

## Department of the Interior Departmental Manual

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**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

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### 512 DM 4

4.1 **Purpose.** This chapter provides the requirements for the Department of the Interior (Department) government-to-government consultation between Tribal officials and Department officials. It expands and clarifies Departmental policy on consultation with Tribes and acknowledges the provisions for conducting consultation in compliance with Executive Order (EO) 13175 (Consultation and Coordination with Indian Tribal Governments); applicable statutes, which include, but are not limited to, the National Historic Preservation Act, Native American Graves Protection and Repatriation Act, and National Environmental Policy Act; and administrative actions. See 512 DM 6 and 7 for Department of the Interior Consultation Policy with Alaska Native Claims Settlement Act Corporations and 513 DM 1 and 2 for Department of the Interior Consultation Policy with the Native Hawaiian Community.

4.2 **Scope.** The policy and requirements in this chapter apply to all Department Bureaus and Offices. The chapter 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 (Secretary) acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 5131.

B. Departmental Action with Tribal Implications. Any Departmental regulation, rulemaking, policy, guidance, legislative proposal, plan, programmatic or operational activity, or

grant or funding formula<sup>1</sup> changes that may have a substantial direct effect on a Tribe in matters including, but not limited to:

- (1) Tribal cultural practices; lands; treaty rights; resources; ancestral lands; sacred sites, including sites that are submerged; and lands Tribes were removed from, or access to traditional areas of cultural or religious importance on Federally managed lands and waters;
- (2) The ability of a Tribe to govern or provide services to its members;
- (3) A Tribe's formal relationship with the Department, be it nation-to-nation or beneficiary-to-trustee; or
- (4) Any action planned by a non-federal entity that involves funding, approval, or other final agency action provided by the Department, unless the Tribe is a party to the action. Substantial direct effects on Tribes may include, but are not limited to, effects as shown in the Consensus-Seeking Model (Figure 1).

C. Formal Government-to-Government Consultation. Formal government-to-government consultation is a process based on a bilateral recognition of sovereignty and is generally focused on a given issue or set of issues, including compliance with a variety of statutes, policies and administrative actions that direct the Federal government to consult with Indian Tribes. Consultations are defined as having both Department and Tribal officials with decision-making authorities present at the government-to-government consultation session(s)/ meeting(s) regarding the proposed Departmental Action with Tribal Implications.

D. Tribal Governance Officer (TGO). An individual designated by the Department 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.

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

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<sup>1</sup> Advice from the Office of the Solicitor is not a regulation, rulemaking, policy, guidance, legislative proposal, grant funding formula change, or operational activity with any direct effect on a party outside the Department, but rather an internal legal opinion. *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgt.*, CV 17-8587-GW(ASX), 2019 WL 2635587, at \*12 (C.D. Cal. June 20, 2019). Such advice is also protected from disclosure under the attorney-client privilege, even as to the beneficiary of the trust. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011). Any such advice, therefore, is not within the scope of this Chapter. Furthermore, matters that are in litigation or in settlement negotiations, or matters for which a court order limits the Department's discretion to engage in consultation are also outside the scope of this Chapter.

4.4 **Policy.** It is the policy of the Department to recognize and fulfill its legal obligations to identify, protect, and conserve Tribal trust resources; carry out its trust relationship with Federally recognized Tribes and Tribal members; and invite Tribes to consult on a government-to-government basis whenever there is a Departmental Action 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 the Department 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 the Department's consultation efforts to ensure effective government-to-government relationships with Tribes.
- (3) Overseeing the Department's compliance with the policy in this chapter, EO 13175, and other consultation requirements pertaining to government-to-government consultation.
- (4) Implementing a Department 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:

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(1) Serving as the Bureau or Office principal point of contact for Tribal consultation matters.

(2) Promoting and facilitating consultation and collaboration between Tribes and their Bureau or Office.

(3) Reporting to the TGO annually in the Tribal Consultation Annual Report of newly engaged national or regional consultations with Tribes and any updates to their Bureau or Office consultation procedures or processes.

E. Department Staff. Any Department staff who will represent the Department or a Bureau or Office in consultation (other than note-takers) should 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 Tribes;

(2) The treaty rights of Tribes;

(3) The Federal trust obligation owed to American Indians (both individuals and Tribes) and Alaska Natives;

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

(5) Existing consultation policies of the Tribe(s), as well as Tribal government structures, and decision-making processes.

F. Department of the Interior University (DOIU). The DOIU in collaboration with Bureaus and 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.

4.6 **Consensus-Seeking Model.** The basis of consultation is rooted in meaningful dialogue where the viewpoints of Tribes and the Department, 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 Tribal self-government and sovereignty, honor Tribal treaty and other rights, and to 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. (The Consensus Seeking model is Figure 1.)

4.7. **Secretary's Tribal Advisory Committee (STAC).** The Secretary established, by charter, the 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 Department programs, including those that arise explicitly or implicitly under treaty, statute, regulation, or executive order. The duties of the STAC are to:

- A. Identify evolving issues and barriers to access, coverage, and delivery of services related to Department programs to American Indians and Alaska Natives;
- B. Identify evolving issues relating to trust assets; lands, waters, and treaty/subsistence resources; cultural resources; and governmental interests of Federally recognized Indian Tribes;
- C. Propose clarifications and other recommendations and solutions to address issues raised at Tribal, regional, and national levels;
- D. Serve as a forum for Tribes and the Department to discuss these issues and proposals for changes to Department regulations, policies, and procedures;
- E. Identify priorities and provide advice on appropriate strategies for Tribal consultation on issues at the Tribal, regional, and, or national levels;
- F. Ensure that pertinent concerns are brought to the attention of Tribes in a timely manner, so that timely Tribal feedback can be obtained; and
- G. Coordinate with Department Regional Offices on Tribal consultation initiatives.

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

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**4.9 Tribal Consultation Annual Report.** On an annual basis, Bureaus and Offices shall develop a report of the results of their consultations with 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 or Office may also include consultation efforts conducted one-on-one with Tribes to highlight successes, challenges, or best practices, and when appropriate, ANCSA Corporations (See 512 DM 6) and the Native Hawaiian Community (see 513 DM 2). The report should also include the outcome proposed plans and recommendations. (The format for the report is provided in the attached Appendix.)

**4.10 Flexibility for Tribal Waivers.** For all statutory or regulatory requirements applicable to Tribes that are subject to Department discretion and waiver, each Bureau and 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 or Office shall provide the Tribal applicant with timely written notice of the decision and the reasons.

## Appendix: Department of the Interior Tribal Consultation Annual Report

The annual report is a summary of all Bureau or Office formal consultations that were conducted on a nationwide or regional basis during one fiscal year. Additionally, Bureaus and Offices may report on any consultation efforts conducted one-on-one with Tribes to highlight consultation successes, challenges, or best practices. The information in the Annual Report is a summary of, and should be compiled from, all the information captured during the fiscal year. Public meetings should not be included in the reporting information. Additionally, any information deemed sensitive or confidential by a Tribe should not be included in the Annual Report. (Use as much space as needed and include the Bureau or Office name on each page.)

Bureau/Office:

1. Summarize and list all consultation topics.
2. List all Tribes consulted.
3. List the location of each consultation by city and state or indicate if consultation was held virtually.
4. Summarize outcomes (e.g., decisions made, actions planned or taken, and how Tribal input was incorporated).
5. Summarize successes and recommendations for improvements to the consultation process. Bureaus and Offices should get permission from the Tribe before including any information on successes, in the annual report.

Prepared By:

Date Prepared:

Approving Official:

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**Figure 1: Consensus-Seeking Model Showing Increasing Dedicated Efforts for Tribal Consensus in Relation to Agency Action Impact:** This model is intended to apply to every Departmental Action with Tribal Implications, whether on Indian land or not, and the full range of impacts from such actions. The Department recognizes that the importance of any particular action or impact to Tribes will vary from case-to-case but affirms that its goal is to achieve consensus wherever possible. In instances where greater degree of consensus is indicated on the model, agencies and offices may need to begin consultation earlier in the planning process, provide additional opportunities for consultation, conduct additional targeted outreach to Tribes, and, where possible, provide longer timeframes for actions that impact Tribal interests.

