



## Office of the Secretary of Transportation

[Docket No. DOT-OST-2021-0023]

### Notice of Tribal Consultation; Request for Comments

**AGENCY:** Office of the Secretary (OST), U.S. Department of Transportation (DOT).

**ACTION:** Notice of Tribal consultation; request for comments.

**SUMMARY:** The U.S. Department of Transportation (DOT or we) announces that it is holding virtual Tribal consultation with American Indian and Alaskan Native Tribes on its implementation of Executive Order 13175 of November 6, 2000, consistent with the Presidential Memorandum of January 26, 2021. We also announce the establishment of a docket to receive comments on our Tribal consultation policies and practices. Testimony presented at these Tribal consultations will be considered by DOT in formulating its plan of actions in response to the Presidential Memorandum of January 26, 2021. We will host a virtual Tribal consultation on March 24, 2021.

**DATES:** Consistent with Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, we will hold a virtual Tribal consultation meeting to take oral testimony. The Tribal consultation meeting will be held on Wednesday, March 24, 2021 from 2:00 p.m. to 3:30 p.m. EDT. Participants can access the presentation by logging into the following: <https://www.transportation.gov/self-governance>. Participants may submit written questions in advance of the meeting to [tribalaffairs@dot.gov](mailto:tribalaffairs@dot.gov), or provide written comments/questions using the chat function during the presentation. Any questions or comments to be considered must be received in writing via email to [tribalaffairs@dot.gov](mailto:tribalaffairs@dot.gov) by 5pm EST, Wednesday, March 31, 2021. Additional information about how to participate during the consultation will be made available at <https://www.transportation.gov/self-governance> in advance of the consultation and announced at the beginning of the consultation.

Additional follow-on listening sessions with Tribal associations may be scheduled. These listening sessions will be open to the public. Please check <https://www.transportation.gov/self-governance> for additional details.

The closing date for comments on this notice is [INSERT DATE 40 DAYS FROM THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The Department will consider late comments to the extent practicable.

**ADDRESSES:** You may submit comments by any of the following methods:

- Electronic mail: Send electronic mail to [tribalaffairs@dot.gov](mailto:tribalaffairs@dot.gov) and reference OST-2021-0023 in the subject line.
- Electronically through the Federal eRulemaking Portal: [www.regulations.gov](http://www.regulations.gov). Follow the online instructions for submitting comments;
- Mail: U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC 20590;
- Hand Delivery: U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or
- Fax: 1-202-493-2251.

All comment submissions must include the agency name, docket name, and docket number (DOT-OST-2021-0023). DOT solicits comments from the public to better inform its deliberations. DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL-14 FDMS), which can be viewed at [www.dot.gov/privacy](http://www.dot.gov/privacy). Physical access to the Docket is available at the Hand Delivery address noted in this section.

**FOR FURTHER INFORMATION CONTACT:** Milo Booth, Director of Tribal Affairs, 202-309-9786, [milo.booth@dot.gov](mailto:milo.booth@dot.gov).

**SUPPLEMENTARY INFORMATION:**

## **I. Purpose**

On January 26, 2021, President Biden issued a Presidential Memorandum on Tribal consultation and Strengthening Nation-to-Nation Relationships (Presidential Memorandum)<sup>1</sup> reaffirming Executive Order (E.O.) 13175 titled “Consultation and Coordination With Indian Tribal Governments”<sup>2</sup> and the policy announced in the 2009 Presidential Memorandum titled “Tribal Consultation” (2009 Presidential Memorandum).<sup>3</sup> The Presidential Memorandum directs agencies to consult with Indian Tribes to develop a detailed plan of actions to implement E.O. 13175 and subsequently submit this plan to the Director of the Office of Management and Budget (OMB) and the Assistant to the President for Domestic Policy (APDP) within 90 days (April 26, 2021).

Consistent with E.O. 13175 and the Presidential Memorandum, the U.S. Department of Transportation (DOT or we) announces its intent to engage in Tribal consultation on whether our existing consultation policies and practices are effective in implementing E.O. 13175 and ways we can improve our outreach and communication with Indian Tribes. We also announce the establishment of a docket to receive comments from Indian Tribal officials,<sup>4</sup> tribal organizations, individual tribal members and other interested persons on our communication and outreach with Indian Tribes when we consider “policies that have tribal implications.”<sup>5</sup> In section II, below, we identify specific questions to help us assess our implementation of E.O. 13175.

## **II. Background**

*A. Agency Mission.* Our mission is to ensure America has the safest, most efficient and modern transportation system in the world, which boosts our economic productivity and global

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<sup>1</sup> 86 FR 7491 (January 29, 2021).

<sup>2</sup> 65 FR 67249 (November 9, 2000).

<sup>3</sup> 74 FR 57879 (November 9, 2009).

<sup>4</sup> “Tribal officials,” as defined in Section I(d) of E.O. 13175, means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

<sup>5</sup> “Policies that have tribal implications,” as defined in Section I(a) of E.O. 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.

competitiveness and enhances the quality of life in communities both rural and urban. The Department and its Operating Administrations (OAs) implement a diverse set of funding and safety programs. We are interested in any general comments or concerns that would help us improve our communication and outreach with Indian Tribes on “policies that have tribal implications,” as we strive to achieve our mission.

*B. Existing Policies Regarding Interactions with Indian Tribes.* We previously have issued two policy statements that set forth principles to promote effective government-to-government interactions with American Indian and Alaska Native Tribes, and to encourage and facilitate Tribal involvement in areas over which the DOT has jurisdiction. DOT Order 5301.1, “Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes” (November 16, 1999).

(<https://www.transportation.gov/sites/dot.gov/files/docs/DOT%205301.1.pdf>) and a Consultation Plan issued in response to the 2009 Presidential Memorandum

(<https://www.transportation.gov/sites/dot.gov/files/docs/Tribal%20Consultation%20Plan.pdf>) comprise these policy statements. These policy statements provide Department-wide guidelines to achieve consistency, but also encourage tailored approaches to consultation and coordination that reflect the circumstances of each situation and the preference of each Tribal government. It is our expectation that all program and OA consultation and coordination practices will be consistent with or adhere to the Department’s Tribal consultation policies.

### *1. Consultation Plan*

The U.S. Department of Transportation Tribal Consultation Plan (Consultation Plan) (<https://www.transportation.gov/sites/dot.gov/files/docs/Tribal%20Consultation%20Plan.pdf>) summarized E.O. 13175, the 2009 Presidential Memorandum, and DOT Order 5301.1. The Consultation Plan did not cancel or displace DOT Order 5301.1. Rather, we read the two documents jointly. The Consultation Plan identified seven goals and specific actions associated with each goal that we would continue to take to support the principles of self-governance, self-

determination, and tribal sovereignty identified in E.O. 13175. These goals and actions include the following:

Goal 1: Foster meaningful government-to-government relations by:

- Ensuring participation by Department officials at national tribal conferences, tribal/State meetings, summits, and conferences discussing tribal issues.

- Establishing direct contact with Indian tribal governments, including visiting tribal governments at reservations, Native Villages, and communities.

- Seeking tribal government representation in meetings, conferences, summits, advisory committees, and review boards concerning issues with tribal implications.

Goal 2: Improve existing tribal programs by:

- Seeking tribal input when the DOT develops or revises regulations with tribal implications and providing adequate time to allow for comment.

- Notifying tribes of grant opportunities through multiple means, including direct letters and emails whenever appropriate, as well as announcements on the DOT website and in the Federal Register.

- Providing timely technical assistance on changes to legislation, regulations, programs, and grants.

Goal 3: Ensure meaningful tribal input into future tribal transportation programs by:

- Developing policy and programs using input, guidance, and recommendations from tribal leaders.

- Seeking and responding to comments from tribal governments.

- Soliciting tribal comments in the development of the DOT's surface transportation reauthorization proposal.

- Conducting meetings throughout the country after the passage of the next surface transportation authorization legislation to discuss impacts on and opportunities for the tribes and their transportation systems.

- Consulting with tribal governments on making transportation services available to improve mobility, employment opportunities, and access to community services for people who have disabilities, are elderly, or low-income.

Goal 4: Ensure the DOT's uniform and effective delivery of tribal programs throughout the country by:

- Reviewing existing tribal policies in DOT's OAs to ensure consistency with this action plan and each other.
- Assessing the resource needs of the tribal transportation programs at DOT.
- Developing training modules for DOT employees on tribal transit and highway programs.
- Developing a training program for DOT employees regarding tribes, the sovereignty of tribal governments, and the unique government-to-government relationship between tribes and the Federal Government.
- Reaffirming DOT's commitment to working with the Bureau of Indian Affairs on the administration of tribal highway safety grants.
- Continuing to support the tribal Technical Assistance Program (TTAP).
- Addressing tribal transportation issues in DOT Strategic Plans.
- Enhancing support for tribal Liaisons in the Federal Transit Administration, the Federal Highway Administration, the Federal Aviation Administration, and other staff throughout the Department working with tribal governments.
- Coordinating efforts among DOT's OAs by establishing a Department-wide working group tasked with making specific recommendations to the Secretary of Transportation.

Goal 5: Assist in implementing tribal infrastructure projects by:

- Building capacity of tribes on DOT Programs and processes, including the Indian Reservation Roads Program and the Tribal Transit Program.
- Initiating a review of the grant process for the Tribal Transit Program in consultation with the tribes.

- Working with tribal governments to develop case studies and best practices in transportation planning and highway safety.
- Developing a highway Safety Management System (SMS) for tribal governments and forming a Steering Committee that includes tribal representatives to advise on the SMS.
- Identifying and communicating to tribal leaders emerging issues that could impact tribal transportation programs.
- Publishing guidance on DOT's programs with potential benefits to tribal governments.

Goal 6: Assist tribal members in developing transportation capacities by:

- Increasing internships for American Indians and Alaska Natives at DOT through outreach to tribal colleges and universities.
- Creating a webpage for tribes on the DOT website.
- Increasing the representation of American Indians and Alaska Natives in the DOT workforce, within merit principles and consistent with the application of appropriate veterans' preference criteria.

Goal 7: Assist efforts to coordinate national tribal infrastructure policy and programs within the Federal Government by:

- Working with the U.S. Department of Agriculture, the Indian Health Service, and the Bureau of Indian Affairs to coordinate Federal tribal infrastructure programs and incorporating livability principles as adopted by the Department's Sustainability Partnership with the U.S. Department of Housing and Urban Development and the U.S. Environmental Protection Agency

We seek your input on these seven goals, which the Department identified in the Consultation Plan developed in 2010 to guide the actions we will take to support the principles set forth in E.O. 13175. Should we revise any of these goals or incorporate new goals? Please explain your recommendation. If a new goal is proposed, what actions should we take, to the

extent practicable and consistent with law, to support the principles set forth in E.O. 13175?

Please explain why these actions are appropriate and how they are consistent with law.

*2. DOT Order 5301.1*

The Department issued DOT Order 5301.1 (<https://www.transportation.gov/sites/dot.gov/files/docs/DOT%205301.1.pdf>) to ensure that programs, policies, and procedures administered by the Department are responsive to the needs and concerns of American Indians, Alaska Natives, and tribes. DOT Order 5301.1 predates E.O. 13175. It affirms the Department's and the OAs' unique legal relationship with Indian tribes; establishes the Department's consultation and coordination process with Indian tribes for any action that may "significantly or uniquely affect" them; and, lists goals and requirements for OAs carrying out policies, programs, and activities affecting American Indians, Alaska Natives, and tribes. These requirements were designed to recognize Indian statutory preferences in employment, Federal financial assistance arrangements, and contracting; respond to the transportation concerns of Indian tribes related to environmental justice, children's safety and environmental health risks, occupational health and safety, and environmental matters; foster opportunities for hiring tribal members and increasing participation in Federal training activities; include tribal colleges and universities in Departmental educational, research, and program activities; and treat correspondence from leaders of Indian tribes in the same manner as Congressional correspondence.

In developing our detailed plan of action for consideration by OMB and the APDP, we have identified a need to review DOT Order 5301.1.

E.O. 13175 requires agencies to ensure meaningful and timely input from Tribal government representatives in the development of rules that have substantial direct effects. What additional or different steps can we take to "ensure meaningful and timely input" in the development of "policies that have tribal implications"? Please explain why these actions are appropriate.

What steps should we continue to take to ensure meaningful and timely input by tribal officials in the development of regulatory “policies that have tribal implications?”

Are there recommendations for ways the accountability of our consultation process can be improved?

DOT Order 5301.1 defines consultation, in relevant part, as a “meaningful and timely discussion...during the development of regulations, policies, programs, plans or matters that significantly or uniquely affect” Tribal communities. DOT Order 5301.1 references implementing instructions found in OMB Memorandum M-95-20 and the 1994 Presidential Memorandum titled “Government-to-Government Consultations with Native American Tribal Governments.” How do you recommend that we revise DOT Order 5301.1 to align it with E.O 13175? Please explain your recommendation.

E.O. 13175 requires agencies to consult with Tribal governments in the development of rules that impose “substantial direct compliance costs” or “substantial direct effects” on Tribal communities or the relationship and distribution of power between the Federal Government and Tribes. Please identify actions we have taken that, in your view, impose “substantial direct compliance costs” or “substantial direct effects” on Tribes or the distribution of power between the Federal Government and Tribes. Please explain why, in your view, these actions have a substantial direct effect on Tribal communities and how these actions impose substantial direct compliance costs or on Tribes.

Would it be helpful to define the meaning of the terms “substantial direct compliance costs” and “substantial direct effects?” How do you define these terms when determining whether to consult with DOT?

### *3. Consultation with ANCSA Corporations*

Our policies address consultation with federally-recognized Indian tribes (including Alaska Native tribes, villages, and communities) that the Secretary of the Interior acknowledges to exist

as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994.<sup>11</sup> It does not, however, address consultation with corporations established pursuant to the Alaska Native Claims Settlement Act (ANCSA Corporations). In 2004, through two consolidated appropriations acts, Congress required Federal agencies to consult with Alaska Native Corporations<sup>6</sup> on the same basis as Federally recognized Indian Tribes under E.O. 13175. (Public Law 108-199, 118 Stat. 452, as amended by Pub. L. 108-447, 118 Stat. 3267). DOT interprets the term "Alaska Native Corporations" in this requirement to mean "Native Corporations" as that term is defined under the Alaska Native Claims Settlement Act (ANCSA) of 1971. DOT is considering adding to the DOT Consultation Policy the requirement to consult with Alaska Native Corporations on the same basis as Indian Tribes under E.O. 13175. The Department requests comments on the requirement to consult with Alaska Native Corporations that would help us improve our policy while recognizing the important differences between them and sovereign tribal governments, the Federal trust responsibility to those Tribal governments and corporations obligated to maximize financial returns to shareholders, and that Alaska Native Corporations may not necessarily represent the same perspective or interests as Tribal nations.

#### *4. Consultation with Native Hawaiians and State-recognized Tribes*

Our policies currently include references to non-Federally recognized groups of Indigenous people, such as State-recognized Tribes, but not Native Hawaiians and Native Hawaiian organizations. The intent of our Tribal consultation policies is to outline how DOT will engage and conduct consultation with Federally recognized Tribal Governments in accordance with E.O. 13175 and applicable requirements. To be consistent with the definition of an "Indian tribe" in E.O. 13175, the Department is considering removing from our policies implementing E.O. 13175 references to non-Federally recognized Tribes. Please comment on whether you would agree with removing references to non-Federally recognized Tribes.

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<sup>6</sup> "Alaska Native Corporation," pursuant to 43 U.S.C. 1602 *et seq.*, is any Regional Corporation, any Village Corporation, any Urban Corporation, and any Group Corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act.

### *5. Communicating Agency Disposition of Tribal Input*

DOT and its OAs describe tribal input and concerns regarding specific projects in its environmental documents and decision documents. DOT similarly addresses tribal input and concerns in its rulemaking documents by describing any Tribal consultations or concerns that were identified in the course of developing the rulemaking. We are interested in any general comments or concerns that would help us improve our process for communicating with Tribes how their input was considered by agency decision makers. How could we improve our post-consultation communication? Are there best practices of which we should be aware to ensure that tribal concerns are heard and addressed?

### *6. Recognition of Federal trust and treaty obligations*

As set forth in the U.S. Constitution, treaties, U.S. Supreme Court decisions, Federal statutes and regulations, and Executive Orders, the United States has a unique legal relationship with Indian tribes and a special relationship with Alaska Native entities. Based on treaties with Indian tribes, the U.S. Supreme Court shortly after the founding of the United States established the concept of a Federal trust to define the relationship between the Federal and tribal governments. This trust relationship continues to guide and interpret the responsibility of the United States to Indian tribes. The Department acknowledges that the Federal trust doctrine is a cornerstone of Federal Indian law and that it is the responsibility of the U.S. government to faithfully carry out its treaty promises and trust obligations to Indian tribes.

To ensure that the Department is meeting its treaty obligations and trust responsibilities, we are therefore seeking comments on what actions you think the Department should conduct or not conduct regarding its programs and activities with Indian tribes. Please explain your recommendation.

What treaty or other source do you consider creates an obligation that the Department should carry out? Please explain your response.

What treaty or other source do you consider creates a trust obligation for the Department?

In addition to carrying out consultations with tribes on “policies that have tribal implications,” what other specific trust obligations should be carried out by the Department? Please explain your recommendation.

### **III. Tribal Consultation Meeting**

This Tribal consultation meeting and any listening sessions hosted by Tribal associations are intended to provide interested parties with an opportunity to discuss their views on the issues; and for us to obtain the views of Federally recognized Tribes, in accordance with E.O. 13175 and the Presidential Memorandum, on ways we can improve our outreach and communication with Indian Tribes when we develop policies with Tribal implications. We consider Tribal consultation meetings a valuable component of our deliberations and believe that these meetings will allow for constructive dialogue with the Tribal community, Tribal officials, Tribal Elders, elected members of Alaska Native Villages or their appointed representatives, and principals of tribally-owned and Alaska Native Corporation-owned firms. Testimony received at these Tribal consultations will guide our review process of our Tribal consultation policies and practice and may be used to develop new policies and strategies for consultation.

*Respondents.* The Consultation will prioritize the Government-to-Government discussion and will provide elected or appointed leaders of Tribal governments or their designated representatives first opportunity to comment. Other representatives of Tribal governments, Tribal organizations, and members of the public may offer comment after official Tribal representatives. The order of comments will be as follows: first, elected or appointed leaders of Tribal governments or their designated representatives who requested to provide testimony in advance of the meeting; second, elected or appointed leaders of Tribal governments or their designated representatives who requested to provide testimony via a chat function during the consultation; third, other representatives of Tribal governments who request to provide oral testimony in advance of the meeting or via the chat function; fourth, representatives of Tribal

organizations, who request to provide oral testimony in advance of the meeting or via the chat function; fifth, other members of the public who request to provide oral testimony in advance of the meeting or via the chat function; and sixth, all other members of the public who identify themselves orally.

*Adjournment.* We will adjourn Tribal consultation meetings early if all attendees who requested to provide oral testimony in advance of and during the consultation have delivered their comments. We may provide additional or alternate opportunities to comment, including in virtual listening sessions hosted by Tribal transportation associations with Departmental officials. Additional information regarding additional opportunities to provide oral comment will be made available at <https://www.transportation.gov/self-governance>. We will summarize in a letter to Tribal governments the comments received and indicate how Tribal input was considered in the final action. The letter will constitute formal follow-up notification and will be entered as the date Tribal consultation ended.

#### **IV. Request for Comments**

We request public comment from Indian Tribes on the Department's implementation of E.O. 13175 and its Tribal consultation policies and practice. Your comments may relate to, but should not be limited to, the questions identified above. All comments will be accepted. The virtual Tribal consultation meetings and listening sessions are not the only opportunity you have to comment on this matter. In addition to, or in place of, attending a virtual meeting, we encourage you to submit comments in accordance with the instructions in Addresses, above. Public comment submissions should include the Docket number OST-2021-0023.

DOT solicits comments from the public to better inform its deliberations. The DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL-14 FDMS), which can be viewed at [www.dot.gov/privacy](http://www.dot.gov/privacy).

Issued in Washington, D.C., on or about March 04, 2021.

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**Peter Paul Montgomery Buttigieg**

*Secretary of Transportation.*

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