



**FOREST SERVICE HANDBOOK
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FSH 1509.13 – AMERICAN INDIAN AND ALASKA NATIVE RELATIONS HANDBOOK

CHAPTER 10 – CONSULTATION WITH TRIBES

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Approved: ROBIN L. THOMPSON
Associate Deputy Chief, S&PF

Date Approved: 07/13/2012

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Digest:

11.1 - Establishes code, caption “Who may Consult”, and sets forth new direction to clarify who may conduct government-to-government consultation with Tribes and government-to-corporation consultation with Alaska Native Corporations

11.2 - Establishes code, caption “Consultation Timelines”, and sets forth new direction to clarify the minimum time required to accomplish Tribal or Alaska Native Corporations consultation.

11.3 - Establishes code, caption, and sets forth new direction on “Consultation Processes.”

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10.1 - Authority

The laws, Executive orders, and regulations that govern Federal agencies' relationship with Tribes are abstracted at FSM 1563.01 through FSM 1563.01; exhibit 01 sets out the complete text of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments.

10.1 - Exhibit 01

Executive Order 13175 **Consultation and Coordination with** **Indian Tribal Governments**

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) Policies that have tribal implications 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.

(b) Indian tribe 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.

(c) Agency means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) Tribal officials means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Section 2. Fundamental Principles. When formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

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(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive orders, and judicial decisions, has guaranteed the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the ongoing right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Section 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating policies that have tribal implications:

(a) Agencies shall be guided by the principles of respect for Indian tribal self-government and sovereignty, for tribal treaty and other rights, and for responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

- (1) encourage Indian tribes to develop their own policies to achieve program objectives;
- (2) where possible, defer to Indian tribes to establish standards; and in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Section 4. Special Requirements for Legislative Proposals. Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Section 5. Consultation.

(a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 45 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 90 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance and costs on Indian tribal governments, and

- (1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government, or

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(2) the agency, prior to the formal promulgation of the regulation,
(a) consulted with tribal officials 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 tribal summary impact statement that consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns, 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 makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;
(2) 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 tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns, 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) makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by tribal officials.

Section 6. Increasing Flexibility for Indian Tribal Waivers.

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency 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 consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefore.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Section 7. Cooperation in developing regulations. On issues relating to tribal self-government, trust resources, or treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

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Section 8. Accountability.

(a) In transmitting any draft final regulation that has tribal implications to the Office of Management and Budget pursuant to Executive Order No. 12866, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to the Office of Management and Budget, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of the Office of Management and Budget and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Section 9. Independent agencies. Independent regulatory agencies are encouraged to comply with the provisions of this order.

Section 10. General provisions.

(a) This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

(b) This order shall supplement but not supersede the requirements contained in Executive Order 12866 ("Regulatory Planning and Review"), Executive Order 12988 ("Civil Justice Reform"), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(c) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(d) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(e) This order shall be effective 90 days after the date of this order.

/s/ William J. Clinton
THE WHITE HOUSE
November 6, 2000

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11 - CONSULTATION WITH TRIBES

11.1 - Who May Consult

Government-to-government consultation may only occur between Forest Service line officers and Tribal leaders who have authority to consult on behalf of their Tribe. In accordance with Forest Service Manual (FSM) 1230.6, the line of delegation passes from the Chief to the Deputy Chiefs and through line officers to the field. Tribal consultation may not be delegated from line to staff in the field. Line officers should engage personally with Tribal leaders. The Chief reserves the ability to delegate consultation authority in specific cases, in writing, for Washington Office directors on a case-by-case basis.

This direction is not intended to minimize the importance of staff to staff communication and collaboration. On the contrary, staff interactions are essential to set the stage for effective consultation and should be maintained and enhanced. Staff personnel provide needed subject matter expertise, and sometimes they have extensive relationships with Tribal staff or leaders. Staff certainly can and should participate in consultation as well as in staff-to-staff and staff-to-leader discussions where it makes sense locally.

In Alaska, the Forest Service is required to consult with Alaska Native Corporations (ANCs) on a government-to-corporation basis rather than government-to-government but, as in the government-to-government consultations, the representatives shall have delegated authority to consult. The Forest Service does not control who from a Tribe or an ANC is authorized to consult.

11.2 - Consultation Timelines

For national-level actions that may affect Tribes from across the country or ANCs, the entities being consulted should have a realistic opportunity to review the issue and associated materials, discuss fully with Agency consulting officials, and have their concerns and suggestions received by the responsible official in time to be incorporated into the decision being made. Widely applicable national issues must provide a consultation period of at least 120 days from the date the Tribe or ANC likely received the information on which they are being invited to consult.

Other actions (such as consultation on national issues that may affect only one or a few Tribes or ANCs, or on regional or more local decisions) may require less time for consultation. Consultation periods and other aspects of consultation should be worked out through local protocols, ideally formalized in memoranda of understanding negotiated with the affected Tribes or ANCs.

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11.3 - Consultation Processes

The following steps should be taken when coordinating consultation with Tribes:

1. The agency contacts the Tribal Government, preferably prior to scoping and public involvement, to advise the Tribe of a proposed policy, plan, or project that may affect tribal rights or interests.
2. The Tribe may respond back, that this is not an issue or that this proposal is important and would like to initiate consultation.
3. The Tribe may request that Federal agency technical experts meet with the Tribe's technical representatives (or the Tribe may request an official level meeting).
4. Issues are discussed in order for the agency to understand why the proposal is of concern to the Tribe. This allows the respective staff to brief respective parties and to provide informed opinions and recommendations.
5. Consultation steps are defined and an agreement may be reached between the Tribe and the Forest Service on the process for consultation.
6. The agency makes a decision in consultation with the Tribe.

12 - COMPENSATION

Agency officials are encouraged to facilitate tribal participation in agency decision-making. While there are no legal requirements to compensate for consultation or other involvement in Forest Service activities, the Forest Service may elect to provide compensation to Tribes or tribal representatives for extraordinary situations and specialized expertise.

The following provides guidance for compensation:

1. When seeking the views of the Tribal Government to comply with Section 106 of the National Historic Preservation Act (NHPA) or the National Environmental Policy Act (NEPA), the agency is not required to compensate the Tribe for providing its views. However, the agency can take a number of actions to assist tribal participation.
2. Facilitating tribal participation may include scheduling meetings in places and at times that are convenient for the tribe's members. The Forest Service may pay travel expenses for tribal members if specifically authorized by a statute, a contract, a grant, or the Federal Travel Regulations. Questions regarding whether travel expenses may be paid in a particular case should be addressed to the appropriate fiscal officer.

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3. The Forest Service may request the Tribe to provide specific information and documentation or actual surveys and reports from the Tribe that would assist the agency's management responsibilities. In these circumstances, the Tribe may be acting as a professional contractor or consultant and providing work products or services that the agency would normally compensate for.
4. There are various authorities under which the Forest Service can enter into grants, contracts, or cooperative agreements with Tribes for extraordinary consultation and specialized expertise, such as traditional ecological knowledge that could be incorporated into restoration efforts (FSM 1563.01 and FSH 1509.11). The implementing regulations of NHPA also authorize Federal agencies to expend funds for historic preservation activities, which could include working with Tribes (16 U.S.C. 470h-2(g)).