

## **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 U.S. Constitution and Federal treaties, statutes, executive orders, and policies. Federal agencies help to meet that obligation through meaningful consultation with Indian Tribes.

The Department of the Interior (Department) is committed to fulfilling its Tribal consultation obligations—whether directed by statute or administrative action such as Executive Order (EO) 13175 (Consultation and Coordination with Indian Tribal Governments) or other applicable Secretarial Orders or policies—by adhering to the consultation framework described in this Policy. Through this Policy, the Department strives to strengthen its government-to-government relationship with Indian Tribes and begin a new era of consultation. This Policy reflects the Secretary’s commitment to consultation with Indian Tribes, recognition of Indian Tribes’ right to self-governance and Tribal sovereignty.

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

### **II. Guiding Principles**

This Policy broadly defines provisions for enhancing the Department’s consultation

processes with Indian Tribes. This Policy shall complement, not supersede, any existing laws, rules, statutes, or regulations that guide consultation processes with Indian Tribes.

This Policy requires a government-to-government consultation between appropriate Tribal Officials and Departmental officials. The appropriate Departmental officials are those individuals who are knowledgeable about the matters at hand, are authorized to speak for the Department, and exercise delegated authority in the disposition and implementation of an agency action. Departmental officials will identify appropriate Tribal consulting parties early in the planning process and provide Indian Tribes a meaningful opportunity to participate in the consultation process as described in Section VII of this Policy. Departmental officials will participate in the consultation process in a manner that demonstrates a meaningful commitment and ensures continuity in the process. The Policy thus honors the government-to-government relationship between the United States and Indian Tribes, and complies with the Presidential Memorandum of November 5, 2009, which affirms this relationship and obligates the Department to meet the spirit and intent of EO 13175.

Consultation is a deliberative process that aims to create effective collaboration and informed Federal decision-making. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility. Communication will be open and transparent without compromising the rights of Indian Tribes or the government-to-government consultation process. Federal consultation conducted in a meaningful and good-faith manner further facilitates effective Department operations and governance practices. To that end, Bureaus and Offices will seek and promote cooperation, participation, and efficiencies between agencies with overlapping

jurisdiction, special expertise, or related responsibilities regarding a Departmental Action with Tribal Implications. Efficiencies derived from the inclusion of Indian Tribes in the Department's decision-making processes through Tribal consultation will help ensure that future Federal action is achievable, comprehensive, long-lasting, and reflective of Tribal input.

### **III. Definitions**

*Bureau or Office* – As defined in the Department Manual.

*Collaboration* – The Department and Indian Tribes working together to implement this Policy.

*Consultation Policies* – Those policies established to comply with the procedures described in Section VII.

*Departmental Action with Tribal Implications* – Any Departmental regulation, rulemaking, policy, guidance, legislative proposal, grant funding formula changes, or operational activity that may have a substantial direct effect on an Indian Tribe on matters including, but not limited to:

1. Tribal cultural practices, lands, resources, or access to traditional areas of cultural or religious importance on federally managed lands;
2. The ability of an Indian Tribe to govern or provide services to its members;
3. An Indian Tribe's formal relationship with the Department; or
4. The consideration of the Department's trust responsibilities to Indian Tribes.

This, however, does not include matters that are in litigation or in settlement negotiations, or matters for which a court order limits the Department's discretion to engage in consultation.

*Indian Tribe or Tribe* – Any 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.

*Tribal Governance Officer (TGO)* – An individual designated by the Department to carry out responsibilities defined in this Policy.

*Tribal Liaison Officer (TLO)* – One or more individuals designated by a Bureau or Office to carry out responsibilities defined in this Policy.

*Tribal Official* – An elected or appointed Tribal leader or official designated in writing by an Indian Tribe to represent the Tribe in government-to-government consultations.

#### **IV. Accountability and Reporting**

Methods that ensure accountability and reporting are essential to regular and meaningful consultation. The heads of Bureaus and Offices shall include appropriate performance measures consistent with this Policy in future annual performance plans of their employees.

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. As part of its annual report, Bureaus and Offices shall provide a comprehensive listing of the topics on which consultations were held, training, innovations, and the engagement of senior leadership in these efforts. Where possible, such reports shall include feedback from Indian Tribes with whom the Bureau or Office has consulted. Reports should reference the documents and correspondence with Indian Tribes that address the

Implementation of the Final Federal Action Stage described in Section VII of this Policy, a description of budget expenditures in the execution of consultation efforts, narratives describing significant consultation efforts, and forthcoming consultation opportunities.

Based on information received from the Bureaus and Offices, the Secretary will provide an annual report to Indian Tribes on implementation of the Department's Consultation Policy.

The Department will use its website to share report information, where appropriate.

## **V. Training**

The Department will design training for Department staff aimed at improving the Department's capacity for promoting collaboration with Indian Tribes and executing the consultation provisions of Section VII of this Policy. The training will:

- A. Promote consultation, communication, collaboration, and other interaction with Tribes;
- B. Outline and reinforce the Department's duties concerning tribal interests;
- C. Describe the legal trust obligation of the Federal-Tribal relationship; and
- D. Highlight and provide the knowledge, skills, and tools necessary for collaborative engagement to Tribal and Departmental staff engaged in the consultative process with attention to the unique distinctions within Indian Country.

The Department, through the Department of the Interior University (DOIU), in collaboration with Bureaus, Offices, Tribal colleges and universities, and other entities with Indian expertise, will develop and deliver training to facilitate implementation of this Policy. DOIU will develop required core competencies, which Bureaus and Offices may enhance

through other appropriate sources of Tribal expertise. This training will seek to enhance mutual understanding of cultural perspectives and administrative requirements between Tribal and Federal officials and to promote inter-governmental relationships. Tribal representatives will be encouraged to participate in training along with Federal employees.

## **VI. Innovative and Effective Consultation Practices**

The Department's leadership will strive to advance Federal consultation practices and to 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.

In consultation with Indian Tribes, the Secretary will establish a joint Federal-Tribal Team for the purpose of making recommendations on the implementation of this Policy and for ensuring continued improvement of this Policy. The Federal Tribal Team may:

- A. Host regular meetings between the Secretary and Indian Tribes;
- B. Communicate through a regular gathering of Indian Tribes to discuss improving consultation practices and procedures;
- C. Solicit recommendations from Indian Tribes for the initial development of performance measures described in Section IV, and thereafter for the evaluation of consultation practices.

## **VII. Consultation Guidelines**

Consultation guidelines are meant to establish uniform practices and common standards, which 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 to 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. Departmental Actions with Tribal Implications that are regional or impact a limited number of Indian Tribes shall be carried out in a manner consistent with this Policy while allowing discretion to employ only appropriate parts of this Section.

*A. Initiating Consultation.* When considering a Departmental Action with Tribal Implications, a Bureau or Office must notify the appropriate Indian Tribe(s) of the opportunity to consult pursuant to this Policy. The Bureau or Office will strive to ensure that a notice is given at least 30-days prior to scheduling a consultation. If exceptional circumstances prevent notice within 30-days of the consultation, an explanation for the abbreviated notification will be provided in the invitation letter. An Indian Tribe may request an extension for timelines associated with this Policy.

Adequate notice entails providing a description of the topic(s) to be discussed, a timeline of the process, and possible outcomes. 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. The notice should also give Tribal leaders the opportunity to provide feedback prior to the consultation, including any request for technical assistance or request for clarification of how the consultation process conforms to this Policy.

Beginning at the Initial Planning Stage, see Section VII, Part E, Subsection 1, a Bureau or Office will consult with Indian Tribes on a Departmental Action with Tribal Implications.

An Indian Tribe may request that the Department initiate consultation when the Indian Tribe 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 should describe the specific Departmental Action with Tribal Implications. However, in the event that an Indian Tribe may choose not to engage the TGO, a Bureau or Office is not relieved of its obligation to engage in consultation as described by this Policy. If the Bureau or Office initiates consultation with a Tribe but does not receive a response, the Bureau or Office should make reasonable and periodic efforts to repeat the invitation and, whenever feasible, should allow an Indian Tribe to join an ongoing consultation. These efforts of engagement shall be appropriately documented.

*B. Role of Tribal Governance Officer and Tribal Liaison Officer in Consultation Process.*

1. The Secretary shall designate a TGO, who will have access to the Secretary or Deputy Secretary, to carry out the responsibilities defined in this Policy. These responsibilities shall include:

- a. Monitoring compliance with this Policy, EO 13175, and other Consultation Policies pertaining to government-to-government consultation;
- b. Serving as the Secretary's representative when requested to do so in matters pertaining to consultation;
- c. Promoting government-to-government consultation;
- d. Communicating and coordinating with TLOs concerning Bureau and Office compliance with this Policy;

- e. Encouraging Indian Tribes to request consultation directly with the appropriate Bureau or Office representative or the TLO and helping to ensure the resolution of all requests.
- f. Implementing, in coordination with the TLOs, a reporting system to ensure that consultation efforts are documented and reported to the Secretary and to the Department's TGO for EO 13175; and
- g. Facilitating a government-to-government relationship that is honored by all parties in Tribal consultations of national significance or involving multiple Bureaus or Offices.

2. Each Bureau or Office shall designate one or more TLOs whose responsibilities shall include:

- a. Working with the Bureau or Office to achieve compliance with this Policy, the Consultation Policies of the Bureau or Office, and any future policies related to EO 13175 or other government-to-government consultation policies;
- b. Promoting and facilitating consultation and collaboration between Indian Tribes and the Bureau or Office;
- c. Advocating opportunities for and consideration of the positions of Indian Tribes, consistent with Bureau or Office mission;
- d. Serving as the principal point of contact for the TGO concerning compliance with this Policy, including the Bureau's and Office's reporting requirements;
- e. Striving to enhance a trusting and on-going relationship with Indian Tribes, consistent with applicable law and executive orders;

- f. Serving as an initial contact for Indian Tribes to request or inquire about consultation when it is unclear whom to contact in the Bureau or Office; and
- g. Carrying out other responsibilities as assigned by Bureau or Office Consultation Policies.

3. Identify TLOs and TGO – Each Bureau or Office shall take appropriate measures to identify and disseminate the name and contact information of the TGO and the TLO(s) to facilitate contacts by Tribal Officials.

*C. Guidelines for Response to Request for Consultation.* The TGO or appropriate representative will 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 an expedited fashion and respond in writing that the Department has received the request, using the most expedient methods to communicate to the Indian Tribe.

*D. Consultation Process Support.* The Office of Collaborative Action and Dispute Resolution can assist in planning and facilitating an effective consultation process, negotiated rulemaking, or other collaborative approach to decision-making. In planning consultation processes as outlined below in Paragraph E, Bureaus and Offices are encouraged to consider best practices for engagement, including but not limited to, the use of neutral facilitation and other collaborative problem-solving approaches to promote effective dialogue and conflict resolution.

*E. Stages of Consultation.* Bureaus and Offices shall carry out the consultation stages described below for a Departmental Action with Tribal Implications.

1. Initial Planning Stage.

Each Bureau or Office will consult with Indian Tribes as early as possible when considering a Departmental Action with Tribal Implications. 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. Bureaus and Offices will work with each other and with other Federal agencies, where appropriate, to avoid duplicative consultations.

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 appropriate collaborative partners, particularly where negotiated rulemaking or a Tribal Leader Task Force is created.

The Bureau or Office shall develop a process for the Proposal Development Stage that maximizes the opportunity for timely input by Indian Tribes and is consistent with both Tribal and Bureau or Office schedules. The Bureau or Office will solicit the views of affected Indian Tribes regarding the process timeline to consult on a Departmental Action with Tribal Implications. The Bureau or Office should work with Indian Tribes to structure a process, to the extent feasible, that considers specific Indian Tribal structures, traditional needs, and schedules of the Indian Tribes. The Bureau or Office should make all reasonable efforts to comply with the

expressed views of the affected Indian 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. The Bureau or Office then may proceed with the expectation that interested Indian Tribes will respond within a reasonable time period.

When the matter under consultation involves confidential or culturally sensitive information, the Bureau or Office will work with the Indian Tribe to develop a consultation process that addresses the sensitivity of the information to the extent permitted by Federal law. If litigation or legal requirements impact a Bureau's or Office's schedule for conducting consultation, the Bureau or Office shall 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 Rulemaking.** Where appropriate, the Bureau or Office shall consider using negotiated rulemaking for developing significant regulations or other formal policies in accordance with the Federal Advisory Committee Act (FACA) and the Negotiated Rulemaking Act.
- **Tribal Leader Task Force.** A Tribal Leader Task Force may be used, in appropriate circumstances, on regional or issue-specific matters (e.g., timber). In each instance, the composition of the Task Force shall be collaboratively determined by the Indian Tribes, provided that the Task Force shall be a process open to all Indian Tribes and, to the extent possible, represent a cross-section of Tribal interests with respect to the matter at issue.

The location and number of meetings to be held will conform to the expressed views of

the Indian Tribes, to the extent practicable and permitted by law and in accordance with FACA.

- Series of Open Tribal Meetings. The Bureau or Office may provide open invitations for Tribal leaders to attend a series of open meetings. Open meetings can be used for national, regional or subject-matter specific issues.
- Single Meetings. The Bureau or Office may host Tribal Officials in a single meeting to discuss a Departmental Action with Tribal Implications under consideration. Single meetings are particularly appropriate for local or regional issues, or a Tribe-specific issue.

If either 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 Indian Tribes at the earliest opportunity in this Stage in the process.

### 3. Implementation of Final Federal Action Stage.

A Bureau or Office may consider implementing a post-consultation review process where it is consistent with law, regulations, and EO 13175. The review process shall not limit the Department's deliberative process privilege regarding internal considerations or any other applicable privilege. The Department may invite feedback from the Indian Tribe of the consultation process at this Stage. The Bureau or Office also will consider the need for training or technical assistance concerning the final Federal action.

*F. Impact of Consultation Guidelines.* Consultation does not preclude requests or recommendations by Bureaus, Offices, or Indian Tribes to collaborate and foster collaborative relationships between the Department and Indian Tribes outside of the processes described in this Section.

### **VIII. Supplemental Policies.**

Bureaus and Offices, in collaboration with the TGO, shall review existing policies affected by this Policy. All existing policies shall conform to this Policy and, where necessary, a Bureau or Office may develop a new policy in order to conform to this Policy.

Consistent with Federal law, the Department shall develop a policy for consultation with Alaska Native Corporations and other entities as appropriate following the principles set out in this Policy.

Departmental entities that are not Bureaus and Offices may develop policies consistent with this Policy and in coordination with the TGO.

### **IX. Disclaimer.**

Except to the extent already established by law, 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 by virtue of this Policy any applicable privilege that it may hold.