



DEPARTMENT OF COMMERCE

[Docket Number: [120530127-2127-01](#)]

American Indian and Alaska Native Consultation and Coordination Policy

AGENCY: Department of Commerce

ACTION: Notice and request for comments

SUMMARY: The Department of Commerce (Department) requests public comments on a draft “Consultation and Coordination Policy of the U.S. Department of Commerce.” This proposed policy establishes the manner in which the Department works with federally-recognized Indian tribes when developing Department policies that have tribal implications. The policy reaffirms the unique government-to-government relationship that exists between Indian tribes and the Department of Commerce to support Tribes in the development of strong and stable economies able to participate in today’s national and global marketplace.

DATES: Written Comments must be submitted on or before [Insert date 90 days from publication in the Federal Register].

ADDRESSES: You may submit comments on this document, identified by DOC-2012-002, by and of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking Portal, at <http://www.regulations.gov>. To submit comments via the e-Rulemaking Portal, first click the “submit a comment” icon, then enter DOC-2012-0002 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the “Submit a Comment” icon on the right of that line.
- Fax: 206-482-4420; Attn: Dee Alexander.
- Regular Mail, express delivery, hand (courier) delivery or messenger service: Submit comments to Dee Alexander, Senior Advisor on Native American Affairs Office of Legislative and Intergovernmental Affairs, U.S. Department of Commerce, Room 5422, 1401 Constitution Ave., NW, Washington, DC 20230.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. The Department will accept anonymous comments (if submitting comments via the Federal e-Rulemaking portal, enter “N/A” in the relevant required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

Background:

Executive Order (E.O.) Number 13175, “Consultation and Coordination with Indian Tribal Governments,” (November 6, 2000) requires Federal agencies to have an accountable process to ensure meaningful and timely input by tribal officials in developing policies that have tribal implications.

President Barack Obama reaffirmed the government-to-government relationship between the Federal Government and Indian tribal governments in a White House Memorandum, “Tribal Consultation,” 2009 Daily Comp. Press Docs.87 (November 5, 2009). Among other things, this memorandum acknowledges that Indian tribes exercise inherent sovereign powers over their members and territory. The memorandum also acknowledges that the United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

This proposed policy is part of the Department’s response to President Obama’s memorandum. The Policy builds upon and expands the principles expressed in the Department’s previous policy, “American Indian and Alaska Native Policy of the Department of Commerce,” promulgated on March 30, 1995. The Policy incorporates the requirements of E.O. No. 13175, and the Office of Management and Budget Memorandum, “Guidance for Implementing E.O. 13175, “Consultation and Coordination with Indian Tribal Governments.”

The Department will work with tribes on developing the final policy by sending this draft policy directly to the tribes and by conducting several webinars with Tribes on the policy and how to improve it. We will announce these webinars in future notices posted in the Federal Register.

The statements in the draft document are intended solely to provide internal Department guidance. This document is designed to implement E.O. 13175; the draft document does not, however, substitute for requirements in federal statutes or regulations, nor is it a requirement itself. This document is not intended, nor can it be relied upon, to create any right or trust responsibility enforceable in any cause of action by any party against the United States, its agencies, officers or any other person. It does not impose legally binding requirements on the Department or anyone else, and may not apply to a particular situation based upon the circumstances. The Department may change this Guidance in the future, as needed or appropriate.

Request for Comments:

Comments are invited on: Sections 1-7. These sections provide guidance to the Department and all its operating units and its employees on when and how to coordinate consultation with federally recognized Indian tribes on a government-to-government basis, in recognizing their sovereignty, when developing policies that have tribal implications.

Proposed Tribal Consultation and Coordination Policy for the U.S. Department Of Commerce

Section 1. Introduction

01. This “Tribal Consultation and Coordination Policy of the U.S. Department of Commerce” (“Tribal Consultation Policy” or “Policy”) establishes the manner in which the Department of Commerce (“Department”) works with Indian tribes on a government-to-government basis to

build a durable relationship and address issues concerning tribal self-government, tribal trust resources, and tribal treaty and other rights, as well as support tribes in developing strong and stable economies able to participate in the national and global marketplace.

02. The Department recognizes the Federal Government's trust responsibility, as established in the Constitution, statutes, treaties and federal court decisions, which together define the unique legal relationship between Tribal governments and the Federal Government.

03. The Department and operating units will seek and promote cooperation within the Department and with other agencies that have related responsibilities. The Department's mission encompasses many complex issues where cooperation and mutual consideration among governments (federal, state, tribal, and local) are essential. The Department and operating units will promote intradepartmental and interagency coordination and cooperation to assist Tribal governments in resolving issues requiring mutual effort.

04. Executive Order (E.O.) No. 13175, "Consultation and Coordination with Indian Tribal Governments," requires federal agencies to have an accountable process to ensure meaningful and timely input by tribal officials in developing policies that have tribal implications. This Policy provides uniform standards and methodology outlining consultation procedures for all Department personnel working with Tribal governments regarding policies that have tribal implications.

Section 2. Background

01. This Policy builds upon and expands the principles expressed in the "American Indian and Alaska Native Policy of the Department of Commerce," promulgated by the Department on March 30, 1995. The Tribal Consultation Policy incorporates the requirements of E.O. No. 13175; Presidential Memorandum, "Tribal Consultation," 2009 Daily Comp. Pres. Docs. 887 (November 5, 2009); and the Office of Management and Budget Memorandum, "Guidance for Implementing E.O. 13175, 'Consultation and Coordination with Indian Tribal Governments'."

02. This Policy is for internal management only and shall not be construed to grant or vest any right to any party not otherwise granted or vested by existing law or regulations.

Section 3. Authority

This Tribal Consultation Policy is issued pursuant to the authority of 5 U.S.C. § 301 and Department Administrative Order (DAO) 218-8, "Consultation and Coordination with Indian Tribal Governments." This Policy shall have the same force and effect as a DAO. Amendments (substantive changes) or revisions (corrections or updates) to this Policy may be developed and issued by the Department of Commerce Tribal Consultation Official or the Secretary's designee in consultation with Tribal governments.

Section 4. Definitions

01. “Consultation,” as defined in Section 5 of E.O. No. 13175, refers to an accountable process ensuring meaningful and timely input from tribal officials on Department policies that have tribal implications.
02. “Indian tribe (or Tribe),” as defined in Section 1(b) of E.O. No. 13175, means an Indian or Alaska Native tribe, band, nation, pueblo, 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.
03. “Operating units,” as defined in Section 3.c.1 of Department Organization Order 1-1, are organizational entities outside the Office of the Secretary charged with carrying out specified substantive functions (i.e., programs) of the Department. The operating units are the components of the Department through which most of its substantive functions are carried out.
04. “Policies that have tribal implications,” as defined in Section 1(a) of E.O. No. 13175, refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.
05. “Tribal Consultation Official,” as defined in Section 5(a) of E.O. No. 13175, means the designee of the Secretary with principal responsibility for the implementation of this Policy.
06. “Tribal officials,” as defined in Section 1(d) of E.O. No. 13175, means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Section 5. Roles and Responsibilities for Consultations

01. Department of Commerce Tribal Consultation Official

- a. The Tribal Consultation Official is an individual in the Office of Legislative and Intergovernmental Affairs (OLIA) within the Office of the Secretary who is duly appointed to act as a liaison between the Secretary of Commerce and Tribal officials. The Tribal Consultation Official may delegate authority, as necessary, to the head of each operating unit. The Tribal Consultation Official has primary responsibility for ensuring compliance with DAO 218-8, this Policy, and E.O. No. 13175, and is responsible for tribal consultations and coordination for the Office of the Secretary programs.
- b. The Tribal Consultation Official has responsibility for coordinating the implementation of this Policy and DAO 218-8 within the Department and all operating units.
- c. The Tribal Consultation Official will engage tribal officials in periodic dialogue to discuss the Department’s implementation of this Policy. The dialogue will provide an opportunity for tribal

officials to assess policy implementation, program delivery, and discuss outreach and communication efforts, and other issues.

02. Head of Operating Unit Responsibilities

- a. The head of each operating unit will designate an official in the headquarters office who has primary responsibility for ensuring compliance with this Policy within the operating unit. Each operating unit's designated official will work with the Department Tribal Consultation Official to ensure coordination of tribal consultations, as necessary. The designated official is responsible for the development, maintenance and internal distribution of any guidance produced by the operating unit in compliance with the requirements of this Policy.
- b. The head of each operating unit or the designated official may delegate authority to appropriate individuals within the operating unit.

Section 6. Training and Guidance

01. The Tribal Consultation Official and the head of each operating unit will ensure that personnel assisting with tribal consultations have appropriate training.

02. Each operating unit may develop and issue tribal consultation guidance to assist staff in preparing, reviewing and managing the consultation process within their respective operating units, so long as:

- a. The guidance is consistent with DAO 218-8, and
- b. The Department's Tribal Consultation Official reviews the guidance.

Section 7. Consultation

01. The Consultation Process. Consultation may take a variety of forms. Implementing this Policy may require a range of formal and informal planning activities. The Department and operating units' consultation processes may include one or more of the following: formal meetings, informal meetings, letters, conference calls, webinars, on-site visits, or participation in regional and national events. The Tribal Consultation Official or the head of each operating unit, as applicable, will make a reasonable effort to accommodate a tribal request for consultation.

02. Elements of the Consultation Process.

- a. Ongoing communication shall be a regular part of the government-to-government relationship with tribal governments. The Department and operating units will engage in meaningful dialogue with Tribes regarding all policies that have tribal implications.
- b. Exchange of Information. The Department and operating units will make a reasonable effort to identify and provide timely and accurate information for consultation.

c. Notification. The Department and operating units will notify Tribes of policies that have tribal implications. Follow-up may be necessary to ensure the appropriate tribal official has received the consultation notification and accompanying documents. These notifications do not replace or supersede any notifications that are required by statute or E.O. regarding tribal consultations.

d. Consultation Planning. The Department and operating units will coordinate with tribal officials to plan logistical considerations for the consultation. The Department and operating units will, when practical, allow Tribes a reasonable amount of time to prepare for consultation and submit their views on policies that have tribal implications.

e. Written Communication and Record-Keeping. When a consultation occurs between the Department or its operating units and Tribal officials, the Department or operating unit will provide the Tribal officials with a formal, written communication that summarizes the consultation, and responds to the issues and concerns, if any, identified during consultation. The Tribal Consultation Official or head of each operating unit conducting a consultation will maintain documentation addressing the consultation, tribal concerns, and recommendations in conformance with applicable records retention schedules.

Section 8. Implementation

01. The Tribal Consultation Official, located in OLIA within the Office of the Secretary, is responsible for ensuring implementation of this Policy. This responsibility may be delegated as appropriate. This Policy does not alter or affect any existing duty or authority of any individual operating unit.

02. This Policy is not intended to, and does not, grant, expand, create or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this Policy be construed to alter, amend, repeal, interpret, or modify tribal sovereignty, any treaty rights of any Indian tribes, or to preempt, modify, or limit the exercise of any such rights.

03. This Policy is intended to improve the Department's management of its relations and cooperative activities with Indian tribes. The Department and operating units have no obligation to engage in any consultation activities under this policy unless they are practicable and permitted by law. Nothing in this policy requires any budgetary obligation or creates a right of action against the Department for failure to comply with this policy nor creates any right, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

04. This Policy shall be updated as necessary.

Section 9. Effective Date

01. This Policy is effective beginning with the date of this memorandum and will remain in

effect until it is amended, superseded by a Departmental Administrative Order, or revoked.

Dated: June 26, 2012 _____

Dee Alexander
Senior Advisor on Native American Affairs

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