prior to taking actions that could have substantial direct effects on Tribes.

To achieve this goal, it is essential that APHIS engage with Tribes in timely and meaningful consultation on policies that have substantial direct effects on one or more Tribes. Consultation, coordination, and collaboration are different but not mutually exclusive; rather, they are mutually supportive. Together, they lead to information exchange, mutual understanding, and informed decision-making.

5. POLICY

- a. APHIS will respect the rights of sovereign tribal governments and provide an opportunity for Tribes to participate in policy and program development. Each Tribe will be provided the opportunity for timely and meaningful government-to-government consultation regarding policy actions that may have tribal implications. Tribal implications are defined as substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and

Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Pursuant to EO 13175, policies that have tribal implications may include regulations, legislative comments or proposed legislation, and other policy statements or actions. This Directive does not preclude APHIS from consulting with a Tribe when the Tribe and the agency agree that consultation may be desirable, even if consultation is not specifically required. To enhance the evolution of working relationships and mutual partnerships between APHIS programs and Native American governments, the Agency will be flexible.

- b. APHIS will maintain accountable processes to ensure regular and meaningful consultation with tribal officials in the development of policies that may have tribal implications. In order to ensure accountability, APHIS will maintain an administrative record of all relevant decision-making, information, and communications associated with each consultation. This includes initial scoping and assessment, any outreach, consultative meetings and dialogue, and how the results of consultation were considered by the Agency in the decision-making processes. These administrative records will be retained by APHIS and entered into the USDA Tribal Consultation Database once it is established.
- c. The process of evaluating whether or not government-to-government consultation is required, or the actual tribal-consultation process itself, can be initiated by APHIS, by any federally recognized Tribe, or by another party (e.g., the National Congress of American Indians). APHIS should accept all requests for consultation: the emphasis must be on accepting opportunities rather than declining.
- d. The process defines critical triggers that cause an evaluation or offer of formal tribal consultation or government-to-government discussions. This needs assessment or initial scoping is the first phase of the consultation process. The second phase involves communicating with the appropriate Tribes to determine their interest in pursuing government-to-government consultation. APHIS may make an offer; tribal leaders may or may not accept it. The third phase involves planning and conducting government-to-government consultation. APHIS will employ the same methods in these phases across all its program areas to ensure a process that is trackable and transparent.
- e. ***Executive Authority***. Consultation does not require APHIS to do everything a tribal representative requests, but rather requires the agency to take the Tribes' views, information, rights, and interests into serious, deliberative consideration. Consultation should be part of an effort to cooperate and collaborate in good faith

with tribal partners. Consultation and collaboration with Tribes helps APHIS better serve tribal communities.

- f. ***Emergency Actions.*** To facilitate rapid response to animal and plant health emergencies on reservations, APHIS programs should consider establishing Memorandums of Understanding (MOUs) with Tribes before emergencies occur. These MOUs would not replace government-to-government consultation, but having them in place might reduce the chances that a Tribe would require it.
- g. APHIS policy and philosophy does not suggest recognition of tribal authority that does not currently exist. Neither the Native American philosophy, nor this Directive, will be used to arbitrate differences in opinion between Government agencies or to interpret any authorities, laws, or judicial findings. Unless specific judicial rulings or Acts of Congress indicate otherwise, APHIS' policy and philosophy will not be construed as validating the authority of any Native American government over lands or other natural resources or non-tribal members.

6. RESPONSIBILITIES

Within APHIS in regard to tribal consultation,

- a. The Administrator will:
 - (1) Ensure that APHIS operates within government-to-government relationships with federally recognized tribal governments.
 - (2) Ensure that APHIS' programs and activities are operated in a manner consistent with the authorities listed in Section 2 of this Directive.
 - (3) Ensure that APHIS maintains accountable processes for tribal consultation and Native American Programs.
 - (4) Name a single National Coordinator for Tribal Consultation (NCTC).
- b. Deputy Administrators of the line programs, with the exception of International Services, will:
 - (1) Ensure that there is one designated tribal consultation point of contact (TCPOC) from their respective program areas, and
 - (2) Ensure that they and their staffs receive training and support to serve as Consulting Officials, when appropriate, and to coordinate with others as Consulting Officials, as required.

c. The APHIS NCTC will:

- (1) Coordinate the implementation of the USDA Action Plan for Tribal Consultation and Collaboration,
- (2) Establish communications networks and reporting protocols for tribal consultation among all agency TCPOCs (which may be the tribal liaisons in programs that have established those positions),
- (3) Serve as the primary APHIS coordinator to expand and develop opportunities for APHIS employees to be trained and prepared to participate in various levels of tribal consultation, as appropriate,
- (4) Ensure that APHIS' tribal consultation work is appropriately documented in a permanent database and summarized for APHIS management, as requested,
- (5) Provide any necessary reporting or other information to the USDA Office of Tribal Relations regarding the Agency's tribal consultation activities and outcomes, and
- (6) Be the owner of the APHIS Tribal Consultation SharePoint Site and work cooperatively with all relevant personnel to populate and maintain the site.

d. The TCPOCs/tribal liaisons will:

- (1) Be appointed by a Deputy Administrator to serve as the single point of contact for coordination of tribal consultation efforts and reporting,
- (2) Work with the National Coordinator to ensure data are maintained and reported as appropriate to provide an Agency-level picture of tribal consultation work in APHIS,
- (3) Work with the program managers and the National Coordinator to maintain and update the APHIS Tribal Consultation SharePoint Site,
- (4) Provide advice, support, and other assistance to the Administrator and the APHIS Management Team to promote/facilitate all APHIS policies and programs affecting consultation with Native American Tribes,
- (5) Work cooperatively with APHIS field personnel to coordinate initial scoping and formal assessments of APHIS activities' impacts on Tribes and follow-up, as appropriate,
- (6) Assist APHIS managers and program personnel in establishing and maintaining tribal contacts, and

- (7) Assist in providing guidance and training to APHIS consulting officials as needed.
- e. State-level Managers in APHIS, working within their authority, will:
- (1) Establish and maintain relationships with Indian Tribes and tribal organizations within their areas, including tribal advisory councils, as appropriate,
 - (2) Maintain complete files on tribal contacts in their States and keep relevant information posted and current on the APHIS Tribal Consultation SharePoint Site, and
 - (3) Ensure they and their staffs receive appropriate training and stay informed about the APHIS processes for tribal consultation.
- f. APHIS Managers and Program Personnel, working within their authority, will:
- (1) Establish regular communication systems with tribal leaders to ensure that tribal government rights and concerns are considered before the Agency takes an action,
 - (2) Assess the impact of appropriate APHIS projects, programs, and activities on Tribes and tribal members and recommend offering government-to-government consultation consistent with the APHIS tribal consultation processes, and
 - (3) Maintain appropriate records and report on work with Native American Tribes.

7. INQUIRIES

- a. Direct inquiries concerning APHIS consultation work with Native Americans and Tribal Governments, to the APHIS National Coordinator for Tribal Consultation at 301-734-6336.
- b. Direct inquiries concerning civil rights to APHIS Civil Rights Enforcement and Compliance at 202-720-6312.
- c. This Directive can be accessed at <http://www.aphis.usda.gov/library/>

/s/ Kevin Shea for

Gregory L. Parham
Administrator