

Department of the Interior Departmental Manual

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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 (Department) formal government-to-government consultation between appropriate Tribal officials and Department officials. This chapter incorporates the definitions from 512 DM 4.

5.2 **Scope.** All Department 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/Offices must invite Indian Tribes early in the planning process to consult whenever a Departmental plan or action with Tribal Implications arises. Bureaus/Offices should operate under the assumption that all actions with land or resource use or resource impacts may have Tribal implications and should extend consultation invitations accordingly. Bureaus/Offices should also be aware that Tribes continue to have a connection and interest in their traditional homelands but may have been removed from those lands or may have reservations that are significantly reduced from their traditional homelands. Bureaus/Offices must consult with Tribes when Departmental Actions with Tribal Implications affect Tribe's traditional homelands.

B. Appropriate Representatives at Consultation.

(1) The Department official with authority to decide on the proposed Departmental Action with Tribal Implications must participate in the consultation.

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

(3) Bureau or Office staff with subject matter expertise for the topic or program may be involved in the consultation.

C. Coordination. Bureaus/Offices will work with each other and with other Federal agencies, where appropriate, to coordinate consultation, and coordinated consultations will adhere to 512 DM 4.

D. Facilitation Support. In planning consultation, Bureaus/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). If 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/Offices must be open and candid with Tribal governments during consultations and incorporate Tribal views and knowledge in their decision-making processes. The consultations, whether initiated by the Tribe or the Department, must be respectful of Tribal sovereignty. The goal in consultation is to have Tribal leaders and Federal representatives engage in respectful dialog based on mutual understanding of the issues to reach a common agreement pursuant to the principles laid out in paragraph G.

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. Seeking Consensus. Consistent with the 512 DM 4, Bureaus and Offices should abide by the Consensus-Seeking Model (Figure 1 in 512 DM 4) 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 Departmental Action with Tribal Implications closer to the center necessitate increasingly dedicated efforts by Department officials to achieve consensus and should, 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 Department 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.

(1) **Dispute Resolution.** Where consensus cannot be reached for areas outlined in the consensus model, the head of the Bureau/Office will review the consultation information and consensus-seeking documentation and determine how to proceed. The Secretary's Tribal Advisory Committee described in 512 DM 4.7 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, and must identify the session as consultation in advance of the scheduled meeting. Consultation session methods may be expanded upon through subsequent correspondence after consultation is initiated through written notification. The Department 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 Departmental offices) to one or more Tribes of a Departmental action as a stand-alone effort is not consultation.

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 Department officials within a Bureau/Office will provide notice to Tribes inviting them to consult as early as possible when considering a Departmental Action with Tribal Implications and will provide Tribes a meaningful opportunity to participate in the consultation process. Providing notification (the distribution of information from one or more Departmental offices) to one or more Tribes of a Departmental action as a stand-alone effort is not consultation. (The appropriate Department 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 to consult and, if so, provide an opportunity to fully engage in consultation. Adequate notice entails providing:

- (a) A description of the topic(s) to be discussed;
- (b) The scope of the proposed Departmental action under consideration;
- (c) The purpose of the Departmental action under consideration;

(d) A timeline of the process, and possible outcomes of the Departmental action under consideration; and

(e) Department Bureaus and Offices that will participate in the consultation and the development and implementation of the Departmental action under consideration.

(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 announces 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 calendar days, an explanation for the abbreviated notification will be provided in the invitation letter.

(5) If the notice announces the opportunity to consult, without a scheduled Tribal consultation session, the notice should give the Tribal leaders at least 30 calendar days (preferably 45 calendar days) to request consultation before Department action planning proceeds.

(a) A Tribe may request that the Department provide an extension of more than 30 days' notice to consider whether to request consultation and, at its discretion, the Department may grant such requests.

(b) 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 a Tribe to join an ongoing consultation. These efforts of engagement shall be appropriately documented.

(6) A Tribe may request that the Department initiate consultation when the Tribe believes that a Bureau/Office is considering a Departmental 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 the Department has received the request, using the most expedient methods to communicate (e.g., by email in addition to U.S. Mail).

(a) 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 Tribes and is

consistent with both Tribal and Bureau/Office schedules and allows for Tribal input in determining if there is substantial and direct effect to the Tribe. 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 Tribes regarding the process timeline to consult on a Departmental Action with Tribal Implications. Bureaus/Offices should work with Tribes to structure a process, to the extent practicable, that considers specific Tribal structures, traditional needs, and schedules of the Tribes. Bureaus/Offices may proceed with the expectation that interested Tribes will respond within a reasonable time period, and only after documenting attempts to follow up on consultation letters thorough multiple forms (e.g., letters, emails, etc.).

(2) When the matter under consultation involves confidential or culturally sensitive information, the Bureau/Office will work with the Tribe to develop a consultation process that addresses the sensitivity of the information to the extent permitted by Federal law.

(3) 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 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 Tribes should be informed at the earliest opportunity in this stage of the process.

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

- (1) A summary of Tribal input received;
- (2) An explanation of how that Tribal input was addressed;

(3) The reasoning for any instance in which Tribal suggestions were not incorporated into the Departmental 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 the Department'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.