

# INDIAN AFFAIRS MANUAL

- 1.1 Purpose.** This chapter establishes the policy and responsibilities for Indian Affairs' (IA) Tribal consultation process. Consultation is warranted if an agency action will have a substantial direct effect on one or more Indian Tribes; the relationship between the Federal Government and Indian Tribes; or the distribution of power and responsibilities between the Federal Government and Indian Tribes. The IA Office of Regulatory Affairs & Collaborative Action (RACA) manages IA's regulatory-related consultation process, including providing guidance and technical assistance.
- 1.2 Scope.** This policy applies to all programs and offices under the authority of the Assistant Secretary – Indian Affairs (AS-IA), including offices reporting to the AS-IA, the Bureau of Indian Affairs (BIA), the Bureau of Indian Education (BIE), and the Bureau of Trust Funds Administration (BTFA).
- 1.3 Policy.** It is IA's policy to facilitate meaningful consultation with Tribes in order to: ensure Tribal impacts and concerns are heard and respected as part of IA's commitment to honoring its nation-to-nation relationship with Tribes; acknowledge the United States' treaty and trust responsibilities to Tribal Nations; and facilitate compliance with all applicable laws and regulations as well as with Department of the Interior (DOI) policies and procedures regarding Tribal consultation.
- 1.4 Authority.**
- A. Statutes and Regulations.**
- 1) 36 CFR Part 61, Procedures for State, Tribal, and Local Government Historic Preservation Programs
  - 2) 16 U.S.C. §§ 470aa–470mm, Archaeological Resources Protection Act (ARPA), as amended
  - 3) 25 U.S.C. Chapter 32, Native American Graves Protection and Repatriation Act (NAGPRA), as amended
  - 4) 29 U.S.C. § 794 (d), Section 508 of the Rehabilitation Act of 1973, as amended
  - 5) 42 U.S.C. § 1996, American Indian Religious Freedom Act, as amended
  - 6) 42 U.S.C. § 4321 et seq., National Environmental Policy Act (NEPA), as amended
  - 7) 54 U.S.C. § 300101 et seq., National Historic Preservation Act of 1966, as amended

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## **B. Guidance.**

- 1) 110 Departmental Manual (DM) 8, Office of the Assistant Secretary – Indian Affairs
- 2) 512 DM 2 – 7, American Indian and Alaska Native Programs
- 3) Executive Order (EO) 13175, Consultation and Coordination with Indian Tribal Governments, November 6, 2000
- 4) Presidential Memorandum: Tribal Consultation, November 5, 2009
- 5) Presidential Memorandum: Tribal Consultation and Strengthening Nation-to-Nation Relationships, January 26, 2021
- 6) Presidential Memorandum: Uniform Standards for Tribal Consultation, November 30, 2022
- 7) 1 IAM 1: Indian Affairs Directives System - General
- 8) 18 IAM 1: Overview [Office of Regulatory Affairs and Collaborative Action (RACA)]
- 9) Standard Operating Procedure for Consultation with the Native Hawaiian Community, DOI's Office of Native Hawaiian Relations, 2020<sup>1</sup>
- 10) Best Practices in Federal Consultation Guidebook, June 2022<sup>2</sup>

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<sup>1</sup> Additional information regarding consultation with the Native Hawaiian Community can be found on DOI's Office of Native Hawaiian Relations webpage here: <https://www.doi.gov/hawaiian/consultation>.

<sup>2</sup> Additional resources are located on IA's Tribal Consultation Resources webpage here: <https://www.bia.gov/service/tribal-consultations/resources>.

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### 1.5 Responsibilities.

**A. AS-IA is responsible for:**

- 1) ensuring that IA has adequate resources to implement and comply with federal and Departmental policies, procedures, and requirements as it relates to Tribal consultations;
- 2) ensuring IA follows this policy for consistency on how its bureaus and offices initiate, provide notice, conduct, record, and report back to Tribal Nations on their Tribal consultations;
- 3) improving agencies' understanding of Tribal Nations' unique needs through Tribal consultation and meaningful partnerships; and
- 4) submitting the consolidated Tribal Consultation Report on behalf of IA to the Department on an annual basis.

**B. IA Deputy Assistant Secretaries and Directors, BIA, BIE, and BTFA are responsible for:**

- 1) determining if Tribal consultation is appropriate;
- 2) responding to Tribal government requests for consultation within a reasonable time;
- 3) facilitating formal government-to-government dialogue between IA and Tribal Nations, as needed and as appropriate;
- 4) ensuring consultation occurs early in the process (i.e., as soon as realistically possible once IA identifies a project, approach, or regulation that may potentially impact Tribal lands, people, programs, or rights);
- 5) ensuring sessions include both IA and Tribal officials with decision-making authority;
- 6) ensuring that information designated as sensitive by a Tribal Nation is not publicly disclosed;
- 7) striving to make the consultation process efficient and not overburdensome by considering joint agency consultation on matters where agencies need to consult on same or similar issues;
- 8) giving Tribal Nations ample time in the process to provide meaningful feedback; and
- 9) listening to Tribal views and considering their input on how the proposed action may impact Tribal rights or interests, and striving for consensus.

**C. Director, RACA is responsible for:**

- 1) managing the IA Tribal consultation process overall as it relates to regulatory efforts to include a notice in the Federal Register;

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- 2) assisting with Departmental and external consultation efforts as appropriate and as resources allow through the notification process, such as the Dear Tribal Leader Letter (DTLL) or other means of notification;
- 3) maintaining the IA Consultation webpage and internal SharePoint Consultation sites, including the schedule of upcoming IA consultations;
- 4) collecting DOI bureau and office Tribal consultation statistics and information on an annual basis, and consolidating, preparing, and submitting the consolidated annual Tribal Consultation Report by December 31 each year in accordance with 512 DM 4.9;
- 5) assisting with the development and updating of a Tribal consultation training course, as required by Presidential Memorandum: Uniform Standards for Tribal Consultation, November 30, 2022;
- 6) providing technical assistance as needed regarding the training; and
- 7) maintaining a secure method of record keeping to accurately capture and reflect IA's Tribal consultation sessions.

**D. Office of RACA staff are responsible for:**

- 1) assisting with the coordination of information within the DTLL;
- 2) scheduling virtual<sup>3</sup> sessions using the Federal Government's approved platform and securing a closed captioner for those who may be hearing impaired;
- 3) providing information on past venues for in-person sessions and court reporters that the program office may contact to secure their services in planning for the sessions;
- 4) reviewing materials for compliance with plain language;
- 5) ensuring that all materials are posted on the appropriate consultation-related webpage(s) in a timely manner and that they are compliant with Section 508 of the Rehabilitation Act, including the DTLL;
- 6) ensuring program staff are available to facilitate the sessions and assist with the development of the run-of-show and agenda; and
- 7) maintaining a secure method of record keeping to accurately capture and reflect IA's Tribal consultation sessions.

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<sup>3</sup> Virtual consultations can be a cost-effective way to allow a Tribal official or representative to participate who may not have the resources to travel to an in-person session.

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- E. IA Offices** involved in the consultation topic/functional area are responsible for:
- 1) working with RACA to identify the proper participants, other possible agencies, and the necessary or key federal decision-makers that should be involved in the consultation;
  - 2) preparing the necessary information and materials to provide appropriate information on the subject of the consultation, including: a proposed agenda, PowerPoint slides, framing paper, and/or other relevant documents to assist in the consultation process, as needed;
  - 3) determining and utilizing a method of record keeping in order to accurately capture and reflect comments received (e.g., using a court reporter to produce a transcript of the consultation);
  - 4) taking measures to protect the confidentiality of any sensitive information provided during the consultation per Tribal request, and to the fullest extent permitted by the Freedom of Information Act (FOIA) and other applicable laws; and
  - 5) covering all expenses associated with the Tribal consultation to include, but not limited to, the in-person venue, audio/video costs, transcript (i.e., court reporter), handouts, and other related expenses.
- F. Office of the Solicitor (SOL)**, to include Field Solicitors as appropriate, is responsible for reviewing consultation materials to determine whether the documents are legally proper and complete.

### 1.6 Definitions.

- A. Consultation** is a formal government-to-government dialogue between the Federal Government and Tribal Nations. Consultation recognizes Tribal sovereignty and the nation-to-nation relationship between the United States and Tribal Nations. Consultation requires that information obtained from Tribes be given meaningful consideration, and federal agencies should strive for consensus with Tribes, or a mutually desired outcome. Further, consultation should include both federal and Tribal officials with decision-making authority regarding the proposed approach or action that has Tribal implications.
- B. Listening session** is a less formal meeting where a Federal Government agency(s) can gather input and feedback from Tribal representatives and Tribal community members. Listening sessions are informative and can be helpful leading up to a consultation. However, they do not qualify as formal government-to-government Tribal consultation.

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- C. Public hearing** is a formal event where a Federal Government agency(s) presents information and solicits feedback from the general public. These meetings are open to all and are often part of a broader process. While Tribal representatives can elect to participate in these public hearings, these also do not qualify as formal government-to-government Tribal consultation.
- D. Tribal official** means an elected Tribal leader or their designee.
- E. Tribal representative** means an elected Tribal leader, their designee, or other Tribal government staff.

## 1.7 Standards, Requirements, and Procedures.

### A. Standards and Requirements.

- 1) All IA programs and offices must work through RACA to develop and/or update IA regulations. RACA is therefore the IA office responsible for facilitating Tribal consultations related to regulatory matters (see also 110 DM 8).
- 2) For consultations related to non-regulatory matters, RACA should be included to ensure consultation session information is posted on the IA Consultation webpage.<sup>4</sup> RACA will assist with other types of consultations and with providing guidance and technical assistance to Departmental and external parties, as appropriate and as resources allow.
- 3) The key defining features of a Tribal consultation include:
  - Formal notice must be provided to Tribes at least 30 calendar days in advance of the first scheduled consultation session and should contain sufficient detail of the topic to be discussed to allow Tribal officials an opportunity to fully engage in the consultation with date, time, and location of the consultation.
  - If exceptional circumstances prevent notification within 30 calendar days, an explanation for the abbreviated notification will be provided in the invitation letter in accordance with 512 DM 5.
  - The Federal Government should discuss federal proposals *before* the federal agency makes decisions on those proposals.

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<sup>4</sup> The IA Consultation webpage serves as the single location for Tribes to access all IA consultation-related information.

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- There should be Federal Government decision-maker participation.
  - Discussion (i.e., “consultation”) should occur between Tribal officials and federal decision-makers.
  - Consultation is usually done in a group setting, to include all Tribes, unless the specific issue to be consulted on is specific to an individual Tribe. In those cases, a consultation session(s) may be held with an individual Tribe(s).
  - A formal record of the proceedings (i.e., a court reporter transcript or recording).
  - A federal response to Tribal officials documenting how Tribal input was incorporated into the final Federal Government’s decision.
- 4) Given the advance notice requirement noted above in 3), programs/offices should start the formal announcement, such as the DTLL, early enough to allow time for reviews, surnaming, and posting of the letter on the BIA consultation schedule [webpage](#) in advance of sending the letter to Tribal Nations<sup>5</sup>. RACA should therefore be included early in the DTLL development and surnaming process so it can complete its compliance review and webpage posting as soon as possible.
  - 5) IA does not consult on operational (internal) policy, such as that contained in IA’s Directives System (see also 1 IAM 1: Indian Affairs Directives System – General). Any potential exceptions must be discussed with RACA in advance.
  - 6) Upon completion of the Tribal consultation and written comment period, IA is required to provide to the affected Tribe(s) the record of the consultation and decisions made as a result of the consultation; this is done through the creation of a Consultation Summary Report which is posted on the BIA.gov webpage. See also 512 DM 5.
  - 7) Additional guidance and information related to the Tribal Consultation process can be found online here: <https://www.bia.gov/service/tribal-consultations>. DOI employees can also find more specific information on RACA’s Consultation SharePoint site here: [https://doimspp.sharepoint.com/sites/doi-bia-Raca\\_Consultation](https://doimspp.sharepoint.com/sites/doi-bia-Raca_Consultation).

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<sup>5</sup> DTLLs are usually sent to Tribal Nations via email from the BIA’s Field Operations office or the BIA regional office.

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**B. Procedures.** Detailed guidance on the Tribal consultation process can be found in RACA’s “Best Practices in Federal Consultation” and “Department Guideline on Consultation/Listening Sessions”, both of which are located on the RACA SharePoint site mentioned above.

## Approval



December 26, 2024

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Date