

Compilation of Comments Received on Updates to Consultation Policy 512 DM 6 and 7

NOVEMBER 2022

Introduction

On August 15, 2022, Interior distributed a letter inviting Alaska Native Claims Settlement Act Corporations (ANCSA Corporations) to consult on the draft updates to 512 DM 6 and 512 DM 7. On September 15th and 16th, two consultation sessions were held on the draft updates. Approximately, 22 ANC representatives attended the consultation sessions, and Interior received 8 comment letters. What follows is a summary of the comments received. Also included is information on how comments were used to inform revisions to 512 DM 6 and 512 DM 7. Additionally, based on input received during the December 2021 consultation, four new Departmental Manual chapters were developed to outline the Department's consultation policy and procedures for consultation with federally recognized Indian Tribes (512 DM 4 and 512 DM 5), ANCSA Corporations, and the Native Hawaiian Community (513 DM 1 and 513 DM 2).

Summary of Comments

Scope:

One ANC commented that 512 DM 6.2 should be updated to include “Departmental officials shall give due consideration to the rights of sovereignty and self-government of federally recognized Indian Tribes and to the unique legal status, and rights of self-determination, of Alaska Native Corporations.”

512 DM 6.2 is updated to reflect the language recommended by the ANC.

ANCs expressed concerns with DOI's proposed additions to the policy's statement of the “Scope” of the policy in 512 DM 6.2. “To the extent that concerns expressed by Indian tribes and ANCSA Corporations substantively differ, Departmental officials shall give due consideration to the rights of sovereignty and self-government of federally recognized Indian tribes.” They expressed that this language does not necessarily respect the interests of ANCSA Corporations and could significantly and adversely impact ANCSA Corporations' ability to fulfill the purposes for which we were established under ANCSA -- to protect and advance the economic, social, and cultural interests of shareholders.

*512 DM 6.2 has been updated to include language that reflects the legal status and rights of ANCSA Corporations. The last two sentences of the “Scope” section are:
“Departmental officials shall give due consideration to the rights of sovereignty and self-government of federally recognized Indian Tribes, and to the unique legal status and rights of ANCSA Corporations. Department officials shall also be mindful that ANCSA hold title to lands conveyed pursuant to ANCSA and related legislation.*

ANCs expressed that under Public Law No. 108-199, as amended by Public Law No. 108-477, Federal agencies are to consult with ANCSA Corporations “on the same basis” as Indian tribes under Executive Order No. 13175.” They also suggested that it is clear that Congress and OMB in no way stated or implied that concerns or issues raised in consultation by Indian tribes should prevail or take precedence over concerns or issues raised by ANCSA Corporations.

*512 DM 6.2 has been updated to include language that reflects the legal status and rights of ANCSA Corporations. The last two sentences of the “Scope” section are:
“Departmental officials shall give due consideration to the rights of sovereignty and self-government of federally recognized Indian Tribes, and to the unique legal status and rights of ANCSA Corporations. Department officials shall also be mindful that ANCSA Corporations hold title to lands conveyed pursuant to ANCSA and related legislation.*

ANCs expressed that the proposed language in DM 6.2 may be used to deny ANCSA Corporations the right to consult or participate in various Federal programs and processes—based on the unsubstantiated argument that ANCSA Corporations participation in federal programs and consultations somehow impacts the sovereignty of federally recognized tribes.

*512 DM 6.2 has been updated to include language that reflects the legal status and rights of ANCSA Corporations. The last two sentences of the “Scope” section are:
“Departmental officials shall give due consideration to the rights of sovereignty and self-government of federally recognized Indian Tribes, and to the unique legal status and rights of ANCSA Corporations. Department officials shall also be mindful that ANCSA Corporations hold title to lands conveyed pursuant to ANCSA and related legislation.*

Section 6.2: The addition of the last sentence appears to be a violation of the federal statute mandating that “all Federal agencies consult with Alaska Native Corporations on the same basis as Indian Tribes under Executive Order No. 13175,” because it sets out a consultation process with ANCs that is on a different basis, rather than on the same basis, as the consultation process with Indian Tribes.

*512 DM 6.2 has been updated to include language that reflects the legal status and rights of ANCSA Corporations. The last two sentences of the “Scope” section are:
“Departmental officials shall give due consideration to the rights of sovereignty and self-government of federally recognized Indian Tribes, and to the unique legal status and rights of Alaska Native Corporations. Department officials shall also be mindful that ANCSA Corporations hold title to lands conveyed pursuant to ANCSA and related legislation.*

Definitions:

One ANC recommended that DOI delete the term “good-faith” from 512 DM 6.4 . The ANC commented that the term is undefined in the Departmental Manual and could be misinterpreted by offices and bureaus.

The term “good-faith” is included in the chapter as part of the policy indicating to Department staff that should carry out all consultations in an honest and straightforward manner. The term also appears in 512 DM 4, and is a plain-meaning, common term that needs no definition.

ANCSA Corporations noted that 515 DM 6.3.D [512 DM 6.3.D] defines the term “Formal Consultation,” but the term is not found in the chapter outside of this definition. They stated that it is unclear why a term would be defined but not used in the policy guidance, or if DOI is intentionally distinguishing between “formal consultation” and some lesser, undefined form of consultation. Additionally, ANCSA Corporations commented that the updated policy should make clear that formal consultation is limited to Department officials (including appropriate DOI bureau, service, or office) and ANCSA Corporation representatives (including outside counsel or consultants that an ANCSA Corporation may wish to include). They also commented that the policy should specify that formal consultation may not involve representatives of other entities, organizations, or stakeholders.

The term “formal consultation” is defined to indicate the formal process of consultation between DOI and ANCSA Corporations and to distinguish between other forms of communication and meetings that may take place in the course of DOI’s work with an ANCSA Corporation. Language was added to 512 DM 6.3(D) to indicate that ANCSA Corporations’ representatives can participate in formal consultations if designated by the corporation as a representative. Language was also added to indicate that other entities, organizations, or stakeholders should not participate in formal consultation unless agreed upon by the ANCSA Corporation and DOI.

ANCSA Corporations commented that 5.4(B) should be revised to include: (3) Any third party organization may participate only with the consent of the DOI and all ANCSA Corporation participants

Language was added to 512 DM 6.3(D) to indicate that other entities, organizations, or stakeholders should not participate in formal consultation unless agreed upon by the ANCSA Corporation and DOI.

One ANCSA Corporation commented that in Section 6.1 and 6.3 the deletion of the term “government-to-government” appears to be a violation of the federal statute mandating that “all Federal agencies consult with Alaska Native Corporations on the same basis as Indian Tribes under Executive Order No. 13175,” because it sets out a consultation process with ANCs that is on a different basis, rather than on the same basis, as the consultation process with Indian Tribes.

Response: The relationship between Indian Tribes and Alaska Native Villages and the United States is between the sovereign Tribal and Village governments and the sovereign government of the United States. The relationship between ANCSA Corporations and the United States, as defined by statutes including those cited by the commenters, is not on the same basis because ANCSA Corporations are not sovereign governments and created through federal statutes.

One ANC commented that the terms “Village Corporation,” “Urban Corporation,” and “Regional Corporation” are defined terms, found at 43 U.S.C. 1602. We recommend capitalizing each term, consistent with ANCSA, and adding “Group Corporation” to the list.

Terms have been updated and “Group Corporation” is added to the definition at 512 DM 6.3(A).

Definition of Departmental Action with ANCSA Corporation Implications:

One ANCSA Corporation commented that section 6.3 defines “Departmental Action with ANCSA Corporation Implications” to include “[a]ny Departmental regulation, rulemaking, policy, guidance, legislative proposal, grant funding formula changes, or operational activity that may have a substantial direct effect on an ANCSA Corporation...” but specifically excludes “matters that are in litigation or settlement negotiations, or matters for which a court order limits the Department’s discretion to engage in consultation.” No such language or provision is found in the draft policy for Tribal consultation’s definition of Departmental Actions with Tribal Implications.

Response: This limitation is also found in 512 DM 4 for Tribal consultation.

ANCSA Corporations commented that the examples in 512 DM 6.3 1 and 2 of the definition of Departmental Action with ANCSA Corporation Implications are not the only instances when ANCs should be consulted. They recommended revising the language to state “Any Departmental regulation, rulemaking, policy, guidance, legislative proposal, grant funding formula changes, or operational activity that may have a substantial direct effect on an ANCSA Corporation, including, but not limited to...”

512 DM 6.3(C) has been updated to add “but not limited to”.

One ANCSA Corporation commented that there must be a presumption that if an ANCSA Corporation asserts that a particular Departmental Action would have a substantial direct effect on it, that this is the case and DOI must engage it in consultation on the Action.

Language added to 517 DM 7.4(A) Requirements for Consultation to indicate that when an ANCSA Corporation indicates that there is substantial and direct effect DOI must engage in consultation.

One ANCSA Corporation commented that the Department should broaden the definition to include actions that may have a direct effect on the ability of Alaska Native Settlement Act Corporations and their shareholders to access and use ANCSA lands, water areas or resources (including federal land management planning and regulatory and policy decisions that could result in restricting or blocking access to or use of ANCSA lands and resources) and Department actions that could impact the ability of the Alaska Native people to maintain their traditional way of life and subsistence practices on ANCSA lands or water areas or on adjacent federal lands.

Language added to 512 DM 6.3(C) to include shareholder access and traditional and subsistence practices to the definition of a Departmental Action with ANCSA Corporation Implications.

Additionally, an ANCSA Corporation commented that the Department should list, among the activities that may have a substantial direct effect on Alaska Native Corporations, the development and implementation of Department policies and regulations that could impact the ability of Alaska Native Corporations to fulfill the purposes for which they were established under ANCSA—namely, to protect and advance the economic, social, and cultural interests of the Alaska Native people.

Language added to 512 DM 6.3(C) to include effects on the ability of ANCSA Corporations to fulfill the purposes for which they were established under ANCSA.

Roles and Responsibilities:

One ANCSA Corporation commented that the role and responsibilities of the Tribal Governance Officer (TGO) have been removed from the draft ANCSA Corporation Consultation Policy. The Corporation commented that the manner in which the language has been removed also seems problematic. It noted that when the Department shares a “redline” of a policy document—as is the case here—the entities with whom it is consulting should be able to trust the accuracy of that document. In the draft redline, the position of “Tribal Governance Officer” was removed without explanation. The ANC recommended that the Department post additional information detailing and discussing any differences between the Department’s proposed consultation policy and procedures for ANCSA Corporations and the Department’s proposed policy and procedures for Tribal Governments.

The Tribal Governance Office role was inadvertently left out of the original redline draft that was shared for consultation. DOI appreciates the ANC raising this issue. The TGO role has inserted at 512 DM 6.5(A). 512 DM 4, 512 DM 5, 512 DM 6, and 512 DM 7 are available online for comparison.

Consultation Notice:

ANCSA Corporations commented that DOI should seek to initiate consultations with Corporations in a manner that appropriately reflects the formality and respect due to ANCs as the representatives of their Alaska Native shareholders.

Language was added at 512 DM 7(A)(1) to state that the consultation process should be carried out in a manner that respects the role of ANCs and representatives of Alaska Native shareholders.

One ANCSA Corporation recommended that DOI include the following language at the end of the sentence in § 5.4.E [7.4.E] of 512 DM 7: “must be respectful of the unique interests, roles, and responsibility of ANCSA Corporations.”

Suggested language added at 512 DM 7.4(E).

ANCSA Corporations commented that language should be added to the Departmental Manual clarifying that the responsibility lies with DOI to affirmatively engage ANCSA Corporations at appropriate junctures during the development of a proposed action or rulemaking to ensure that ANCs’ views are heard on all aspects of a proposed federal action that might affect ANCs.

Language added to 512 DM 7.5 to indicate that it is DOI office and bureau responsibility to proactively engage ANCSA Corporations throughout the consultation process.

ANCSA Corporations also commented that in cases where an ANCSA Corporation affirmatively and proactively requests consultation, DOI and its bureaus should respond immediately, and consultations should be scheduled as soon as practicable.

Language was added to 512 DM 7.5(A)(6)(i) indicating that consultations should be scheduled as soon as practicable when an ANCSA Corporation initiates a consultation with DOI.

One ANCSA Corporation commented that because the “preliminary draft updates to Alaska Native Corporation consultation policy and procedures, 512 DM 6-7,” interpret and apply an important federal statute in a way that significantly impacts Alaska Native Corporations and our Alaska Native Shareholders, notice of those updates should have been provided in the Federal Register.

A proposed rule, or Notice of Proposed Rulemaking (NPRM), must be published in the Federal Register to notify the public and to give them an opportunity to submit comments. The Departmental Manual (DM) is not a proposed rule requiring publication in the Federal Register. 512 DM 7.5 (A)(2) was updated to indicate that DOI offices and bureaus should work with ANCSA Corporations to determine the preferred method of notice, which may include notice in the Federal Register.

One ANCSA Corporation commented that DOI should include in section 5.5.A [512 DM 7.5.A], or another appropriate place in the policy, language stating that DOI should collaborate with, or seek input from, relevant Regional ANCSA Corporations to help DOI officials identify the ANCSA Corporations that should be provided notice and invited to consult with regard to a particular DOI action.

The recommendation to reach out to Regional ANCSA Corporations can be included in DOI guidance and best practices.

One ANCSA Corporation commented that the proposed consultation procedures, 512 DM 5.5 [512 DM 7.5], intermittently refer to two different situations: (i) DOI providing notice and inviting consultation; and (ii) an ANCSA Corporation requesting consultation without an invitation from DOI. They noted that the updated policy should set forth procedures, including timing, for each of these situations in a way that is clear for both DOI staff and ANCSA Corporations. They suggested creating separate subsections with appropriate headings and applicable procedures.

512 DM 7.5(A) was updated to clarify that section 4 and 5 outline procedures for when DOI offices and bureaus initiate consultation, and that section 6 outlines procedures for when ANCSA Corporations initiate consultation. Language was added to 512 DM 7.5(A)(6) to indicate that when ANCSA Corporations initiate consultation, consultations should be scheduled as soon as practicable.

One ANCSA Corporation commented that 512 DM 5.5 [512 DM 7.5] should make it clear that DOI should accommodate ANCSA Corporations requests for expedited consultation.

512 DM 7.5(A)(6)(ii) was added to indicate that whenever an ANCSA Corporation requests an expedited consultations the Department will work with the ANCSA Corporation to schedule the consultation as soon as practicable and at a mutually agreeable time.

Early Consultation:

ANCSA Corporations commented that meaningful and collaborative consultation with ANCSA Corporations should occur early in a process (i.e. pre-scoping and pre-decisional), and appreciates the language in the draft which requires DOI bureaus and offices to invite ANC consultation “early in the planning process.” Additionally, ANCSA Corporations indicated that transparency will be needed around the consultation and planning process to ensure success.

512 DM 6.4 states that consultations will be transparent. DOI will reinforce the need for transparency in consultation guidance and trainings.

ANCSA Corporations commented that consultation should be an ongoing and iterative process between the relevant bureaus and offices and Corporations that fosters a collaborative dialogue and open exchange of information that leads to better federal decision-making on all aspects of a proposed federal action that could affect ANCSA Corporations.

512 DM 6.4 states that consultation is a robust and interactive process. DOI will reinforce the need for ongoing and iterative communication with ANCSA Corporations in consultation guidance and trainings.

ANCSA Corporations also commented that consultation should continue throughout the initial planning stage, the proposal development stage, and the implementation of final action stage.

The ANCSA Corporations recommended that DOI include language which clarifies that DOI's obligations to consult are ongoing throughout the duration of the federal action.

512 DM 6.4 states that consultation should occur early in the planning phase and throughout the decision-making process.

One ANCSA Corporation commented that the Departmental Procedure at Section 7.5.A(5)(i) allows an ANCSA Corporation to request that the Department provide an extension of more than 30 calendar days to consider whether to request consultation. They recommended that the final clause be replaced to state, "and such extension shall not be unreasonably withheld."

512 DM 7.5(A)(5)(i) has been updated to indicate that extensions shall not be unreasonably withheld.

Additionally, an ANCSA Corporation commented that the Departmental Procedure at Section 7.5.A(7), regarding Departmental response to an ANCSA Corporation request for consultation does not address the timing for a response by the Department. It commented that requests from an ANCSA Corporation should be met with a timely and expeditious response from the Department to schedule the requested consultation. It recommended that the paragraph could be amended to insert language so that it reads, "the Department will make a timely response and expeditiously work with the ANCSA Corporation to schedule the consultation at a mutually agreeable time."

512 DM 7.5(A)(6)(ii) was added to indicate that whenever an ANCSA Corporation requests an expedited consultations the Department will work with the ANCSA Corporation to schedule the consultation as soon as practicable and at a mutually agreeable time.

ANCSA Corporations commented that the proposed 512 DM 5.4.A [512 DM 7.4.A], addressing "Requirement for Consultation" is confusing. In addition, its discussion of the timing of consultation is not fully consistent with proposed 512 DM 5.5.A, which requires bureaus and offices to provide notice and invite ANCSA Corporations to consult "as early as possible when considering" a Departmental Action with ANCSA Corporation Implications. The ANC recommended that this section be redrafted to be consistent with proposed section 5.5.A [7.5.A] and provide for consultation "as early as possible." Additionally, they recommended 5.4.A [7.5.A] should reference Departmental Action with ANCSA Corporation Implications, defined in proposed 512 DM 6.3.C.

512 DM 7.4(A) has been updated to be consistent with 512 DM 7.5 and the reference to 512 DM 6.3(C) has been included as well.

One ANCSA Corporation commented that DOI add the following sentence to 512 DM 5.4(A) [512 DM 7.4 (A): If an ANCSA Corporation requests consultation, the Department and its agencies should respond immediately, and an initial consultation should be scheduled at the earliest time available.

512 DM 7.5(A)(6)(ii) was added to indicate that whenever an ANCSA Corporation requests an expedited consultation the Department will work with the ANCSA Corporation to schedule the consultation as soon as practicable and at a mutually agreeable time.

One ANCSA Corporation commented that 512 DM 5.4.H [512 DM 7.4.H] should be revised to direct DOI officials to seek information from an ANCSA Corporation at the outset of a consultation with regard to the ANCSA Corporation's preferences and expectations for how consultation should be conducted, and to then to proceed with the consultation in accord with those preferences and expectations.

512 DM 7.5(H) has been updated to indicate that DOI officials should ask ANCSA Corporations about their preferences for consultation and strive to accommodate those preferences where practicable.

One ANCSA Corporation commented that the following language be added to 512 DM 5.4 H: The Department generally should seek to afford Alaska Native Corporations an opportunity to engage in one-on-one consultation. Whenever possible, the Department should grant requests for one-on-one consultation.

512 DM 7.5(H) has been updated to indicate that DOI officials may grant requests for one-on-one consultations where possible.

One ANCSA Corporation commented that the policy should not suggest that one consultation session is sufficient and that some Departmental Actions with ANCSA Implications will require more than one consultation session.

512 DM 6.4 indicates that consultation should occur early in the planning process and throughout the decision making process.

Conduct in Consult:

One ANCSA Corporation commented that 512 DM 7.4.E [512 DM 7.4.E] should include some reference or acknowledgment of the unique relationship that does exist between the federal government and ANCSA Corporations. They recommended that paragraph should be amended to insert after "respectful", the following: "of the unique relationship with ANCSA Corporations and their Alaska Native shareholders."

512 DM 7.4(E) has been updated to indicate the unique relationship with ANCSA Corporations and their Alaska Native shareholders.

One ANCSA Corporation Commented that the draft updated policy states, at 512 DM 5.4.E, that "The consultations, whether initiated by the ANCSA Corporation or DOI, must be respectful", and suggested that the sentence be modified to state that consultations "must be respectful, meaningful, and timely."

512 DM 7.4(E) has been updated to indicate that consultations must be respectful, meaningful, and timely.

Confidentiality:

One ANCSA Corporation commented that there should be an appropriate reference to cultural or other sensitive ANCSA resources in 512 DM 7. It recommended in place of the language struck in the draft, “negatively impact upon a trust resource or”, the Department should insert in its place, “negatively impact upon a cultural or other sensitive ANCSA resources”.

512 DM 7.4(F) has been updated to reflect suggested language.

One ANCSA Corporation recommended amending 512 DM 5.5(A)(2) (ii) [512 DM 7.5 (A)(2)(ii)] to read: The scope of the proposed DOI action under consideration, including, as available, all relevant background information and documentation;” and suggested adding “ Notice of the right to identify confidential or sensitive information and detail regarding federal laws relevant to the protection of specific categories of information.” . Additionally, they suggested adding a new clause to 5.5(A)(2): (iv) Notice of the right to request technical assistance and a general description of how the Department provides technical assistance.

512 DM 7.5 (A)(2)(ii) has been updated to reflect the suggested language. 512 DM 7.5 (A)(2)(v) has been added to indicate notice should include the right identify information as confidential and 512 DM 7.5 (A)(2)(vi) is added to indicate notice should include information on technical assistance.

One ANCSA Corporation commented that proposed 512 DM 5.4.F [512 DM7.4.F] would provide that “Information received will be deemed confidential, unless otherwise provided by applicable law, regulation, or policy, if disclosure would compromise the United States legal position in anticipation of/or during administrative proceedings or litigation on behalf of the ANCSA Corporations.” It noted that this language suggests that information provided by an ANCSA Corporation in the context of a consultation will be deemed confidential only if disclosure would “compromise the United States legal position in anticipation of/or during administrative proceedings or litigation on behalf of the ANCSA Corporations.” In the course of a consultation, an ANCSA Corporation might provide certain information that must be held in confidence by the Federal government, including but not limited to trade secrets and privileged or confidential commercial or financial information (protected by Exemption 4 of the Freedom of Information Act) or certain sensitive cultural resource information. It commented that confidentiality provisions of the Departmental policy must be revised to appropriately ensure the protection of confidential or sensitive information that the Federal government might receive in the course of a consultation.

512 DM 7.5 (A)(2)(v) has been added to indicate notice should include the right to identify information as confidential.

One ANCSA Corporation commented that section 5.4(F) provides limited protection for “information . . . if disclosure would compromise the United States legal position in anticipation of/ or during administrative proceedings or litigation on behalf of the ANCSA Corporations.” It commented that it is unclear why this language does not extend to other forms of confidential information protected by the Freedom of Information Act (FOIA), such as trade secrets or commercial or financial information that is confidential or privileged. It recommended that the Department list specific FOIA exemptions within any invitation to an Alaska Native Corporation or a Tribal Government to consult with the Department. The Department should also detail any other categories of information that may be identified and protected as confidential or sensitive—for example, the location and nature of sacred sites—and provide reference to the relevant federal law that authorizes the Department to protect such information.

512 DM 7.5 (A)(2)(v) has been added to indicate notice should include the right to identify information as confidential.

Training:

ANCSA Corporations commented that DOI should expand the training requirements to specifically highlight that DOI staff charged with implementing the consultation policy shall be required to complete comprehensive training and should be required to maintain a working knowledge that enables them to carry out their responsibilities.

512 DM 6.5(E) indicates that DOI staff who represent the Department, or a bureau or office must complete training.

Several ANCSA Corporations commented that requirements should also include comprehensive training on the Alaska National Interest Land Conservation Act (ANILCA).

512 DM 6.5(E)(1) has been updated to include the Alaska National Interest Land Conservation Act.

ANCSA Corporations commented that 512 DM6.5F should include a provision that requires DOI University to work with ANCSA Corporations and their representative organizations on the development of the training.

512 DM 6.5(F) has been updated to include ANCSA Corporation representatives.

One ANCSA Corporation commented that DOI staff who are charged with implementing the consultation policy should be required to complete comprehensive training in these topics and to maintain a working knowledge of them that enables them to carry out their responsibilities in a manner consistent with the intent of Executive Order 13175 and related directives. The Corporation also commented that DM 6.5.E(3) should be revised to say “Existing ANCSA Corporation governance, decision-making processes, and consultation policies.” The proposed reference to “corporate structures” fails to appreciate the unique status and role of ANCSA Corporations as provided for by Congress.

512 DM 6.5(E)(3) has been updated to indicate training on existing ANCSA Corporation governance, decision-making processes, and consultation policies .

One ANCSA Corporation commented that Iḷisaḡvik College, the only tribal college in Alaska, located in Utqiagvik, Alaska, is capable of serving as a resource to the Department of the Interior University. It suggested the Department retain the reference to “tribal colleges and universities.”

512 DM 6.5(F) retains the reference to tribal colleges and universities.

Dispute Resolution:

One ANCSA Corporation proposed including language that would allow for dialogue and discussion between the Department, an Indian Tribe or Alaska Native Village and an ANCSA Corporation, in instances where there may be disagreement between an Indian Tribe or Alaska Native Village, to see if a resolution to any differences could be achieved. It suggested that the dialog could be facilitated by the Office of Collaborative Action and Dispute Resolution (CADR), listed as a Departmental Office with Responsibilities in the Policy, at Section 6.5, Paragraph G. It also suggested that if resolution cannot be achieved, the opposing interests should be weighed and considered equitably prior to agency decision.

512 DM 7.4(D) has been updated to indicate that CADR can assist with facilitating dialog and discussion between the Department, Indian Tribes or Alaska Native Villages and ANCSA Corporations. 512 7.4(G)(2) outlines process for dispute resolution.

Record of Consultation:

One ANCSA Corporation commented that after the federal decision is finalized, the Department should invite ANCSA Corporations to provide feedback. The current procedures provide only that Department bureaus and offices “may consider” inviting such feedback. Specifically, they recommend adding a new paragraph (5) to Section 5.5(C) [7.5(C)]: An invitation to the ANCSA Corporation to provide feedback or submit input on the need for training or technical assistance concerning the final federal action. Additionally, they commented that assuming the Department invites feedback from Alaska Native Corporations under Section 5.5(C), Section 5.5(D) will also need to be amended. They recommended the following: Bureaus/offices may consider implementing a post-consultation review process. The post-consultation review process shall not limit DOI’s deliberative process privilege regarding internal considerations or any other applicable privilege.

512 DM 7.5 (C) and (D) have been updated to reflect the comment.

One ANCSA Corporation recommended the inclusion of a new at 512 DM 7.5.C that states, “A summary of the notices and communications to and from the ANCSA Corporations about consultation, as well as the consultation method(s) used.”

512 DM 7.5(C)(1) has been updated to indicate that summary of input should include a summary of notices and communications as well as consultation methods.

One ANCSA Corporation commented that the proposed policy should be revised to emphasize that both the required explanation of how an ANCSA Corporation was addressed and the required explanation of the “reasoning for any instance in which ANCSA Corporation

suggestions were not incorporated into the DOI action or consensus could not be attained” must be provided with specificity.

512 DM 7.5(C) states that the DOI bureau or office must prepare a record of consultation that describes how ANCSA Corporations input was addressed and the reasoning for when ANCSA Corporations view and requests cannot be incorporated or consensus could not be reached.

One ANCSA Corporation recommended that the Department host multi-agency annual check-ins with ANCSA Corporations focused on the consultation process. They noted that by conducting regular check-ins, the Department’s various bureaus and offices can share best practices and lessons learned, and ANCSA Corporations can learn more about the evolving consultation process.

The recommendation to host multi-agency annual check-ins with ANCSA Corporations can be included in DOI guidance and best practices.

Reporting:

ANCSA Corporations recommended using stronger language than “intended to” and “may” to ensure that information is reported in a consistent and transparent way.

512 DM 6.7 indicates that bureaus and offices shall report on an annual basis and that the reporting. “May include, but not limited to” is used to indicate to staff that reporting should include the listed items but can also include other information as appropriate.

One ANCSA Corporation suggested providing a template for the annual report.

512 DM 6.7 directs staff to report using the template included in 512 DM 4.

Reaching Consensus:

ANCSA Corporations commented that DOI has emphasized reaching consensus with Tribes, so much so that DOI’s draft procedures for Tribal consultation explicitly prescribes the steps that should be taken to achieve consensus with Tribes. DOI’s draft policy for ANC’s, however, is conspicuously silent with respect to achieving consensus with ANCSA Corporations. Parity is needed in DOI’s approach to seeking consensus with ANCSA Corporations. They also stated that DOI should include language in its Departmental Manual which provides for consensus-seeking processes with ANCs.

512 DM 6.4 and 7.4(G) contain language emphasizing seeking consensus.

One ANCSA Corporation commented that a determination on how to proceed even if consensus can’t be reached must still take ANCSA Corporation input into account. It commented that the following be added to the end of proposed section 5.4.G [512 DM 7.4.G]: “, after giving due consideration to the interests and concerns of the ANCSA Corporation(s).”

512 DM 7.4.G has been revised with the suggested language.

Several ANCSA Corporations suggested that the Department adopt a consensus-seeking model. They commented that the draft ANCSA Corporation Consultation Policy does not similarly include any reference to the Consensus-Seeking Model. They noted that 512 DM 4 and 5 include consensus seeking approaches and that the difference approaches in the DM chapters should be explained; otherwise, it appears to be inconsistent with the Department's obligation to consult with Alaska Native Corporations on the same basis as Tribal Governments.

Both 512 DM 5 and 6 contain new language emphasizing seeking consensus with ANCSA Corporations. The Consensus-Seeking Model in DM 4 and 5 applies to Indian Tribes and Alaska Native Villages.

Secretary's Tribal Advisory Committee:

ANCSA Corporations expressed concern that the draft policy for DOI consultation with Tribes provides for the establishment of a Secretary's Tribal Advisory Committee (STAC), and that no such advisory committee is found in the draft policy for consultation with ANCs. They commented that DOI should either make sure that ANCSA Corporation shareholders are included as designated representatives of the STAC, or alternatively DOI should have a separate Secretarial ANCSA Advisory Committee (SAAC) comprised of representatives from ANCSA Corporations and tasked with the same goals of the STAC with respect to DOI actions implicating ANC interests.

One ANC commented that Section 5.6 [7.6]: Having a Joint Federal-Tribal Consultation Team, but not a Joint Federal-Alaska Native Corporation Consultation Team, appears to be a violation of the federal statute mandating that "all Federal agencies consult with Alaska Native Corporations on the same basis as Indian Tribes under Executive Order No. 13175," because it sets out a consultation process with ANCs that is on a different basis, rather than on the same basis, as the consultation process with Indian Tribes.

The Department is not proposing to establish an advisory committee of ANCSA Corporations. Because any such committee would not be composed of "elected officers of State, local, and tribal governments," the committee would be subject to the Federal Advisory Committee Act and have to "be fairly balanced in its membership in terms of the points of view represented and the functions to be performed." 2 U.S.C. § 1534(b) and 41 C.F.R. § 102-3.34(c). A committee that is so "balanced" would not serve the same purpose as the STAC. For the same reasons, the Department declines to include ANCSA Corporation representatives on the STAC.

Free Prior and Informed Consent:

One ANCSA Corporation commented that DOI should not take actions that have a material effect on a Tribe or ANCSA Corporation without "free, prior, and informed consent." Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples provides that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own

representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

As noted in the Announcement of U.S. Support for the UNDRIP, “the United States understands [free, prior, and informed consent] to call for a process of meaningful consultations with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken.” See, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples, at <https://2009-2017.state.gov/documents/organization/154782.pdf> (last visited October 29, 2021)