



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

NOV 12 2021

Dear Tribal Leader:

As we continue our efforts to improve the U.S. Department of the Interior's (Department) implementation of Executive Order 13175 and Tribal consultation, I am pleased to present to you for your input and expertise a preliminary draft of updates to our Departmental Tribal Consultation policy and procedures. The Departmental Manual (DM) contains the policy at Part 512, Chapter 4 (512 DM 4) and the procedures at Part 512, Chapter 5 (512 DM 5). This policy was put into place approximately seven years ago to codify the freestanding 2011 Tribal consultation policy that was jointly developed by Tribes and Department officials.

The enclosed draft<sup>1</sup> edits 512 DM 4 and 5 to:

- Bolster the Department's consultation policy to encourage early, robust, interactive, pre-decisional, informative and transparent consultation;
- Establish a model for seeking Tribal consensus;
- Require that Department staff undergo training before participating in consultation;
- Codify the Secretary's Tribal Advisory Committee (STAC);
- Address flexibility for Tribal waivers;
- Clarify that the Department's decision-makers must invite Tribes to engage in consultation; and
- Require a record of consultation.

We welcome your input on this draft and also offer the enclosed questions to consider. Please join me at one or more of the following sessions to discuss:

**Monday, December 13, 2021**

2 p.m. – 4 p.m. ET

Please register in advance at:

<https://doitalent.zoomgov.com/meeting/register/vJIsce6grj4uHtR3YCZAZ5zeR6mew0zJnPU>

**Wednesday, December 15, 2021**

2 p.m. – 4 p.m. ET

Please register in advance at:

<https://doitalent.zoomgov.com/meeting/register/vJIsdemsqTkqH6oc5Gp8NNPC-mvGJsK4BTk>

---

<sup>1</sup> The draft separates out consultation for Alaska Native Claims and Settlement Act (ANCSA) Corporations in recognition of the unique government-to-government relationship the United States has to Tribes. We will be consulting separately with ANCSA Corporations on the draft policy applicable to them.

**Thursday, December 16, 2021**

2 p.m. – 4 p.m. ET

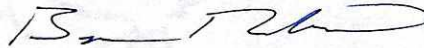
Please register in advance at:

<https://doitalent.zoomgov.com/meeting/register/vJItdeiqqzItHTahi3HINtx7BTi43NvtXR0>

Please also email any written input you may have to [consultation@bia.gov](mailto:consultation@bia.gov) by 11:59 p.m. ET December 31, 2021.

If you have any questions, please contact Mr. Joaquin Gallegos, Special Assistant, Office of the Assistant Secretary – Indian Affairs, by email at [joaquin\\_gallegos@ios.doi.gov](mailto:joaquin_gallegos@ios.doi.gov) or by phone at (202) 208-7163.

Sincerely,



Bryan Newland  
Assistant Secretary – Indian Affairs

Enclosures

## Questions to Consider on Draft Revisions to 512 DM 4 and 5

1. The draft defines “actions with Tribal implications” based on the definition of “policies with Tribal implications” in E.O. 13175 but incorporates Tribes’ past input that the definition should include actions that “may have substantial direct effects” rather than the more definitive “have substantial direct effects.” Should “actions with Tribal implications” be defined differently or in more detail? If so, how?
2. Are there different thresholds for what constitutes “substantial direct effect” that the policy should articulate?
  - a. Should the policy list categories of Departmental actions that may cause a “substantial direct effect”?
  - b. Should the policy list categories of land status/treaty rights (such as those listed in the draft Consensus-Seeking Model) that would incur substantial direct effects?
  - c. Should the policy provide examples of thresholds of “substantial direct effect” combining categories of Departmental actions with categories of land status/treaty rights (e.g., non-earth-disturbing activities on non-reservation lands)?
3. Is the draft Consensus-Seeking Model in Figure 1 workable?
  - a. Are there impacts that are not included in the model that should be?
  - b. Should any of the items be in a different ring than shown?
4. How might the policy better contribute to the Department’s efforts in protecting sacred sites under Executive Order 13007 and other laws?
5. Do you have any recommendations regarding the Tribal Consultation Annual Report identified in draft 512 DM 4.7?
  - a. Now that the Department is now listing its national and regional Tribal consultation sessions on its website, would a website showing an archive of those past sessions be a sufficient replacement of the Annual Report?
  - b. If not, what should the Annual Report contain?
  - c. What should the Department’s Tribal Governance Officer (TGO) do with the Annual Report?
6. Are there other provisions from the 2011 policy that have not been incorporated into the DM chapters, and should be?

Department of the Interior  
**Departmental Manual**

---

**Effective Date:**

**Series:** Intergovernmental Relations

**Part 512:** American Indian and Alaska Native Programs

**Chapter 4:** Department of the Interior Policy on Consultation with Indian Tribes

**Originating Office:** Office of the Secretary

---

**512 DM 4**

4.1 **Purpose.** This chapter provides the requirements for Department of the Interior (DOI or the Department) government-to-government consultation between appropriate Tribal officials and DOI officials. It expands and clarifies DOI's policy on consultation with Indian Tribes and acknowledges the provisions for conducting consultation in compliance with Executive Order (EO) 13175 (Consultation and Coordination with Indian Tribal Governments), applicable statutes, and administrative actions.

4.2 **Scope.** The policy and requirements in this chapter apply to all DOI bureaus and offices. It complements, but does not supersede, any existing Federal laws, rules, statutes, or regulations that guide consultation processes with Indian Tribes.

4.3 **Definitions.**

A. Indian Tribe or Tribe. Any American Indian or Alaska Native tribe, band, nation, pueblo, rancheria, 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.

B. Action with Tribal Implications. An action by the Department or any of its bureaus or offices that may have a substantial direct effect on one or more Tribes, the relationship between the Federal Government and Tribes, or on the distribution of power and responsibilities between the Federal Government and Tribes. Substantial direct effects on Tribes may include, but are not limited to, effects as shown in the Consensus-Seeking Model (Figure 1).

C. Tribal Governance Officer (TGO). An individual designated by DOI to carry out responsibilities described in this chapter.

E. Tribal Liaison Officer (TLO). One or more individuals officially designated by a bureau or office to carry out responsibilities described in this chapter.

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

XX/XX/XX #XXXX

Replaces 11/09/15 #4031

4.4 **Policy.** It is the policy of DOI to recognize and fulfill its legal obligations to identify, protect, and conserve Tribal trust resources; carry out its trust relationship with federally recognized Indian Tribes and Tribal members; and invite Tribes to consult on a government-to-government basis whenever DOI plans actions with Tribal implications. All bureaus and offices shall make good-faith efforts to invite Tribes to consult early in the planning process and throughout the decision-making process and engage in robust, interactive, pre-decisional, informative, and transparent consultation when planning actions with Tribal implications. It is the policy of DOI to seek consensus with impacted Tribes in accordance with the Consensus-Seeking Model.

4.5 **Responsibilities.**

A. TGO. The TGO is appointed by the Secretary and is responsible for carrying out the responsibilities in this chapter including the following:

- (1) Serving as the Secretary's representative when requested to do so in matters pertaining to consultation.
- (2) Leading and managing DOI's consultation efforts to ensure effective government-to-government relationships with Indian Tribes.
- (3) Overseeing DOI compliance with the policy in this chapter, EO 13175, and other consultation requirements pertaining to government-to-government consultation.
- (4) Implementing a DOI reporting system to ensure that consultation efforts are documented and properly reported.

B. Assistant Secretaries. Assistant Secretaries are responsible for ensuring that all bureaus and offices within their reporting chain comply with the requirements of this chapter.

C. Heads of Bureaus and Offices. Heads of bureaus and offices are responsible for:

- (1) Designating in writing one or more TLOs.
- (2) Ensuring that procedures are established to carry out the consultation activities of their organizations and ensuring compliance with those procedures.
- (3) Ensuring compliance with the requirements in this chapter.

D. TLOs. The TLOs are responsible for:

- (1) Serving as the bureau/office principal point of contact for Tribal consultation matters.

(2) Promoting and facilitating consultation and collaboration between Indian Tribes and their bureau/office.

(3) Reporting to the TGO annually in the Tribal Consultation Annual Report of newly engaged national or regional consultation with any Indian Tribe and any updates to bureau/office consultation procedures or processes.

E. DOI Staff. Any DOI staff who will represent the Department or a bureau or office in consultation (other than note-takers) must first complete training to promote positive relations with Tribes, including training on implementation of this policy and a review of:

(1) The general history of the government-to-government relationship between the Federal Government and Indian Tribes;

(2) The treaty rights of Indian Tribes;

(3) The Federal trust obligation owed to American Indians, Alaska Natives, and Native Hawaiians in the United States;

(4) The culture and history of American Indians, Alaska Natives, and Tribes; and

(5) Existing Tribal consultation policies, government structures, and decision-making processes.

F. Department of the Interior University (DOIU). The DOIU in collaboration with bureaus/offices, tribal colleges and universities, and other entities with Indian expertise is responsible for developing and delivering training to facilitate implementation of this policy.

G. Office of Collaborative Action and Dispute Resolution (CADR). Upon request, the CADR may assist in planning and facilitating an effective consultation process, negotiated rulemaking, or other collaborative approaches to decision-making.

H. Secretary's Tribal Advisory Committee (STAC). The Secretary will establish, by charter, a STAC consisting of elected Tribal leaders or their designated representatives from each of the 12 Bureau of Indian Affairs Regions. The STAC's purpose is to seek consensus, exchange views, share information, provide advice and/or recommendations or facilitate any other interaction related to intergovernmental responsibilities or administration of DOI programs, including those that arise explicitly or implicitly under treaty, statute, regulation or executive order.

4.6 **Departmental Database.** A single DOI database will be maintained to manage the contact list for leadership of all Indian Tribes. The database should be an electronic and interactive system that allows real--time updating of contacts and allows all bureau/office access. This database shall be maintained by the Bureau of Indian Affairs, Office of Indian Services.

4.7 **Tribal Consultation Annual Report.** On an annual basis, bureaus/offices shall develop a report of the results of their efforts to promote consultation with Indian Tribes. The report is due to the TGO by December 31 of each year. Reporting is intended to be a comprehensive list of all national and regional consultation efforts undertaken that year and may include, but is not limited to, the scope, cost, and activities of the consultation efforts. The bureau/office may also include consultation efforts conducted one-on-one with Indian Tribes to highlight successes, challenges, or best practices. The report should also include proposed plans and recommendations. (The format for the report is provided in the Appendix.)

4.8 **Flexibility for Tribal Waivers.** For all statutory or regulatory requirements applicable to Tribes that are subject to DOI discretion and waiver, each bureau/office shall streamline processes by which Tribes apply for waivers of those requirements, use flexible policy approaches when reviewing Tribal requests for waivers of those requirements, and render a decision upon a complete application for a waiver within 120 days of receipt of such application, or as otherwise provided by law or regulation. If the application for waiver is not granted, the bureau/office shall provide the Tribal applicant with timely written notice of the decision and the reasons.

Department of the Interior  
Tribal Consultation Annual Report

Bureau/Office:

The annual report is a summary of all bureau/office consultations during one fiscal year that were conducted on a nationwide or regional basis and any consultation efforts conducted one-on-one with Indian Tribes that the bureau/office would like to report to highlight successes, challenges, or best practices. The information in the Annual Report is a summary of and should be compiled from all of the information captured during the fiscal year. (Use as much space as needed and include the bureau/office name on each page.)

1. Summarize and list all of the consultation topics.
2. List all of the Tribes consulted.
3. List the location of each consultation by city and state.
4. Summarize and list all of the issues and recommendations.
5. Summarize successes and accomplishments and include recommendations for improvements to the consultation process.

Prepared By:  
Date Prepared:  
Approving Official:



Department of the Interior  
**Departmental Manual**

---

**Effective Date:****Series:** Intergovernmental Relations**Part 512:** American Indian and Alaska Native Programs**Chapter 5:** Procedures for Consultation with Indian Tribes**Originating Office:** Office of the Secretary

---

**512 DM 5**

5.1 **Purpose.** This chapter provides the procedures and process for the Department of the Interior (DOI) government-to-government consultation between appropriate Tribal officials and DOI officials.

5.2 **Scope.** All DOI bureaus/offices shall follow the processes in this chapter for consultation with Tribes.

5.3 **Authority.** Executive Order (EO) 13175 (Consultation and Coordination with Indian Tribal Governments).

5.4 **Consultation.**

A. **Requirement for Consultation.** Bureaus and offices must invite Tribes to consult whenever a DOI plan or action with Tribal implications arises.

B. **Appropriate Representatives at Consultation.**

(1) The DOI official with authority to decide on the proposed DOI action with Tribal implications must participate in the consultation.

(2) The elected official of the Tribe, acting in their official capacity as the leader of the Tribe may participate or choose to designate alternate or additional Tribal representatives to participate in the consultation.

C. **Coordination.** Bureaus/offices will work with each other and with other Federal agencies, where appropriate, to coordinate consultation.

D. **Facilitation Support.** In planning consultation, bureaus and offices should consider best practices for engagement, including but not limited to, the use of neutral facilitation and other collaborative problem-solving approaches to promote effective dialogue and conflict resolution. Such support is available through the Office of Collaborative Action and Dispute

Resolution (CADR). In the event that the consulting parties encounter an impasse, the parties may utilize the impartial facilitation, mediation, and consensus-building services provided by CADR.

E. **Conduct in Consultation.** Bureaus and offices must be open and candid with Tribal government(s) during consultations and incorporate Tribal views in their decision making processes. The consultations, whether initiated by the tribe or DOI, must be respectful of Tribal sovereignty.

F. **Confidential or Sensitive Information.** Information received will be deemed confidential, unless otherwise provided by applicable law, regulation, or policy, if disclosure would negatively impact upon a trust resource or compromise the trustee's legal position in anticipation of/ or during administrative proceedings or litigation on behalf of the Tribal government(s).

G. **Consensus-Seeking Model.** The basis of consultation is rooted in meaningful dialogue where the viewpoints of Tribes and DOI, including its bureaus and offices, are shared, discussed, and analyzed. Executive Order 13175 directs agencies to explore and, where appropriate, use “consensual mechanisms” for developing regulations that relate to Tribal self-government, Tribal trust resources, or Tribal treaty or other rights. Executive Order 13175 also establishes criteria for policy-making, including directives to 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 Tribal governments; grant Tribal governments the maximum administrative discretion possible; encourage Tribes to develop their own policies to achieve program objectives; where possible, defer to Tribes to establish standards; and determine whether to establish Federal standards, consult as to the need for Federal standards and any alternatives to preserve the prerogatives and authority of Tribes.

- (1) **Seeking Consensus.** Consistent with the above directives, bureaus and offices should abide by the Consensus-Seeking Model (figure 1) that correlates the degree to which Tribal consensus should be sought based on the degree of impact on the Tribe. The model illustrates that impacts of DOI action closer to the center necessitate increasingly dedicated efforts by DOI officials to achieve consensus and, where possible, defer to Tribes to establish standards. This model may be most useful for one-on-one consultation where impacts are to a single Tribe, or to several Tribes who have among themselves achieved consensus, but DOI officials are encouraged to use the model as a framework for national and regional consultations even where full consensus of all impacted Tribes may not be achievable.
- (2) **Dispute Resolution.** Where consensus cannot be reached for areas outlined in the consensus model, the head of the bureau or office will review the consultation

information and consensus-seeking documentation and make a determination on how to proceed. The Secretary's Tribal Advisory Committee described in 512 DM 5.7 may be called upon to provide review and guidance to the head of the bureau or office.

H. Consultation Session Methods. Consultation session methods may include, but are not limited to, in-person meetings, video-conferences, teleconferences, and correspondence to discuss a specific issue. Consultation session methods may be expanded upon through subsequent correspondence after consultation is initiated through written notification. DOI will strive to include both in-person and virtual consultation session methods to provide Tribes with access to participate in at least one consultation session for a specific issue, regardless of their travel capabilities. On a case-by-case basis, consultation may be held through a series of written correspondence with the Tribal leadership, but only when other consultation session methods are not feasible. Providing notification (the distribution of information from one or more DOI offices) to one or more Tribes of a Departmental action as a stand-alone effort is not consultation. [NOTE: Last sentence moved up from "Initial Planning Stage" below].

5.5 **Consultation Procedures.** Bureaus/offices will carry out the consultation stages described below for a Departmental action with tribal implications.

A. Initial Planning Stage.

(1) The appropriate DOI officials within a bureau/office will provide notice to and invite Tribes to consult as early as possible when considering a DOI action with Tribal implications and provide Tribes a meaningful opportunity to participate in the consultation process..[NOTE: Deleted text moved to H. Consultation Session Methods] (The appropriate DOI officials are those individuals who are knowledgeable about the matters at hand, are authorized to speak for a bureau/office, and who exercise delegated authority in the disposition and implementation of a bureau/office action.)

(2) Notification should include sufficient detail of the topic to be discussed to allow Tribal leaders to determine if they want to accept the offer and, if so, provide an opportunity to fully engage in consultation. Adequate notice entails providing:

- (i) A description of the topic(s) to be discussed;
- (ii) The expected scope of the proposed DOI action;
- (iii) The expected purpose of the DOI action;
- (iv) The expected a timeline of the process, and possible outcomes; and
- (v) DOI offices and bureaus that are expected to participate in the consultation and development and implementation of the DOI action.

(3) The notice should also give Tribal leaders the opportunity to provide feedback prior to the consultation, including time to request technical assistance and/or clarification on how the consultation process conforms to the requirements in this chapter.

- (4) If the notice is announcing a scheduled Tribal consultation session, the bureau/office will ensure that notice to the Tribe(s) is given at least 30 days prior to the first scheduled consultation session. If exceptional circumstances prevent notification within 30 days, an explanation for the abbreviated notification will be provided in the invitation letter.
- (5) If the notice is announcing the opportunity to consult, without a scheduled Tribal consultation session, the notice should give the Tribal leaders at least 30 calendar days (preferably 45 days) to request consultation before DOI action planning proceeds.
  - (i) A Tribe may request that DOI provide an extension more than 30 days' notice to consider whether to request consultation and, at its discretion, DOI may grant such requests.
  - (ii) If a bureau/office invites a Tribe to consult but does not receive a response, the bureau/office should make good-faith, reasonable and periodic efforts to repeat the invitation and, when feasible, should allow an Indian Tribe to join an ongoing consultation. These efforts of engagement shall be appropriately documented.

(2) A Tribe may request that the DOI initiate consultation when the Tribe believes that a bureau/office is considering a DOI action with Tribal implications. The appropriate bureau/office TLO or appropriate representative will treat an official request for consultation in an expedited fashion and respond to the Tribe in writing that DOI has received the request, using the most expedient methods to communicate (e.g., by email in addition to U.S. Mail).

(3) Whenever a Tribe requests consultation the Department will work with the Tribe to schedule the consultation at a mutually agreeable time, usually 30 days in advance.

B. Proposal Development Stage. The bureau/office will develop a process for the Proposal Development Stage that maximizes the opportunity for timely input by Indian Tribes and that is consistent with both Tribal and bureau/office schedules. Examples of appropriate processes for the proposal development stage include, but are not limited to, negotiated rulemaking, a Tribal leader task force, a series of open Tribal meetings, or single meetings. Bureaus/offices may perform these activities during the Initial Planning Stage, above, as appropriate.

(1) Bureaus/offices will solicit the views of affected Indian Tribes regarding the process timeline to consult on a departmental action with Tribal implications. Bureaus/offices should work with Indian Tribes to structure a process, to the extent practicable, that considers specific Indian Tribal structures, traditional needs, and schedules of the Indian Tribes. Bureaus/offices may proceed with the expectation that interested Indian Tribes will respond within a reasonable time period. [NOTE: Deleted text was moved up to "Initial

Planning” stage, above].

(2) When the matter under consultation involves confidential or culturally sensitive information, the bureau/office will work with the Indian Tribe to develop a consultation process that addresses the sensitivity of the information to the extent permitted by Federal law. If litigation, legal requirements, or natural disaster emergencies impact a bureau/office schedule for conducting consultation, the bureau/office shall explain the constraints to the Indian Tribe. If a determination is made that the Administrative Procedure Act or other Federal law or regulation expressly prohibits continued discussion at a specified point in the decision-making process, the Indian Tribes should be informed at the earliest opportunity in this stage of the process.

[NOTE: Deleted text was moved up to 5.4(C)]

C. Record of Consultation. On completion of the consultation period, the head of the DOI bureau/office or their designee must prepare and transmit to the Tribe (or for national and regional consultations or if otherwise appropriate, publish on the website) documentation in a record of consultation that describes:

- (2) A summary of Tribal input received;
- (3) An explanation of how that Tribal input was addressed;
- (4) The reasoning for any instance in which Tribal suggestions were not incorporated into the DOI action or consensus could not be attained.

D. Implementation of Final Federal Action Stage. Bureaus/offices may consider implementing a post-consultation review process that invites Tribal feedback or considers the need for training or technical assistance concerning the final Federal action. The post-consultation review process shall not limit DOI's deliberative process privilege regarding internal considerations or any other applicable privilege.

E. Consultation Summary Report. Upon completion of the consultation, bureaus/offices must prepare a summary of the consultation activities. Information from the summaries should be used to develop the Annual Report described in 512 DM 4.8.

F.

G. [NOTE: Deleted text replaced with STAC in 512 DM 4].

**DRAFT FOR TRIBAL CONSULTATION**

**FIGURE 1: CONSENSUS-SEEKING MODEL**

**Figure 1: Consensus-Seeking Model Showing Need for Tribal Consensus in Relation to Agency Action Impact**

