

Executive Summary:

Tribal Comments Received during U.S. Department of the Interior Consultations on the November 5, 2009 Presidential Memorandum

I. RE-DEFINING CONSULTATION

1. The term “consultation” has negative connotations and should be replaced.
2. Consultation should be a two-way communication.
3. Consultation is more than a procedural requirement.
4. Consultation should equate to joint decision-making.
5. Consultation should be an ongoing dialogue and relationship.
6. Consultation should be on a nation-to-nation level.
7. Other recommendations regarding redefining consultation. (See full *Summary of Tribal Comments Received during U.S. Department of the Interior Consultation on the November 5, 2009 Presidential Memorandum*)

II. RESPONSES TO “QUESTIONS TO CONSIDER”

A. TRIGGER FOR CONSULTATION (WHAT FEDERAL ACTIONS SHOULD TRIGGER CONSULTATION?)

1. Tribes should have the opportunity to trigger a requirement to consult.
2. Tribes should have the opportunity to say whether an action requires consultation.
3. A broader range of actions should trigger consultation including, but not limited to, funding and personnel decisions related to Federal Indian programs, off-reservation actions that affect traditional Tribal territory, ceded, usual and accustomed areas, or tribal treaty-reserved resources.
4. Federal agencies should fulfill current requirements to consult.
5. Federal agencies should consult on their priorities.
6. Other recommendations regarding the trigger for consultation. (See full *Summary of Tribal Comments Received during U.S. Department of the Interior Consultation on the November 5, 2009 Presidential Memorandum*)

B. WHEN TO INITIATE CONSULTATION

1. Federal agencies should initiate informal contacts with Tribes as early as possible through early informal scoping.
2. Federal agencies should initiate consultation as early as possible.
3. Federal agencies should initiate consultation as early as possible to determine the need for action and scope of issues to be considered.
4. Federal agencies should initiate consultation as early as possible, when the policy choices are still being considered and before decisions have been made.
5. Involving Tribes as early as possible results in many benefits.
6. Consultation should occur both in the early stages and throughout the action.

7. Hold regularly scheduled consultation sessions to obtain tribal input.
8. Other recommendations on when to initiate consultation. (See full *Summary of Tribal Comments Received during U.S. Department of the Interior Consultation on the November 5, 2009 Presidential Memorandum*)

C. NOTICE OF CONSULTATION

1. Notice should be sent to Tribes in a timely manner -- at least (1 year/90 days/60 days/30 days) in advance of a consultation session depending on complexity and to allow time for Tribes to make travel plans and develop recommendations.
2. The form of notice should include the Tribal leader letter as well as other methods including posting consultation information on a government-wide website, emailing, and faxing.
3. There should be one central location for all Federal government consultations.
4. Agencies should maintain an up-to-date database of tribal leaders.
5. Notice should be sent to the Tribal leader and all other appropriate Tribal representatives.
6. The notice should include all necessary background information on the topic to be consulted on and the consultation plan.

D. WHO SHOULD PARTICIPATE

1. Consultation should involve both Federal and Tribal representatives with expertise in the matter to be discussed.
2. The Federal agency should identify the issues so that Tribes can ensure their appropriate Tribal staff participates.
3. Tribal leaders and Federal Government leaders should directly consult with each other.
4. Federal agency staff participating in consultation must have the authority to make decisions
5. Tribes should decide who to send as representatives to a consultation.
6. Consultation with organizations does not satisfy the requirement to consult with Tribes.
7. Other recommendations regarding who should participate. (See full *Summary of Tribal Comments Received during U.S. Department of the Interior Consultation on the November 5, 2009 Presidential Memorandum*)

E. HOW CONSULTATION SHOULD OCCUR

1. Face-to-face consultation is the preferred form of consultation.
2. Regional consultations are important, even on matters of national importance.
3. Federal agencies should increase accessibility to and affordability of consultations by holding consultations in geographical regions that are accessible to Tribes, holding consultations in conjunction with other events Tribes will attend, and offering teleconferencing (during business hours) or other technological ways of participating.
4. Offer some financial assistance to Tribes to participate in consultation.
5. Consultations should take place in Indian Country.
6. Consultation should be focused on a limited number of topics, and be conducted either one-on-one with each Tribe or with a limited number of Tribes.

7. The form of consultation should be tailored to the impacted Tribe(s) and issue(s).
8. Federal agencies should provide Tribes with background information in advance of consultation and all pertinent documents.
9. Timelines for Tribes' review of documents should be reasonable.
10. The consultation should be facilitated or moderated either jointly or by a neutral third party.
11. Consultation schedules, agendas, and locations should be mutually agreed to by Federal and Tribal representatives.
12. Other recommendations regarding how to conduct consultations. (See full *Summary of Tribal Comments Received during U.S. Department of the Interior Consultation on the November 5, 2009 Presidential Memorandum*)

F. COORDINATION WITH OTHER AGENCIES/DEPARTMENTS

1. Improve coordination among Federal agencies on cross-agency actions, communication among agencies, and consistency in agencies' approaches to consultation.
2. Improve coordination among DOI bureaus on cross-bureau actions, communication, and consistency in bureaus' approaches to consultation.
3. Establish a DOI-wide Indian policy working group, Tribal Consultation Officer, Office of Tribal Accountability, or Tribal Liaison to coordinate and ensure consistency among DOI bureaus' consultations.
4. DOI should take the lead on a Government-wide coordination and consultation and act as an advocate for Tribes.
5. There are a number of specific areas on which Federal agencies could better coordinate
6. There should be a uniform consultation policy among all agencies and a Government-wide position to coordinate all agencies' consultations.
7. Federal agencies must coordinate with States and require States to consult with Tribes.

G. ALTERNATIVES (IMPROVEMENT, WHAT HAS WORKED? WHAT HASN'T?)

1. Conferences, workshops, sessions, and task forces are useful tools for information gathering and sharing, but should not substitute for consultation.
2. Conferences, workshops, sessions, and task forces may be used as tools for consultation.
3. Technology may be used to facilitate consultation, but should not be the primary source.
4. Other recommendations on alternatives to consultation. (See full *Summary of Tribal Comments Received during U.S. Department of the Interior Consultation on the November 5, 2009 Presidential Memorandum*)

III. OTHER RECOMMENDATIONS

A. CONSULTATION FOLLOW-UP AND ACCOUNTABILITY FOR NOT FOLLOWING THROUGH

1. There must be accountability for not following the consultation policy and considering tribal input.

2. Establish a system for accountability by using report cards, progress reports, or a database
3. Establish consequences for failing to comply with consultation requirements (options include imposing sanctions, providing Tribes a right to administratively appeal, creating a Tribal veto, making action unenforceable against Tribe).
4. Increase accountability of Federal appointees and employees by incorporating consultation into employee performance reviews.
5. Establish an organizational framework for oversight, to ensure compliance with consultation requirements (options include placing an Indian Affairs liaison at OMB, broadening the OIG's duties, or establishing a DOI Consultation Accountability position or Office of American Indian Trust, Tribal commission, or oversight committee).
6. Agencies must follow up in writing (e.g., by mail, email, Website) with Tribes in a reasonable time after a consultation session. The follow-up should explain how the agency is incorporating Tribal comments, provide relevant documents, explain the status of the decision/action, and offer Tribes the opportunity for further discussion.
7. Agencies should distribute verbatim transcripts or recordings of consultation proceedings to Tribes.
8. Establish a feedback loop and/or tracking system to ensure Tribes' concerns are addressed.
9. Establish timelines for the consultation and action that allow Tribes sufficient time to provide input.
10. Consultation and follow-up on the Action Plan on Consultation Report should continue.

B. WHETHER A NEW CONSULTATION POLICY IS NEEDED

1. EO 13175 and agency consultation policies have not been implemented.
2. Focus on implementing EO 13175 rather than developing a new consultation policy.
3. Review agencies' consultation policies and refine/clarify them, prepare a "best practices" guide for employees, or require strategic plans to ensure the policies are implemented.
4. Establish a new, stronger Executive Order.
5. Codify consultation requirements in statute or regulation.

C. CONSULTATION SHOULD REFLECT EACH TRIBE'S UNIQUENESS

1. Each Tribe is unique, agencies should meet with each individual Tribe instead of lumping all Tribes together for the purposes of consultation.
2. There must be different consultation policies for different Tribes.
3. The consultation policy must be flexible enough to meet the unique challenges of each individual Tribe.

D. TRAIN/EDUCATE EMPLOYEES

1. Agency employees should be trained on the consultation policy.
2. Agency employees should be trained on the cultures, histories, and governments, of Tribes in their region.

3. Agency employees should be regularly trained on both the consultation policy and cultural sensitivity and formally evaluate and learn from consultation efforts.

E. OTHER RECOMMENDATIONS

1. Establish a Native American Commission.
2. Provide assistance to Tribes in developing Tribal strategic or recovery plans to define Tribal needs and priorities.
3. Include Tribal representation on the Consultation Action Plan Team.
4. Miscellaneous recommendations. (See full *Summary of Tribal Comments Received during U.S. Department of the Interior Consultation on the November 5, 2009 Presidential Memorandum*)

IV. EXAMPLE CONSULTATION POLICIES

(See full *Summary of Tribal Comments Received during U.S. Department of the Interior Consultation on the November 5, 2009 Presidential Memorandum*)