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# DEPARTMENT OF LABOR

## Office of the Secretary

### Tribal Consultation Policy

**AGENCY:** Office of the Secretary, Labor

**ACTION:** Final policy; Response to comments on proposed policy

**SUMMARY:** The Department of Labor (DOL) is issuing its final Tribal Consultation Policy. The Tribal Consultation Policy (hereinafter referred to as the “policy”) establishes standards for improved consultation with federally-recognized Indian Tribes to the extent that no conflict exists with applicable federal laws or regulations. The policy applies to any Department action that affects federally-recognized Indian tribes and requires that the Department’s government-to-government consultation involve appropriate Tribal and Departmental Officials. In addition to setting forth the final policy, this document also responds to comments on the proposed policy, which was published in the *Federal Register* on April 28, 2012 (77 FR 23283).

**DATE:** This Final Policy is effective [on the date of publication in the *Federal Register*].

**FOR FURTHER INFORMATION CONTACT:** For information on the Department of Labor’s Tribal Consultation Policy, contact Jeremy Bishop, Special Assistant to the Secretary, Office of Public Engagement, U.S. Department of Labor, Room C-2313, 200 Constitution Ave., NW, Washington D.C., 20210. Telephone: (202) 693-6452 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone via TTY by calling the toll-free Federal Information Relay service at 1-800-877-8339. Email: [bishop.jeremy@dol.gov](mailto:bishop.jeremy@dol.gov).

## SUPPLEMENTARY INFORMATION:

### I. Discussion of Comments on the proposed draft Tribal Consultation Policy

In response to the proposed Tribal Consultation Policy, the Department received comments from a broad spectrum of interested parties, including Indian tribes, Alaska Native Corporations, and tribal advocacy groups that raise a variety of concerns with specific provisions of the proposed policy. After reviewing these comments thoughtfully and systemically, the Department has modified several provisions and retained others as originally proposed.

Provisions of the policy that received comments are discussed in detail below; provisions that were not commented on have been adopted as originally proposed. The original comments can also be viewed online in their entirety at: <http://www.regulations.gov/#!docketDetail;dct=FR%252BPR%252BN%252BO%252BSR%252BPS;rpp=25;po=0;D=DOL-2012-0002>.

#### A. Section I—Background and Purpose; B. Referenced Authorities

A commenter suggested adding the Consolidated Appropriations Act of 2005 (Public Law 108-447) to the list of authorities on which the policy is based. Section 518 of Title V of Division H requires OMB and all federal agencies to consult with Alaska Native corporations on the same basis as Indian tribes under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. This provision amends the Consolidated Appropriations Act of 2004 (Public Law 108-199), which only required that the Office of Management and Budget (OMB) participate in such consultations with Alaska Native Corporations.

The Department has incorporated this change.

## ***B. Section II—Guiding Principles; A. Government-to-Government Relationship and Tribal Self-Determination***

One commenter recommended editing this section to specify that while the relationship between the federal government and Alaska Native corporations is different than the government-to-government relationship with federally-recognized tribes, the policy should recognize the Department's obligations to consult with Alaska Native corporations pursuant to the Consolidated Appropriations Act for Fiscal Year 2005 (Public Law 108-447).

The Department does not believe it is necessary to make this suggested change. The definition of "Indian Tribe" in section X, which specifically includes Alaska Native Corporations, makes clear that such organizations are entitled to the same treatment under the policy as other federally-recognized tribes.

## ***C. Section III—Policy Statement; B. Implementation Responsibilities of DOL Operating Agencies***

A commenter suggested changing the phrase "legally permissible" to "not legally prohibited" to allow Indian tribes greater discretion in developing their own policies and standards, so long as such actions are not legally prohibited. The commenter believes the revised standard would give further weight to Indian tribes' self-determination, and would be easier to implement and enforce than "permissible" as a basis for the Department's decision making.

The Department believes the suggested change is unnecessary. The phrase "legally permissible" is consistent with the text throughout this section and sufficiently conveys the discretion to be afforded Indian tribes in developing their own policies and standards regarding the administration of DOL programs by Indian tribes.

## ***D. Section IV—Regulations***

A commenter recommended deleting the term "tribal officials" in section V to clarify that comments are normally provided by the Indian tribes, not individual tribal officials.

The Department does not believe such a change is appropriate. The definition of "Tribal Officials" in Section X specifically recognizes that tribal officials have the authority to represent and act on behalf of their respective Indian tribes.

## ***E. Section V—Unfunded Mandates***

One commenter suggested deleting the term "tribal governments" in paragraphs (1) and (2) of this section because it is not defined in the policy. The commenter notes the proposed change would alleviate potential confusion caused by applying some Tribal Consultation Policy provisions to the undefined "tribal governments", while applying other provisions to the defined term "Indian Tribes".

Moreover, while the term "Tribal Officials" is defined in Section X, the commenter suggested deleting this term in paragraph (2) to make clear that the policy is referring to the same entities throughout, and that the Unfunded Mandates section does not have a different effect from other sections based on the use of different terminology.

The Department agrees with this suggestion and has made the appropriate changes in the text of this section.

It was also suggested that the Department include, with its summary of affected Indian tribes' concerns with certain proposed regulations in subparagraph (2)(b), an explanation of how such concerns were addressed through changes to the proposed regulations.

The Department does not believe a revision is needed. The Department already addresses the impact of its proposed regulations on Indian tribes consistent with applicable federal law.

## ***F. Section VI—Flexibility and Waivers***

A commenter recommended deleting the term "tribal government(s)" in section VI and replacing it with the term "Indian tribes". The commenter notes the proposed change would alleviate potential confusion caused by applying some Tribal

Consultation Policy provisions to the undefined “tribal governments”, while applying other provisions to the defined term “Indian Tribes”.

The Department agrees with these changes and they are reflected in the text of this section.

A commenter also recommended the Department revise its standards for granting Indian tribes certain waivers of statutory or regulatory requirements, so that such waivers will be granted provided they are “not inconsistent” with applicable federal policy objectives.

The Department accepts this change from “consistent” to “not inconsistent”.

The commenter further requested that the Department provide a legal basis for any refusal to grant a requested waiver to an Indian tribe by amending the text to read as follows (new text underlined):

*“The agency will provide the applicant with timely written notice of the decision, and, if the application for a waiver is not granted, the reasons for such denial including a citation to the legal authority which prevented DOL from granting the waiver.”*

The Department routinely cites its legal bases for declining to request a waiver, but notes there may also be instances where important agency policy and programmatic concerns preclude granting a waiver of a statutory or regulatory requirement. Thus, the Department has accordingly revised the provision as reflected in the text of this section.

Another commenter suggested the Department provide specific timeframes for issuing decisions about whether to grant a waiver of a statutory or regulatory requirement. The commenter also questioned whether the Department would deem a waiver request to be approved if the Department failed to respond by the applicable deadline. Lastly, the commenter questioned whether there is an appeals process for the denial of a waiver request.

The Department notes the decision on whether to grant a waiver is fact-specific and varies depending on the circumstances of each particular application. In addition, the procedures for reviewing a waiver application are often prescribed by statute (e.g., the Workforce Investment Act of 1998 (Public Law 105-220, as amended; 29 U.S.C. 2801 et seq.)). Thus, in order to maintain the necessary flexibility to meet these requirements, the Department declines to make further changes to this section.

### **G. VII—Consultation Process Guidelines**

A commenter requested the Department revise, from 60 days to 90 days, the notice provided to Indian tribes in paragraph (1) of this section before the Department moves forward with a policy or action it determines will have tribal implications, whether for an individual tribe, regionally, or nationally. The commenter states such an extension would allow for more meaningful participation.

The Department believes the 60-day notice requirement provides sufficient opportunity for consultation with affected Indian tribes. The Department notes this provision is greater than the 30-day notice and comment period required when an agency issues a Notice of Proposed Rulemaking under the Administrative Procedure Act (see 5 U.S.C. 553(d)).

The commenter also requested that the Department delete the provision in paragraph (1) that an Indian tribe requesting a consultation should distribute any DOL-provided information to its members. Among other things, the commenter asserts that compliance with this provision would “be unworkable because of the significant costs involved for postage, copying, labor, etc.”

The Department notes this provision is not a mandatory requirement, but has amended the provision to offer Indian tribes greater flexibility in supplying DOL-provided materials to its members prior to the consultation.

Another commenter suggested revising, from “no unique impacts on Indian tribes” to “no tribal implications”, the Department’s threshold in paragraph (1) for determining whether DOL agencies may follow the existing *Federal Register*

notice and comment process when providing public notice about rulemaking proceedings of general applicability.

The Department is concerned that requiring a consultation prior to the initiation of every proposed rulemaking that may only have a minor or tangential impact on a particular Indian tribe would impose an unrealistic burden on DOL agencies and may, in fact, hinder the overall effectiveness of the policy. Thus, the Department has revised the determining threshold to “no particularized impact on Indian tribes” to emphasize that consultation prior to the initiation of a rulemaking proceeding should be reserved for proposed rules that would have a particular or distinct impact on Indian tribes.

A commenter requested that enforcement issues, such as “enforcement policy” and “planning”, be added as permissible subjects for consultation under the Department’s Tribal Consultation Policy in paragraph (2).

Discussions with Indian tribes regarding the framing and shaping of the Department’s enforcement policies are not appropriate subjects for consultation under this policy. In particular, the Department’s component agencies need to retain sufficient autonomy, discretion, and confidentiality in order to develop successful enforcement strategies within prescribed statutory frameworks. Allowing certain stakeholders increased influence over the development of strategies, enforcement policies and initiatives would frustrate agencies’ efforts to ensure necessary worker protections, benefits, and rights. The Department, therefore, declines to make the recommended changes.

A commenter also requested that “grants management issues” be included as a permissible subject for consultation in paragraph (2), since these issues may represent an Indian tribe’s greatest area of interest or concern when dealing with the Department of Labor.

Although general discussions regarding the grant programs and contracting are permissible subjects for consultation under the policy, the scope of the Department’s interactions with grantees and prospective grantees about specific grantee selection and monitoring processes are routinely set forth in each grant solicitation application. For these reasons, the Department declines to make further changes to this paragraph.

A commenter recommended that Indian tribes be involved in matters of interest to them before the Initial Planning and Scoping stage outlined in paragraph (3). The commenter believes that Indian tribes should be directly involved in development and planning, and not merely as respondents to a plan developed by the Department of Labor.

The Initial Planning and Scoping stage is specifically designed to allow the Department and Indian tribes to jointly frame the scope of consultation following the Department’s notification to affected tribes that a proposed policy or action will have tribal implications. It is through this consultation process that a proposed policy or action may be subject to amendment based on the valuable input received from affected Indian tribes. A requirement that DOL consult with affected Indian tribes before a proposed policy or action is even formulated would not serve to further the goals of the Tribal Consultation Policy. For these reasons, the Department declines to require consultation prior to the Initial Planning and Scoping stage.

A commenter objected to the requirement in paragraph (7) that a written communication on the correspondence of the highest elected or appointed tribal official will be considered by the Department as the official position of the tribe on the subject at issue. The commenter notes that Indian tribes operate differently and do not all follow the same procedures for vetting their views. Thus, to preserve tribes’ sovereignty and self-determination, the commenter suggests allowing Indian tribes to use their own process for submitting comments on issues of concern.

The Department agrees, and has amended the provision to convey that an Indian tribe’s views can also be submitted by an appropriate third party designee.

A commenter recommended that the suggested timeframes for the consultation process outlined in paragraph (8) be mandatory, rather than permissive, so that all interested parties know with certainty when such actions will take place. The commenter would also extend the timeframe in subsections (a) and (b) from 30 to 60 days, and extend the

timeframe in subsection (c) from 60 to 90 days.

The Department recognizes that each tribal consultation is unique and will depend on the nature and complexity of the issues to be discussed. There may be times, for example, when these timeframes must be compressed to respond to an emergency situation or to meet a critical deadline, or expanded to address novel or highly complex matters. Thus, the Department has retained the permissive nature of the established time frames, but revised the text in subsections (a), (b), and (c) by replacing the word “should” with “shall normally”.

One commenter suggested adding a requirement in paragraph (9) that the Department provide, at the conclusion of a consultation, a specific explanation for why any tribal input was not adopted. The commenter believes this would make the consultation process more transparent and ensure that tribes’ recommendations receive full and fair consideration by the Department.

The Department notes the requirement to provide a “specific explanation” for why a particular recommendation was not adopted may be difficult to articulate in some instances, and an extended debate over the required degree of specificity may unnecessarily detract from the overarching purpose of the policy to improve coordination between the Department and affected Indian tribes. Thus, the Department has accordingly revised the provision as reflected in the text of this paragraph.

A commenter suggested in paragraph (11) that DOL agencies’ use of existing statutory advisory committees be a mandatory, rather than permissive, part of their consultation responsibilities under the policy.

The Department recognizes the valuable role advisory committees often play in meaningful consultation. The Department notes, however, that some Indian tribes may have concerns about being forced to utilize an advisory committee structure as part of the consultation process. The Department has, therefore, declined to make this suggested change.

A commenter recommended deleting the term “tribal governments” from paragraph (12), Submission of Comments by Other AI/AN Organizations, to alleviate potential confusion caused by applying some Tribal Consultation Policy provisions to the undefined “tribal governments”, while applying other provisions to the defined term “Indian Tribes”.

The Department agrees with this suggestion and has changed the text of the section accordingly.

Another commenter stated that aside from paragraph (12), the policy does not provide meaningful participation for Alaska Native Corporations as required by the Consolidated Appropriations Act for Fiscal Year 2005 (Public Law 108-447).

The Department believes the definition of “Indian Tribes” in section X, which specifically includes Alaska Native Corporations, makes clear that such organizations are entitled to the same treatment under the policy as other federally-recognized tribes.

### ***H. VIII —Performance and Accountability***

One commenter recommended under paragraph (1) of this section that the policy specify that DOL agencies be required to maintain records of tribal concerns that were not addressed, as well as those that were, and that such records also be made available to Indian tribes.

The Department believes these changes are unnecessary, since it already reports this information to the public on an annual basis, and continually provides relevant follow-up information on the DOL website at: <http://www.dol.gov>.

A commenter also suggested that under paragraph (2), the Department develop and utilize appropriate evaluation measures, with input from affected Indian tribes, in assessing its efforts to determine whether the overall policy is effective over time.

The Department believes that all Indian tribes should have an opportunity to express their views on how to best measure

the effectiveness of the Tribal Consultation Policy, not just those tribes who may be directly impacted by the policy in the near-term. Thus, the Department has accordingly revised this provision.

### ***I. IX—Designated Officials and Points of Contact; B. Point of Contact for Each DOL Operating Agency***

A commenter identified a possible typographical error that would require the Department to appoint an “alternate tribal official”, instead of providing the Department the authority to appoint one of its own staff as the alternate official.

The Department agrees and has deleted the word “tribal”.

The commenter further noted this subsection also contains reference to “agency tribal officials”. The commenter suggests revising the text so to make clear the subsection does not refer to actual tribal officials.

The Department agrees and has revised the provision accordingly.

Lastly, this commenter suggested changing “should” to “shall” in the final sentence of this subsection to clarify that responsibility for tribal matters is not a civil rights matter, and, therefore, does not belong within the Department’s Civil Rights Center.

The Department has changed “should” to “shall” in this sentence, but believes that it is important to retain final discretion as to whether these responsibilities should ever be placed with the Civil Rights Center.

### ***J. Section X—Definitions***

The Department received input that the policy is inadequate because, among other things, it limits the Department’s responsibility to consulting only with Indian tribes.

One commenter noted there are several instances in the policy where the word “Indian” does not appear before the word “tribe”. Since the term “Indian tribe” specifically encompasses Alaska Native Corporations, the commenter suggests using the term consistently throughout to make clear that Alaska Native Corporations will receive the same treatment under the Tribal Consultation Policy as other federally-recognized tribes.

The Department has addressed this concern throughout the policy, as appropriate, and specifically notes that Alaska Native Corporations are entitled to the same treatment as other federally-recognized tribes under this Tribal Consultation Policy.

A commenter also objected to inclusion of “Native Hawaiians” within the definition of “American Indian and Alaska Native (AI/AN)”. The commenter believes “Native Hawaiian” is considered a racial or ethnic classification rather than a tribal classification, and that use of the term is thus prohibited.

The Department disagrees with this view. The analogous treatment of Native Hawaiians and federally-recognized Indian tribes is explicitly recognized in numerous federal statutes. For example, section 166 of the Workforce Investment Act of 1998 (Public Law 105-220, as amended), which provides specific employment and training programs for Indian, Alaska Native, and Native Hawaiian individuals, gives the same meaning to “Native Hawaiians” as the term is defined in section 7207 of the Native Hawaiian Education Act (P.L. 107-110, as amended):

1. “Native Hawaiian: The term “Native Hawaiian” means any individual who is
  - A. a citizen of the United States; and
  - B. a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawaii, as evidenced by –
    1. genealogical records;
    2. Kapuna (elders) or Kamaaina (long-term community residents) verification; or

### 3. certified birth records.”

In addition, section 7202(12)(B) of the Native Hawaiian Education Act states, “Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship.”

The commenter cites *Rice v. Cayetano*, 528 U.S. 495 (2000) in support of the assertion that “Native Hawaiian” is a suspect racial classification rather than a tribal classification. In *Rice*, the Supreme Court held that Hawaii’s voting scheme for the statewide election of trustees for the Office of Hawaiian Affairs, which restricted voter eligibility to certain defined classes of Hawaiian citizens (including Native Hawaiians), violated the Fifteenth Amendment. However, the Court reached its decision without ever addressing whether Congress (or by extension the Executive branch) may treat Native Hawaiians in the same manner as federally-recognized tribes. In fact, the Court expressly declined to review this issue.

Further, while Native Hawaiians are included in the definition of “American Indian and Alaska Native (AI/AN)”, the Tribal Consultation policy does not provide any additional consultation rights to Native Hawaiian individuals, communities, or organizations. For these reasons, the Department declines to delete the reference to “Native Hawaiians” from the term “American Indian and Alaska Native (AI/AN)” as defined in the policy.

Another commenter noted that federally-recognized Indian tribes have formed consortiums and multi-tribal organizations which operate DOL programs and serve more than one tribe. The commenter notes, “[e]ach of these groups speaks on behalf of the tribes they serve on DOL issues, unless a tribe has decided to participate in any particular issue or has reserved that power to itself.” To accurately include these consortium groups’ participation in the Tribal Consultation Policy, the commenter suggests adding another category, “Tribal Organization”, which would have the same impact on DOL policy as individual tribes, to be defined as follows (new text underlined):

“Tribal Organization: For purposes of this Tribal Consultation Policy, “tribal organization” means an American Indian or Alaska Native intertribal organization, consortium, or other similar organization whose membership includes at least one federally-recognized Indian Tribe.”

As part of this change, the commenter suggests adding the term “tribal organization” throughout the text of the Tribal Consultation Policy wherever there is a reference to “Indian tribes”. The commenter also suggests revising the definition of an “AI/AN Organization” so that there is a clear distinction between that term and the commenter’s proposed definition of “Tribal Organization”.

The Department does not believe that the additional definition of “Tribal Organization” is necessary. The Department recognizes that Indian tribes may delegate or appoint a third party to represent their interests, provided such notice is submitted to the Department in writing prior to the start of any consultation with the Department, similar to consultations conducted pursuant to the Federal Advisory Committee Act (Public Law 92-463). The Department has added a corresponding sentence to the definition of “Indian tribe”.

Lastly, one commenter suggested deleting the word “government” from the definition of the term “Tribal Committee, Task Force, or Work Group”, to ensure consistency with other defined terms. The commenter notes the term “Tribal Government Officials” is undefined in the Tribal Consultation Policy, and may cause confusion as to who is specifically permitted to participate in such task forces, committees, and work groups.

The Department agrees and has deleted the word “government” from this definition.

## II. Final Tribal Consultation Policy

U.S. DEPARTMENT OF LABOR  
Tribal Consultation Policy

### I. Background and Purpose

- A. Executive Order 13175 and the Department of Labor's Relationship with Indian Tribes.
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## **Appendix A - Executive Order 13175**

- I. Background and Purpose
  - A. Executive Order 13175 and DOL's Relationship with Indian Tribes. The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.  
The Department of Labor (DOL) has collaborated extensively with American Indians and Alaska Natives (AI/AN) for many years in advancing its mission of fostering job opportunities, improving working conditions, and assuring work-related benefits and rights of workers and retirees in the United States. In recent years, senior DOL officials have conducted many site visits in Indian Country and regularly engage with Indian tribes and their representatives, including the National Congress of American Indians. The Department's collaboration with Indian tribes encompasses a broad range of DOL matters affecting tribes, including joint efforts to improve tribal program management, rulemaking, regulations, policies, waivers and flexibility, grant programs, contracting opportunities, and regulatory

guidance.

The Department's Employment and Training Administration (ETA), for example, awards grants to Indian and Native American entities for programs that have become a key part of improving tribal economic self-sufficiency by ensuring that tribal workers have the skills to build and operate new infrastructure and facilities at the tribal community level and facilitate the creation of new business opportunities in Indian Country. ETA's Division of Indian and Native American Programs (DINAP) administers employment and training services grants to tribal communities in ways that are consistent with the traditional cultural values and beliefs of the people they are designed to serve, including youth and at-risk populations facing employment barriers. DINAP works closely with the Native American Employment and Training Council (NAETC), a federal advisory committee comprised of representatives of Indian tribes, tribal organizations, Alaska Native entities, Indian-controlled organizations serving Indians, or Native Hawaiian organizations appointed by the Secretary of Labor. The NAETC provides advice to the Secretary regarding the overall operation and administration of tribal programs authorized under section 166 of the Workforce Investment Act (Public Law 105-220, as amended), as well as the implementation of other DOL tribal programs and services.

The Department's Women's Bureau (WB) has an ongoing relationship with the United Indians of All Tribes Foundation and works with its Procurement Technical Assistance Center to provide information to Indian women small business owners concerning workforce development trends and DOL contract opportunities. The WB is also part of a network of Indian women organizations that collaborate on finding ways to end domestic violence and abuse.

The Department's Office of Federal Contract Compliance Programs (OFCCP) works in concert with the Council for Tribal Employment Rights to increase the employment of AI/ANs by federal contractors and subcontractors through linkages, referrals, training, regular communication, and sharing of information and resources pursuant to federal contractors' obligations.

The Department's Occupational Safety and Health Administration (OSHA) works with Indian tribes by providing compliance assistance and including the tribes in relevant OSHA outreach and awareness campaigns addressing worker safety and health. OSHA is making its contacts with Indian tribes more regular and consistent, and seeks to establish voluntary protection programs, partnerships, and alliances with tribal groups in the interest of promoting job safety in Indian Country. OSHA also makes available workplace safety grants that Indian tribes may qualify for, such as the Susan Harwood Training Grants.

The Department's Mine Safety and Health Administration (MSHA) assists Indian tribes with training programs for miners and has provided annual grant funds to the Navajo Nation to educate miners and mine operators on safe working practices in the mining industry and compliance with applicable MSHA regulations.

These are among many of DOL's ongoing actions to engage with tribes and support the efforts of tribal governments to have sustainable tribal communities and achieve our mutual goals of ensuring fair wages, employee rights, and workplace safety while working to alleviate the high unemployment found on tribal lands. The Department is committed to building on these efforts to engage in regular and meaningful consultation and collaboration with tribal officials on policies and actions that have tribal implications, including the development of this formal tribal consultation policy. Accordingly, this policy has been developed in consultation with Indian tribes and tribal officials as set forth in Executive Order 13175.

Implementation of this tribal consultation policy will facilitate greater consistency across the DOL in carrying out tribal consultations and will improve collaboration with Indian tribes at all levels of Departmental organizations and offices. This policy will also ensure that a reporting structure and process is in place so that all Departmental tribal consultation work will be transparent and accountable. DOL employees having responsibility for the outcomes of consultation and collaborative activities will be better able to assess effectiveness and coordinate their efforts with other related Departmental initiatives. Through these efforts, the Department anticipates an even stronger relationship with Indian tribes and improved program delivery to meet the needs of Indian tribes and communities.

## B. Referenced Authorities.

This tribal consultation policy document was developed based upon:

1. Indian Self-Determination and Education Assistance Act, Public Law 93-638, as amended (25 U.S.C. 450 et seq.).
2. Indian Self-Determination Act Amendments of 1994, Public Law 103-413 (25 U.S.C. 450 et seq.).
3. Native American Programs Act, Public Law 93-644, as amended (42 U.S.C. 2991 et seq.).
4. Consolidated Appropriations Act of 2005, Public Law 108-447.
5. Executive Order 12866, Regulatory Planning and Review, September 30, 1993.
6. Presidential Memorandum, Government-to-Government Relations with Native American Tribal Governments, April 29, 1994.
7. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, November 6, 2000.
8. Presidential Memorandum, Government-to-Government Relationship with Tribal Governments, September 23, 2004.
9. Presidential Memorandum, Tribal Consultation, November 5, 2009.
10. OMB Memorandum M-10-33, Guidance for Implementing E.O. 13175, July 30, 2010.

## I. Guiding Principles

- A. Government-to-Government Relationship and Tribal Self-Determination. The United States, in accordance with treaties, statutes, executive orders, and judicial decisions, has recognized the right of Indian tribes to self-government and maintains a government-to-government relationship with federally recognized tribes. Indian tribes exercise inherent sovereign powers over their members and territory. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes. Based on this government-to-government relationship, DOL will continue to work with Indian tribes on its programs involving tribes in a manner that respects tribal self-government and sovereignty, honors tribal treaty and other rights, and meets the Federal Government's tribal trust responsibilities.
- B. Open Communications and Respect for Cultural Values and Traditions. Communication and the exchange of ideas will be open and transparent. Department officials will respect the cultural values and traditions of the tribes. To ensure efficiency and avoid duplicative efforts, DOL will work with other Federal Departments to enlist their interest and support in cooperative efforts to assist tribes to accomplish their goals within the context of all DOL programs.
- C. Ensuring Consultation is Meaningful. The Department is committed to ongoing and continuous dialogue with Indian tribes, both formally and informally, on matters affecting tribal communities. Consultation is a critical ingredient of a sound and productive federal-tribal relationship that emphasizes trust, respect, and shared responsibility. Engaging with tribes and building relationships with tribal officials have improved the Department's policy toward Indian tribes on a broad range of DOL matters. The Department is committed to further improving its collaboration with Indian tribes and creating additional opportunities for input from all affected tribal communities. Consultation that is meaningful, effective, and conducted in good faith makes the Department's operation, decision making, and governance practices more efficient.

## I. Policy Statement

- A. Departmental Consultation Policy Generally. In accordance with Executive Order 13175, when formulating and implementing policies that will have tribal implications, it is the Department's policy that, to the extent practicable and permitted by law, consultation with affected Indian tribes will occur. As stated in the executive order, this refers

to proposed legislation, regulations, policies, 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.

- B. Implementation Responsibilities of DOL Operating Agencies. Each DOL operating agency will have an accountable process to ensure meaningful and timely input by Indian tribes on policies or actions that have tribal implications. With respect to DOL programs administered by Indian tribal governments, operating agencies will grant Indian tribal governments the maximum administrative discretion permissible consistent with applicable law, contracting requirements, and grant agreements, and will defer to Indian tribes to develop their own policies and standards where legally permissible. The Department's operating agencies will review their existing tribal consultation and program administration practices, including those of their regional offices, and revise them as needed to comply with the Department's policy as set forth in this document. If DOL agencies require technical assistance in conducting consultations, the designated Departmental official's office (see section IX below) can provide and/or coordinate such assistance.

#### V. Regulations

In accordance with Executive Order 13175, to the extent practicable and permitted by law, prior to the promulgation of any regulation that has tribal implications and preempts tribal law, the DOL agency involved will:

1. Notify and consult with affected Indian tribes early in the process of developing the proposed regulation consistent with the Administrative Procedure Act (5 U.S.C. 551 et seq.), Executive Order 12866, and Executive Order 13563, and ensure that the tribes are informed about opportunities to participate in stakeholder meetings and public forums about which they might not otherwise be aware;
2. Provide a tribal summary impact statement in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, which consists of a description of the extent of the agency's prior consultation with Indian tribes, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and
3. Make available to the Secretary any written communications submitted to the agency by tribal officials.

On issues relating to tribal self-governance, tribal self-determination, and implementation or administration of tribal programs, each DOL agency will make all practicable attempts where appropriate to use consensual mechanisms for developing regulations, including negotiated rulemaking in accordance with the Negotiated Rulemaking Act.

For any draft final regulation that has tribal implications that is submitted to the Office of Information and Regulatory Affairs for review under E.O. 12866, the agency will certify that the requirements of Executive Order 13175 have been met.

#### V. Unfunded Mandates

In accordance with Executive Order 13175, no DOL agency shall promulgate any regulation having tribal implications that is not required by statute and imposes substantial direct compliance costs on tribal communities, unless:

1. Funds necessary to pay the direct costs incurred by Indian tribes in complying with the regulation are provided by the Federal Government; or
2. Prior to the formal promulgation of the regulation, the agency:
  - a. Consulted with Indian tribes early in the process of developing the proposed regulation;
  - b. In a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of the Office of Management and Budget a description of the extent of the agency's prior consultation with representatives of affected Indian tribes, a summary of the nature of their concerns and DOL's position supporting the need to issue the regulation; and

- c. Makes available to the Director of the Office of Management and Budget any written communications submitted to DOL by such Indian tribes.

## I. Flexibility and Waivers

With respect to statutory or regulatory requirements that are discretionary and subject to waiver by DOL, each DOL agency will review the processes under which Indian tribes apply for waivers and take appropriate steps to streamline those processes as necessary.

When reviewing any application by an Indian tribe for a waiver of regulatory requirements in connection with any program administered by a DOL agency, the agency will consider the relevant factors with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is not inconsistent with the applicable federal policy objectives and is otherwise appropriate as determined by the agency.

Each DOL agency will promptly render a decision upon a complete application for a waiver. The agency will provide the applicant with timely written notice of the decision and, if the application for a waiver is not granted, the reasons for such denial, including a citation to any relevant legal authority that provides a basis for the denial.

## VII. Consultation Process Guidelines

### I. Consultation Process Guidelines

1. Notification. When a DOL agency or regional office determines that a proposed policy or action will have tribal implications, whether for an individual tribe, regionally, or nationally, the DOL agency will have an affirmative responsibility to provide advance notice to the potentially affected Indian tribes at the earliest practicable time, but not less than 60 days prior to DOL's action. An Indian tribe may initiate a request for consultation with DOL or a DOL agency on a DOL matter that it believes has tribal implications at any time by contacting that agency or the designated Departmental official (see section IX), and the tribe should disseminate any DOL-provided information to its members by the method(s) it deems appropriate (e.g., U.S. mail, electronic mail, hard-copy handouts). With respect to rulemaking proceedings of general applicability that have no particularized impact on Indian tribes, DOL agencies may use the existing Federal Register notice and comment process to provide notice, but should supplement this process with targeted outreach where appropriate.
2. Subjects of Consultation. To the extent consistent with applicable laws and administrative requirements, consultation can involve any DOL matter having tribal implications, including but not limited to: tribal program management, rulemaking, regulations, policies, waivers and flexibility; grant programs; contracting opportunities; regulatory guidance; and other matters of tribal interest. At the same time, DOL agencies should not create undue burdens on tribes with respect to regulations or other matters that do not have tribal implications. Routine matters, including normal DOL interactions with direct grantees such as monitoring, selecting grantees, and reporting requirements do not trigger further consultation processes under this policy. Enforcement policy, planning, investigations, cases and proceedings are not appropriate subjects for consultation under this policy.
3. Initial Planning and Scoping. Following notification to affected tribes that policies or actions have tribal implications, the DOL agency or regional office, in conjunction with the designated Departmental official's office, should engage with those tribes on initial planning and the appropriate scope of the consultation. Initial planning and scoping should include describing the nature and extent of the expected tribal implications; identifying any time constraints or deadlines, relevant existing policies, and potential resource issues; and making a determination as to the most useful and appropriate consultation mechanism.
4. Consultation Mechanisms. The manner of consultation should be appropriate to the nature and complexity of the matter and can occur via mailings (e.g., for remote tribes that may not have internet access), one or more face-to-face meetings or meetings via teleconference, roundtables, or other appropriate means and may include the use of electronic media and messaging and website portals. All meetings will be open to the public.

5. **Conducting Consultations.** When a consultation commences, DOL will solicit the views of the Indian tribes involved on the relevant subjects and issues. Consultation should involve a thorough examination of the subject at issue, including discussion of cultural, economic and other impacts on tribal programs, services, functions and activities; compliance guidance; programmatic and funding issues if relevant; any external constraints such as executive, judicial, or legislative actions; and any relevant technical or other regulatory issues as they affect tribes.
6. **Frequency of Consultation Meetings.** Consultation meetings may be scheduled on a regular basis or on an as needed basis except that at least one national tribal consultation meeting will be held by DOL each calendar year. For example, DOL agencies may establish a quarterly or semi-annual conference call with the tribes in order to consult with them on the regulatory proposals being considered by the agency and inform them about opportunities to participate in stakeholder meetings and public forums. To reduce costs, tribes and DOL agencies will make their best efforts to coordinate face-to-face consultation meetings to coincide with other regularly scheduled meetings (such as multi-agency and association meetings and regional tribal meetings).
7. **Submissions of Tribal Comments.** The DOL agency involved in the consultation will communicate clear and explicit instructions on the means and time frames for Indian tribes to submit comments to DOL on the matter, whether in person, by teleconference, and/or in writing, and if appropriate will allow a reasonable period of time following a consultation meeting for tribes to submit additional materials. A written communication on the correspondence of the highest elected official, appointed tribal official, or other third party designee of such authority (according to the procedures set forth under the definition of "Indian Tribes" in section X), will be considered by DOL to be the official position of the tribe on the subject at issue. If the DOL agency determines that the Administrative Procedure Act or other federal law or regulation prohibits continued discussion at a specified point in the decision-making process, the agency will so inform the Indian tribes. With respect to rulemaking proceedings of general applicability that will have no unique impacts on Indian tribes, DOL agencies may use existing Federal Register notices, dockets, and comment periods to obtain tribal comments, but should supplement them with additional means of obtaining tribal input where appropriate.
8. **Time Frames.** Time frames for the consultation process will depend on the nature and complexity of the consultation and the need to act quickly. Suggested guidelines are as follows:
  - a. The initial planning and scoping shall normally take place within 30 days from the date of the issuance of the notice of the proposed action;
  - b. If a consultation meeting will occur, the meeting shall normally be scheduled within 30 days of the completion of the planning and scoping;
  - c. For consultations involving one or more meetings, the consultation process shall normally be concluded within 60 days of the final consultation meeting; for consultations not involving meetings the consultation process shall normally be concluded within 60 days of the planning and scoping.  
These time frames may be compressed in exigent situations, such as when a critical deadline is involved, or expanded as necessary for novel or highly complex matters.
9. **Reporting of Outcome of Consultation to Tribes.** The DOL agency involved in the consultation will report the status or outcome of the issue involved to the affected Indian tribes within 30 days of the conclusion of the consultations on that issue. And, to the extent that tribal input was not adopted, the agency will provide a written explanation for why such input was not adopted or incorporated.
10. **Formation of Tribal Committees, Task Forces, or Work Groups.** Based on the government-to-government relationship, consultation under this policy is generally with one or more individual tribal governments. In some cases, it may become necessary for DOL to form a tribal committee, task force, or work group to study a particular policy, practice, issue, or concern. Members of such committees or work groups will include representatives of federally recognized tribal governments or their designees with authority to represent their interests or act on their behalf. Tribal representation on such committees or work groups should consist of geographically diverse small,

medium and large tribes, whenever possible. Members of these committees or work groups shall make good-faith attempts to attend all meetings which shall be open to the public and may establish member roles and protocols for producing their work and obtaining input and comment on it. All final work group products or recommendations will be given serious consideration by the Department. [See Section XI below on the Federal Advisory Committee Act (FACA) exemption for consultations undertaken with officials of federally recognized tribal governments pursuant to this tribal consultation policy.]

11. Use of Existing Statutory Advisory Committees. DOL agencies may also use existing tribal advisory committees such as the NAETC as part of meeting their consultation responsibilities under this policy. If such an advisory committee is required by law to be used exclusively for a particular function or purpose, consultation shall take place in accordance with the requirements of such committee and nothing in this policy requires any further consultation (see, e.g., 29 U.S.C. § 2911(h)).
12. Submission of Comments by Other AI/AN Organizations. The primary focus of formal consultation activities under this policy is with representatives of federally recognized Indian tribes. DOL recognizes, however, that in some cases the consultation process would be negatively affected if other (non-federally recognized) AI/AN organizations lacking the government-to-government relationship were excluded. Accordingly, nothing in this policy prohibits other AI/AN organizations that are not representatives of Indian tribes from providing their views to the Department.

#### I. Performance and Accountability

The consultation process and activities conducted under this policy should be accountable, transparent, and result in a meaningful outcome for the Department and for the affected Indian tribes. To enable the Department and the Indian tribes to effectively evaluate the implementation and results of this consultation policy:

1. DOL agencies will maintain records of each consultation and the manner in which the tribal concerns were addressed, and will document the status or outcome of each subject of consultation.
2. DOL agencies will, with input from Indian tribes, develop and utilize appropriate evaluation measures to assess their efforts to determine whether their overall consultation process is effective over time.
3. DOL agencies will report annually to the office of the designated Departmental official on the frequency, scope, and effectiveness of their consultation activities including any recommendations received from Indian tribes on ways to improve the consultation process.
4. The designated Departmental official's office will compile the reports of the agencies and prepare an annual DOL consultation report evaluating the overall effectiveness of this policy which will be made available to the Indian tribes. The office will seek tribal feedback on the annual consultation report and consider any comments from Indian tribes and federal participants to determine whether DOL should make any amendments to this policy.
5. The designated Departmental official's office will prepare and submit any reports required to be submitted to the Office of Management and Budget under Executive Order 13175 and the November 5, 2009 Presidential Memorandum.

#### K. Designated Officials and Points of Contact

##### A. Designated Departmental Official.

The designated Departmental official to coordinate the implementation of this policy will be the Director, Office of Public Engagement, working in conjunction with the Department's Office of Intergovernmental Affairs in the Office of Congressional and Intergovernmental Affairs, or other Departmental official in the Office of the Secretary, as designated by the Secretary.

The duties and responsibilities of the designated Departmental official include: serving as the Secretary's expert informational resource on tribal matters; maintaining an overall understanding of tribal concerns and issues as they relate to DOL programs and coordinating and managing the Secretary's policies for Indian tribes; coordination of

tribal site visits for DOL executive leadership; serving as DOL's representative on interdepartmental working groups on tribal matters; conducting periodic intradepartmental meetings and otherwise overseeing the implementation of the Department's tribal consultation policy by DOL operating agencies; providing advice and assistance to DOL agencies and regional field offices on tribal matters; and conducting outreach to national tribal government organizations.

#### B. Point of Contact for Each DOL Operating Agency.

Each DOL operating agency will designate a senior official as having primary responsibility for tribal matters. The designated Departmental official's office will maintain an up-to-date list clearly identifying the agency tribal officials and their contact information and this information will be made available to Indian tribes. DOL agencies should also designate an alternate official to serve in the absence of the primary official.

The duties of the agency officials having responsibility for tribal matters include: having and maintaining knowledge of this policy and the government-to-government relationships and sovereign status of Indian tribes; serving as the primary liaison with Indian tribes for their agency; ensuring the consultation responsibilities of their agencies are carried out, including those of their regional offices; and reporting to the administration in their respective agencies, as well as the designated Departmental official. Unless otherwise approved by the designated Departmental official, these responsibilities shall not be placed within the agency Offices of Civil Rights, as tribal relations and consultations are treaty, trust, and government-to-government based, and are not a function of civil rights based on race.

#### K. Definitions

For the purposes of this policy, the following definitions apply:

**American Indian and Alaska Native (AI/AN)** – A member of an American Indian or Alaska Native tribe, band, nation, pueblo, village, or community of indigenous peoples in the United States, as membership is defined by the tribal community, including Native Hawaiians.

**AI/AN Organization** – An AI/AN organization or group having members that are not representatives of federally recognized Indian tribal governments, such as state tribes and members of urban AI/AN groups that are not located on Indian tribal lands.

**Consultation** – An enhanced form of communication consisting of an open and free exchange of information and opinion among parties which emphasizes trust, respect, and shared responsibility. The consultation process enables mutual understanding, facilitates the effort to reach consensus on issues, and contributes to informed decision making.

**Deliberative Process Privilege** – A privilege exempting the Federal Government from disclosure of government agency materials containing opinions, recommendations, and other internal communications that are part of the deliberative process within the Department or agency.

**Department** – Means the U.S. Department of Labor.

**DOL Operating Agency** – A Department of Labor administration, agency, bureau, office, or division that: (1) has operational responsibility for a Departmental program that has tribal implications; or (2) has been designated by the Secretary to participate in this policy.

**Executive Order** – An order issued by the Federal Government's executive on the basis of authority specifically granted to the executive branch (as by the U.S. Constitution or a Congressional Act).

**Indian Tribe** – An Indian or Alaska Native tribe 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), and with whom the Federal Government maintains a government-to-government relationship, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (Public Law 92-203; 43 U.S.C. 1601 et seq.). The Department of the Interior's Bureau of Indian Affairs maintains and regularly publishes the official list of federally recognized Indian tribes which are generally established pursuant to a federal treaty, statute, executive order, court order, or a federal administrative action making these tribes eligible for certain federal programs and benefits because of their status as Indians. A federally recognized Indian tribe may expressly delegate a third party to represent the tribe in all tribal consultations with the Department of Labor, provided the Department is notified of such delegation in writing prior to the consultation. An Indian tribe may rescind its delegation at any time, but the rescission should occur in writing, if practicable.

**Policies or Actions with Tribal Implications** – Refers to proposed legislation, regulations, policies, and actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. This encompasses a broad range of DOL programs and activities targeted at tribal governments or having AI/ANs as participants including, but not limited to, tribal program management, rulemaking, regulations, policies, waivers and flexibility; grant programs; contracting opportunities; regulatory guidance; or other DOL activities that would have a substantial direct effect on a tribe's traditional way of life, tribal lands, tribal resources, or the ability of the tribe to govern its members or to provide services to its members. This term does not include matters that are the subject of litigation or that are undertaken in accordance with an administrative or judicial order.

**Secretary** – Means the Secretary of Labor.

**Substantial Direct Compliance Costs** – Those costs incurred directly from implementation of changes necessary to meet the requirements of a federal mandate. Because of the large variation in resources among tribes, "substantial costs" will vary by Indian tribe. Where necessary and appropriate, the Secretary will determine the level of costs that represent "substantial costs" in the context of an Indian tribe's resource base.

**To the Extent Practicable and Permitted by Law** – Refers to situations where the opportunity for consultation is limited due to practical constraints including time, budget, or other such reason, and situations where other legal requirements take precedence.

**Tribal Committee, Task Force, or Work Group** – A group composed of Indian tribal officials or their designees with authority to represent their interests or act on their behalf that is formed to work on a particular policy, practice, issue, or concern. This can include representatives of existing organizations representing federally recognized tribes, such as the National Congress of American Indians.

**Tribal Officials** – Tribal council members and delegates, chairpersons, or other elected or duly appointed officials of the governing bodies of Indian tribes or authorized intertribal organizations or their designees with authority to represent them or act on their behalf.

## I. Supplemental Terms and Effective Date

- 1. Inapplicability of the Federal Advisory Committee Act (FACA).** In accordance with section 204(b) of the Unfunded Mandates Reform Act of 1995 (Public Law 104-4), the provisions of FACA are not applicable to consultations between the Federal Government and elected officers of tribal governments or their designated employees with authority to act on their behalf. Therefore, FACA is generally not applicable to consultations undertaken pursuant to this tribal consultation policy. As the Office of Management and Budget stated in its guidelines implementing section 204(b): This exemption applies to meetings between Federal officials and employees and ...tribal governments acting through their elected officers, officials, employees, and Washington representatives, at which 'views, information, or advice' are exchanged concerning the implementation of intergovernmental responsibilities or administration, including those that arise explicitly or implicitly under statute, regulation, or Executive Order. The scope of meetings covered by this exemption should be construed broadly to include meetings called for any purpose relating to intergovernmental responsibilities or administration. Such meetings include, but are not limited to, meetings called for the purpose of seeking consensus, exchanging views, information, advice, and/or recommendations; or facilitating any other interaction relating to intergovernmental responsibilities or administration. (OMB Memorandum 95-20 (September 21, 1995), pp. 6-7, published at 60 FR 50651, 50653 (September 29, 1995)). If, however, DOL were to form an advisory committee consisting of (non-federally recognized) AI/AN organizations or groups lacking the government-to-government relationship, the section 204(b) exception would not apply and all FACA requirements would need to be followed.
- 2. Reservation of Authorities.** Nothing in this policy waives or diminishes the U.S. Government's rights, authorities, immunities, or privileges, including the deliberative process privilege. Among other things, internal communications on the development of proposed legislation, enforcement policy, and other internal policy matters are part of the deliberative process by the Executive Branch and will remain confidential. Nothing in this policy waives or diminishes any tribal rights, authorities, immunities, or privileges including treaty rights and sovereign immunities, and this policy does not diminish any rights or protections afforded to individual AI/ANs under federal law.

3. Disclaimer. This document is intended to improve the Department's management of its relations and cooperative activities with Indian tribes. DOL has 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.
4. Effective Date. The Tribal Consultation Policy is effective [on the date of publication in the *Federal Register*] and shall apply to all prospective actions taken by the Department as described herein.

Dated:

Hilda L. Solis  
Secretary of Labor  
Billing Code: 4510-23P









