

U.S. DEPARTMENT OF AGRICULTURE  
WASHINGTON, D.C. 20250

<b>DEPARTMENTAL REGULATION</b>		Number: 1350-001
SUBJECT:  Tribal Consultation	DATE: September 11, 2008	
	OPI: OGC, Office of the General Counsel	

1. PURPOSE

The United States Department of Agriculture (USDA) hereby establishes this policy requiring consultation and participation by and between Indian tribes on USDA policies and activities.

2. POLICY

It is in the public interest that USDA should, to the extent practicable and permitted by law, consult and coordinate with tribes on a government-to-government basis. Because tribes are affected by USDA policies, programs and actions, USDA should consult with tribes on matters that may affect their rights and interests in compliance with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, prior to making a decision.

3. DEFINITIONS

- 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 or any subsequent List.
- c) Tribal officials – means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.
- d) USDA – means the United States Department of Agriculture or any of its agencies.

4. FUNDAMENTAL PRINCIPLES

In formulating or implementing policies that have tribal implications, USDA 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.
- b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized 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, tribal trust resources, and Indian tribal treaty and other rights.
- c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

## 5. POLICYMAKING CRITERIA

In addition to adhering to the fundamental principles set forth in section 4, USDA shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

- a) USDA shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the 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, USDA shall grant Indian tribal governments the maximum administrative discretion possible.
- c) When undertaking to formulate and implement policies that have tribal implications, USDA shall, to the extent practicable:
  - 1. Encourage Indian tribes to develop their own policies to achieve program objectives;
  - 2. Where possible, defer to Indian tribes to establish standards; and
  - 3. In determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

## 6. LEGISLATIVE PROPOSALS

USDA shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 5.

## 7. CONSULTATION ON REGULATIONS

To the extent practicable and permitted by law, USDA shall not promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

- a) 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
- b) Prior to the formal promulgation of the regulation, USDA will:
  1. Consult 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, provide to the Director of the Office of Management and Budget (OMB) 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 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 Director of OMB any written communications submitted to USDA by tribal officials.

## 8. PREEMPTING TRIBAL LAW

To the extent practicable and permitted by law, USDA shall not promulgate any regulation that has tribal implications and that preempts tribal law unless the Department, prior to the formal promulgation of the regulation:

- a) Consults 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 OMB 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 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
- c) Makes available to the Director of OMB any written communications submitted to USDA by tribal officials.

## 9. OTHER CONSULTATION ISSUES

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

## 10. RESPONSIBILITIES OF USDA OFFICIALS

USDA officials should:

- a) Designate an official to perform the duties required in the Accountability section below.
- b) Notify tribes of proposed policy, guidelines, plans, projects or actions that it deems may substantially affect tribal rights or interests in order to provide tribes an opportunity for meaningful dialogue on potential implications and effects.
- c) Fully consider the information, input and recommendations from tribes and address tribal concerns as much as practicable on proposed decisions.
- d) Inform tribes how their information and recommendations were considered in USDA decisions.
- e) Provide tribes with contact information for USDA officials and staff who are responsible for making final decisions that may affect tribes and request the same of tribes.
- f) Take other actions in furtherance of this Departmental Regulation as deemed necessary.

## 11. WAIVERS

USDA 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 it 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.

- a) USDA shall, to the extent practicable and permitted by law, render a decision upon an application for a waiver within 120 days of receipt of a complete application by USDA, or as otherwise provided by law or regulation. If the application for waiver is not granted, USDA shall provide the applicant with timely written notice of the decision and the reasons therefore.
- b) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by USDA.

## 12. ACCOUNTABILITY

- a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 as amended, USDA shall include a certification stating that the requirements of Executive Order 12866 have been met in a meaningful and timely manner.
- b) In transmitting proposed legislation that has tribal implications to OMB, USDA shall include a certification from an official designated to ensure compliance with this order that all relevant requirements of this order have been met.

## 13. JUDICIAL REVIEW

This Departmental Regulation 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 USDA, its agencies, or any person.

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