

Tribal Consultation and Coordination Policy of the U.S. Department of Commerce

Section 1. Introduction

01. This “Tribal Consultation and Coordination Policy of the U.S. Department of Commerce” (“Tribal Consultation Policy” or “Policy”) establishes the manner in which the Department of Commerce (“Department”) works with Indian tribes on a government-to-government basis to build a durable relationship and address issues concerning tribal self-government, tribal trust resources, and tribal treaty and other rights, as well as support tribes in developing strong and stable economies able to participate in the national and global marketplace. The Department recognizes Indian tribal self-government and supports tribal sovereignty and self-determination.

02. The Department recognizes the unique legal relationship, as established in the Constitution, statutes, treaties and federal court decisions, between tribal governments and the Federal Government.

03. The Department and operating units will seek and promote cooperation within the Department and with other agencies that have related responsibilities. The Department’s mission encompasses many complex issues where cooperation and mutual consideration among governments (federal, state, tribal, and local) are essential. The Department and operating units will promote intradepartmental and interagency coordination and cooperation to assist tribal governments in resolving issues requiring mutual effort.

04. Executive Order (E.O.) No. 13175, “Consultation and Coordination with Indian Tribal Governments,” requires federal agencies to have an accountable process to ensure meaningful and timely input by tribal officials in developing policies that have tribal implications. This Policy provides uniform standards and methodology outlining consultation procedures for all Department personnel working with tribal governments regarding policies that have tribal implications. This Policy is to be construed consistent with Federal statutes, regulations, Presidential memoranda, Executive Orders, and other relevant Federal legal authorities.

Section 2. Background

01. This Policy builds upon and expands the principles expressed in the “American Indian and Alaska Native Policy of the Department of Commerce,” promulgated by the Department on March 30, 1995. The Tribal Consultation Policy incorporates the requirements of E.O. No. 13175; Presidential Memorandum, “Tribal Consultation,” 2009 Daily Comp. Pres. Docs. 887 (November 5, 2009); the Office of Management and Budget Memorandum, “Guidance for Implementing E.O. 13175, ‘Consultation and Coordination with Indian Tribal Governments;’” and the Consolidated Appropriations Act, 2004, Pub. L. 108-199, Div. H § 161, 118 Stat. 3, 452 (2004), as amended by Consolidated Appropriations Act, 2005, Pub. L. 108-447, Div. H., Title V § 518, 118 Stat. 2809, 3267, relating to consultation with Alaska Native Corporations.

02. This Policy is for internal management only and shall not be construed to grant or vest any

right to any party not otherwise granted or vested by existing law or regulations.

Section 3. Authority

01. This Tribal Consultation Policy is issued pursuant to the authority of 5 U.S.C. § 301 and Department Administrative Order (DAO) 218-8, “Consultation and Coordination with Indian Tribal Governments.” This Policy shall have the same force and effect as a DAO. Amendments (substantive changes) or revisions (corrections or updates) to this Policy may be developed and issued by the Department of Commerce Tribal Consultation Official or the Secretary’s designee in consultation with tribal governments.

Section 4. Definitions

01. “Consultation,” as defined in Section 5 of E.O. No. 13175, refers to an accountable process ensuring meaningful and timely input from tribal officials on Department policies that have tribal implications.

02. “Indian tribe (or Tribe),” as defined in Section 1(b) of E.O. No. 13175, 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.

03. “Operating units,” as defined in Section 3.c.1 of Department Organization Order 1-1, are organizational entities outside the Office of the Secretary charged with carrying out specified substantive functions (i.e., programs) of the Department. The operating units are the components of the Department through which most of its substantive functions are carried out. “Operating units” includes all Department bureaus and agencies.

04. “Policies that have tribal implications,” as defined in Section 1(a) of E.O. No. 13175, refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have 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.

05. “Tribal Consultation Official,” as defined in Section 5(a) of E.O. No. 13175, means the designee of the Secretary with principal responsibility for the implementation of this Policy.

06. “Tribal officials,” as defined in Section 1(d) of E.O. No. 13175, means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

07. “Alaska Native Corporation,” pursuant to 43 U.S.C. § 1602 *et seq.*, means any Regional Corporation, any Village Corporation, any Urban Corporation, and any Group Corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act.

Section 5. Roles and Responsibilities for Consultations

01. Department of Commerce Tribal Consultation Official

- a. The Tribal Consultation Official is an individual in the Office of Legislative and Intergovernmental Affairs (OLIA) within the Office of the Secretary who is duly appointed to act as a liaison between the Secretary of Commerce and tribal officials. The Tribal Consultation Official may delegate authority, as necessary, to the head of any operating unit. The Tribal Consultation Official has primary responsibility for ensuring compliance with DAO 218-8, this Policy, and E.O. No. 13175, and is responsible for tribal consultations and coordination for the Office of the Secretary programs.
- b. The Tribal Consultation Official has responsibility for coordinating the implementation of this Policy and DAO 218-8 within the Department and all operating units.
- c. The Tribal Consultation Official will engage tribal officials in periodic dialogue to discuss the Department's implementation of this Policy. The dialogue will provide an opportunity for tribal officials to assess policy implementation, program delivery, and discuss outreach and communication efforts, and other issues.
- d. The Tribal Consultation Official is responsible for submitting an annual report to OMB pursuant to the Presidential Memorandum, "Tribal Consultation" (November 5, 2009).

02. Head of operating unit Responsibilities

- a. The head of each operating unit will designate an official in the headquarters office who has primary responsibility for ensuring compliance with this Policy within the operating unit. Each operating unit's designated official will work with the Department Tribal Consultation Official to ensure coordination of tribal consultations, as necessary. The designated official is responsible for the development, maintenance and internal distribution of any guidance produced by the operating unit in compliance with the requirements of this Policy.
- b. The head of each operating unit or the designated official may delegate authority to appropriate individuals within the operating unit.
- c. The head of each operating unit will consult with Tribes and prepare tribal summary impact statements when promulgating any regulations that have tribal implications, that impose substantial direct compliance costs on Indian tribal governments, and that are not required by statute; and when promulgating any regulations that have tribal implications and that preempt tribal law.

Section 6. Training and Guidance

01. The Tribal Consultation Official and the head of each operating unit will ensure that personnel assisting with tribal consultations have appropriate training.

02. Each operating unit may develop and issue tribal consultation guidance to assist staff in preparing, reviewing and managing the consultation process within their respective operating units, so long as:

- a. The guidance is consistent with DAO 218-8, and
- b. The Department's Tribal Consultation Official reviews the guidance.

Section 7. Consultation

01. The Consultation Process. Consultation may take a variety of forms. Implementing this Policy may require a range of formal and informal planning activities. The Department and operating units' consultation processes may include one or more of the following: meetings, letters, conference calls, webinars, on-site visits, or participation in regional and national events. The Tribal Consultation Official or the head of each operating unit, as applicable, will make a reasonable effort to accommodate a tribal request for consultation. Ultimately, the consultation process is to entail an informed discussion of the proposed federal policy and associated tribal concerns between the designated Tribal Consultation Official and tribal officials.

02. Elements of the Consultation Process.

- a. Ongoing communication shall be a regular part of the government-to-government relationship with tribal governments. The Department and operating units will engage in meaningful dialogue with Tribes regarding all policies that have tribal implications.
- b. Exchange of Information. The Department and operating units will make a reasonable effort to identify and provide timely and accurate information for consultation.
- c. Notification. The Department and operating units will notify Tribes of policies that have tribal implications. Follow-up may be necessary to ensure the appropriate tribal official has received the consultation notification and accompanying documents. These notifications do not replace or supersede any notifications that are required by statute or E.O. regarding tribal consultations.
- d. Consultation Planning. The Department or operating units will coordinate with tribal officials to plan logistical considerations for the consultation. The Department or operating units will, when practical, allow Tribes a reasonable amount of time to prepare for consultation and submit their views on policies that have tribal implications. The Tribal Consultation Official or the head of each operating unit, as applicable, will treat a request for consultation from a tribal official in an expedited fashion and provide a written response confirming receipt of the request.
- e. Written Communication and Record-Keeping. When a consultation occurs between the Department or its operating units and tribal officials, the Department or operating unit will provide the tribal officials with a formal, written communication that summarizes the consultation, and responds to the issues and concerns, if any, identified during consultation. The

Tribal Consultation Official or head of each operating unit conducting a consultation will maintain documentation addressing the consultation, tribal concerns, and recommendations in conformance with applicable records retention schedules.

Section 8. Consultation with Alaska Native Corporations

01. In 2004, through two consolidated appropriations acts, Congress required Federal Agencies to consult with Alaska Native Corporations on the same basis as federally recognized Indian Tribes under E.O. 13175 (Public Law 108-199, 118 Stat. 452, as amended by Pub. L. 108-447, 118 Stat. 3267).

02. The Department interprets the term “Alaska Native Corporations” in this requirement to mean “Native Corporations” as that term is defined under the Alaska Native Claims Settlement Act (ANCSA) of 1971. Congress created regional, village, and urban corporations to manage the lands, funds, and other assets conveyed to Alaska Natives by ANCSA. There are 13 regional corporations and over 200 village corporations in Alaska. The village corporations generally represent shareholders in villages associated with the 229 federally recognized tribes in Alaska. Most Alaska Native Corporation shareholders also are members of a federally recognized tribe in Alaska.

03. The Department will implement the requirement to consult with Alaska Native Corporations in a manner as close as possible to consultations with federally recognized tribes in Alaska, while recognizing the important differences between sovereign tribal governments and the federal trust responsibility to those tribal governments and corporations obligated to maximize financial returns to shareholders. Alaska Native Corporations were established to operate as for-profit enterprises, and may not necessarily represent the same perspective or interests as the tribes. Consultation and coordination with the corporations will follow the same process as described in this Policy for tribes, with the following exceptions:

- a. Consultations with Alaska Native Corporations will occur on a “government-to-corporation” basis, rather than “government-to-government” basis to reflect the distinction between sovereign governments and corporate entities.
- b. Government-to-corporations consultations will occur with appropriate adjustments given the unique status, structure, and interests of Alaska Native Corporations.

Section 9. Implementation

01. The Tribal Consultation Official, located in OLIA within the Office of the Secretary, is responsible for ensuring implementation of this Policy. This responsibility may be delegated as appropriate. This Policy does not alter or affect any existing duty or authority of any individual operating unit.

02. This Policy is not intended to, and does not, grant, expand, create or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this Policy be construed to alter, amend, repeal,

interpret, or modify tribal sovereignty, any treaty rights of any Indian tribes, or to preempt, modify, or limit the exercise of any such rights.

03. This Policy is intended to improve the Department's management of its relations and cooperative activities with Indian tribes. The Department and operating units have no obligation to engage in any consultation activities under this policy unless they are practicable and permitted by law. Nothing in this policy requires any budgetary obligation or creates a right of action against the Department for failure to comply with this policy nor creates any right, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

04. This Policy shall be updated as necessary.

Section 10. Effective Date

01. This Policy is effective beginning with the date of this memorandum and will remain in effect until it is amended, superseded by a Departmental Administrative Order, or revoked.



Rebecca M. Blank
Acting Secretary of Commerce

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Date