

# **Bureau of Indian Affairs**

## **Government-to-Government Consultation Policy**

Pursuant to the President's Executive Order 13175 of November 6, 2000, and in consultation with tribes, the following government-to-government consultation policy is issued. This policy will remain in effect until such time it is published in the Indian Affairs Manual (IAM) or is superceded by another policy.

### 1. INTRODUCTION

More than 550 American Indian tribes in the United States are recognized by the Secretary of the Interior as having a special legal relationship with the United States. This legal relationship is most often called the government-to-government relationship. It is through this relationship that the Bureau of Indian Affairs has a duty to consult with tribal governments. The following policy illustrates the guidelines that the Bureau of Indian Affairs will follow for consultation with tribal governments.

### 2. BACKGROUND

The government-to-government relationship is not new, but has strong roots that took hold with the very earliest contact between the American Indians and the first European settlers. The settlers and the tribal leaders dealt with each other as separate sovereigns and that relationship is the foundation of all dealings that have taken place between the United States and Indian tribes throughout the history of the Nation. This Indian policy has found its way into federal statutes and case law and into Executive Orders. As nations separate from the United States, the internal affairs of tribes are the responsibility of the tribal entity and are not to be tampered or interfered with by the United States.

The Bureau of Indian Affairs is the lead federal agency charged with carrying out the United States' relationship with Indian tribal governments. It is also responsible for overseeing the trust obligations that the United States has to protect tribal property and resources. Thus, most of the contacts between tribal government officials and United States government officials take place within the various offices of the Bureau of Indian Affairs. The Bureau has numerous local or "agency" offices that deal most closely with day-to-day issues facing tribal governments. The Bureau also has 12 regional or "area" offices; its Central office is located in Washington, D.C. within the U.S. Department of the Interior. At the Department of the Interior's Central Office, tribal leaders often work closely with political officials in the Office of the Secretary of the Interior and in the Office of the Assistant Secretary - Indian Affairs.

Tribal leaders also have significant government-to-government contact with officials of the local, regional and central offices of other Department of the Interior agencies,

including the Fish and Wildlife Service, National Park Service, Bureau of Land Management, Minerals Management Service, Bureau of Reclamation, and Office of Surface Mining.

### 3. PURPOSE

The purpose of this consultation policy is to set forth appropriate guidelines that are understood and adhered to by all parties. It is vital to the health of the government-to-government relationship that all contacts and consultation with Indian tribal leaders throughout the Bureau be conducted in a professional and respectful manner and in accordance with the following guidelines. Only by using such guidelines can misunderstandings be avoided and the tribes with the United States can move Indian policy forward.

### 4. DEFINITIONS

**"Consultation"** means a process of government-to-government dialogue between the Bureau of Indian Affairs and Indian tribes regarding proposed Federal actions in a manner intended to secure meaningful and timely tribal input. Consultation includes that Indian tribes are:

1. to receive timely notification of the formulated or proposed Federal action;
2. to be informed of the potential impact on Indian tribes of the formulated or proposed Federal action;
3. to be informed of those Federal officials who may make the final decisions with respect to the Federal action;
4. to have the input and recommendations of Indian tribes on such proposed action be fully considered by those officials responsible for the final decision; and
5. to be advised of the rejection of tribal recommendations on such action from those Federal officials making such decisions and the basis for such rejections.

Consultation does not mean merely the right of tribal officials, as members of the general public, to be consulted, or to provide comments, under the Administrative Procedures Act or other Federal law of general applicability.

**"Federal action"** means regulations, legislative comments or proposed legislation, the budget, 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.

Federal action includes the development of federal policies under which the tribe must take voluntary action to trigger application of the policy.

○**Indian tribe**○ 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 section 479a of title 25, United States Code.

○**Legislation**○ means proposed legislation or legislative comments to be presented to Congress for enactment that will affect tribal governments, communities, members, economies, trust resources or assets, treaty rights, sacred sites, public health, safety welfare or other interest.

○**Collaboration**○ means the act of working jointly toward a common objective.

○**Tribal government**○ means the governing authority of an Indian tribe as recognized by the Department of the Interior or authorized tribal organization.

## 5. PRINCIPLES

In formulating and implementing policies affecting Indian tribal governments, the Bureau will be guided by the following principles:

1. The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, executive orders, and court decisions.
2. The United States recognizes the ongoing right of Indian tribes to self-government and supports tribal sovereignty and self-determination and continues to work with Indian tribes on a government-to-government basis concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights.
3. Federal actions shall be guided by respect for Indian tribal self-government and sovereignty, for tribal treaty rights, and for responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.
4. Federal actions shall favor maximum tribal participation with the goal of consultation and collaboration in federal decision making.
5. Federal action shall defer to the laws and policies established by Indian tribes to the extent permitted by law.
6. The Bureau shall maximize the use of technology to facilitate interactive exchanges with tribes and notify affected tribes that written comments are permitted and will be considered.

## VI. STEP-BY-STEP THROUGH THE CONSULTATION PROCESS

Consultation between the Bureau of Indian Affairs and the Indian tribes shall conform to the following procedures. These procedures allow flexibility and discretion to the Bureau depending on the matter under consultation. The three major procedural steps of consultation are:

**A. Pre-Decisional Scoping**

**B. Developing the Bureau Proposal**

**C. Implementation of Final Federal Action**

**A. Pre-Decisional Scoping**

Consultation should be initiated as early in the Bureau's decision making process as possible. Consultation should begin when the Bureau knows enough about a proposed action to present a coherent proposal and a suggested initial list of issues.

Early consultation with tribal leadership is vital for several reasons. Without early consultation, the Bureau may develop proposals based on an incomplete and anecdotal understanding of the issues that surround a particular matter. As a result, Bureau proposals often create severe unintended consequences for tribal governments. Issues in Indian country are often more complex than they seem at first, in part because of the great diversity among tribes and the circumstances they face, as well as the long history surrounding the development of federal Indian policy.

An open process in the initial stages creates better and more efficient consultation. For example, early consultation with Tribal governments on the scope and impact of a Bureau proposal may provide the basis for the Bureau determining that no action is necessary. More broadly, pre-draft consultation helps insure that real problems are identified at the beginning and properly studied; that issues that are of no concern do not consume time and effort; that subsequent drafts are balanced and thorough; and that the delays and costs occasioned by redoing an inadequate draft are avoided.

For example, consultation should take place:

- 1) Before the Bureau begins drafting proposed regulations;
- 2) Before the Bureau publishes proposed regulations in the Federal Register;
- 3) Before proposed legislation is introduced at the request of the Bureau; and
- 4) Before the Bureau formulates or implements policies or other actions having implications for tribes.

**1. Start consultation immediately after you have enough information.**

Consultation cannot be useful until the Bureau knows enough about the proposed action to identify most of the affected tribes, and to present a coherent proposal and a suggested initial list of issues. Until that time there is no way to explain to the tribes what matters are under consideration. So the first stage is to gather preliminary information, or to compose a clear picture of the proposal if it is being developed by the Bureau.

## **2. Prepare an information packet.**

The Bureau should put together a brief information packet consisting of a description of the proposal, an initial list of issues and impacts, maps, drawings, and any other material or references that can help the interested tribes to understand what is being proposed. At this stage, the purpose of the information is to enable participants to make an intelligent contribution.

## **3. Design the scoping process for each federal action.**

There is no established or required procedure for scoping, but it is intended to be flexible and efficient. The process can be carried out by meetings, telephone conversations, written comments, or a combination of all three. Ad hoc workgroups of tribal leadership and representatives are particularly useful for identifying issues. The issue should drive the process, particularly whether its effect will be national in scope, or related to a region or to a specific tribe. It is important to tailor the type, the timing and the location of any meetings to the proposal at hand. For example:

- A site-specific construction project would be a better candidate for a central scoping meeting.
- A proposal for new regulations that would broadly impact all tribes is a good candidate for a series of regional meetings.
- As a general guide, meetings should not be confined to Washington, D.C. Agencies should try to solicit the views of tribal governments throughout various regions.

An important early step is to determine the level of interest in the proposal by contacting known tribal leaders and by suggesting in the initial scoping notice and information packet that all those who desire a meeting should call to request one.

It may not be possible to plan the whole scoping process at the outset without knowing who all the potential interested tribes are. The process can start with written comments, move on to an informal meeting, and hold further meetings as needed.

## **4. Identify the participants in the consultation process.**

The consultation process is a mechanism for achieving understanding and consensus between federal decision makers and affected tribes with respect to federal actions. Accordingly, the participants should be those decision makers and the affected tribes.

a) **Bureau Participants.** To ensure that consultation involves the proper Bureau participants the Bureau should:

i) identify, at the outset of the consultation process, Bureau personnel who are expected to have a significant role in the Bureau decision;

ii) communicate the results of subsection i) of this section to tribes involved in the consultation process;

iii) seek tribal input on which Bureau personnel would best serve the purpose of the consultation process; and

iv) to the extent feasible, have those Bureau personnel who are expected to have a significant, high level role in the Bureau decision personally participate in the consultation process.

b) **Tribal Participants.** To ensure that consultation involves the proper tribal participants, the Bureau should:

i) determine, at the outset of the consultation process, whether the Bureau views the proposed federal action as national, regional, subject-matter specific, or tribe-specific in scope;

ii) for proposed federal action which the Bureau views as regional or subject-matter specific, seek additional views, including from national or regional tribal organizations and affected tribes, about whether additional tribes, beyond those identified by the Bureau, may have a significant interest in the proposed federal action;

iii) for proposed federal action identified as regional or national in scope, identify the regional or national tribal organizations that may have expertise, and can facilitate dialogue with affected tribes, with respect to the proposed federal action; and

iv) after notifying all those potentially affected tribes identified under subsections a), b), and c) of this subsection, defer to the expressed views of the tribes regarding who the tribal participants shall be with respect to any consultation

c) **Interagency Cooperation.** The Bureau will seek and promote cooperation and participation with other agencies that have jurisdiction over, special expertise with respect to, or related responsibilities regarding the Bureau's proposed legislation, action or policy.

## **5. Issuing notice to tribal governments.**

The Bureau, in any consultation process, shall provide appropriate notification of each stage in the process. Written notice shall be provided where feasible. Where written notice to a tribe is appropriate, the Bureau shall provide notification under this section by mail and/or by facsimile, to the Chair (or other Chief Executive Officer) of the tribe, unless the tribe specifies a different means of notice or unless a different means of notice is required by law. The provisions of this subsection shall apply both to initial notices of the beginning of a consultation process, and to any subsequent notices regarding such a process. Notice may also be provided to interested tribal government organizations and representatives. The Bureau and the tribes have the goal to 1) maximize the use of technology to facilitate interactive exchanges with respect to the proposed decision, and 2) notify affected tribes that written comments are permitted and will be considered.

## **6. Conducting a scoping meeting with tribal governments.**

Meetings with tribal governments should follow protocols appropriate for a government-to-government meeting that are determined by the participants and appropriate for the nature and scope of the meeting. Federal officials and tribal officials should be placed on an equal status in terms of the agenda and the room arrangements. The focus of a scoping meeting is to initiate a thorough identification and review of the issues prior to preparation of a decision, and not to debate the ultimate decisions. The scoping meeting should also identify areas that need further research and gather input from tribal leaders about how the consultation process should proceed.

## **B. Developing the Bureau Proposal**

### **1. What to do with the comments.**

After comments have been received through the scoping process from tribal leadership and appropriate tribal organizations, the Bureau should evaluate them.

A good practice is to develop a post-scoping document in order to share with tribal leaders the preliminary decisions that have been made on what issues to cover. The post-scoping document may be as brief as a list of issues selected for analysis; it may consist of the "scope of work" produced by the Bureau for their own work or for a contractor; or it may be a special document that describes all the issues and explains why they were selected.

### **2. Allocating work assignments and setting schedules.**

Following the scoping process, and the selection of issues to be covered, the Bureau should allocate the decision preparation work among the available resources. Tribal governments and their organizations should be considered as appropriate collaborative partners, particularly where negotiated rule-making or a Tribal Leader Task Force is created. Tribal governments may also be involved in specific research or writing tasks, especially where the tribes have special expertise or jurisdiction by law. A schedule

should be set for completion of the work, a project manager should be designated and reviewers assigned.

### **3. Designing the process for consultation on the draft proposal.**

The Bureau shall consult with tribes to ensure meaningful and timely input by tribal officials. Consultation shall occur in a manner that is consistent with the overriding goal of assuring maximum tribal participation and informed federal decision making. The Bureau shall structure each consultation process to the extent feasible to conform to the expressed views of the tribes.

Forms of consultation are as follows:

**a. Negotiated Rule Making.** The Bureau should use negotiated rule making for developing significant regulations or other formal policies relating to tribal self-government, trust resources, or treaty and other rights, unless such a process would be inappropriate.

**b. Tribal Leader Task Force.** The Bureau should consult with a Tribal Leader Task Force on matters that impact tribes across the country where negotiated rule making is unavailable or is not desired by the tribes. A Tribal Leader Task Force may also be used, in appropriate circumstances, for consulting with tribes on regional or issue-specific (e.g., timber) matters. In each instance, the composition of the Task Force shall be determined by the Tribes, provided that the Task Force shall be a process open to all tribes and shall to the extent possible represent a cross-section of tribal interests with respect to the matter at issue. The number of meetings to be held, and their location, shall conform to the expressed views of the tribes, to the extent practicable and permitted by law.

**c. Series of Open Meetings.** The Bureau should consult with tribal leaders in a series of open meetings where appropriate for the action under consideration. Open meetings can be used for national, regional or subject-matter specific issues.

**d. Single Meetings.** The Bureau should consult with tribal leaders in a single meeting when appropriate for the federal action under consideration. Single meetings are particularly appropriate for local, regional or single tribe issues.

### **4. Length of the Consultation Process.**

The Bureau should, at the outset of the consultation process, solicit the views of affected tribes regarding how long the consultation process shall take. The Bureau should make all reasonable efforts to comply with the expressed views of the affected tribes regarding the length of the consultation process, taking into account the level of impact, the scope and the complexity of the issues involved in the proposed federal action. Notwithstanding the overall time for the process, consultation should continue throughout the Bureau's decision making process, except where expressly prohibited by law. If the Bureau determines that the Administrative Procedure Act or other federal law expressly prohibits



continued consultation at a specified point in the decision making process, the Bureau should so inform the tribes at the outset of the consultation process.

### **C. Implementation of Final Federal Action**

Prior to finalizing a decision on a federal action, the Bureau shall address issues raised as priority matters during the consultation process in a meaningful and timely manner appropriate to the issue. Bureau decisions significantly impacting Indian tribes shall be made in conformance with the Policy Making Principles, above, in Section V and notice shall be provided to all identified parties. The Bureau shall continue to consult with tribes regarding the manner in which that decision is implemented, its impact on tribes, as well as any need for training or technical assistance on a new regulation or policy.

## **VII. EDUCATION**

The Director, Office of American Indian Trust in consultation with the Assistant Secretary for Policy, Management and Budget will develop a Department-wide tiered employee education plan calculated to provide introductory, intermediate, and advanced training on the subject of federal Indian Affairs and the policy of government-to-government relations with tribes. All levels of training will explain the nature of the diplomacy and protocols to be observed. A mandatory refresher course must be completed by all personnel every two years.

In furtherance of the Indian Self Determination and Education Assistance Act, as amended, the plan will reflect how tribes and tribal organizations can assist the Department in developing and maintaining an effective education program, including curricula and materials.

## **VIII. MONITORING AND PERFORMANCE**

The Bureau will develop an accountable process. The system will include the designation of a Department official who is responsible for day-to-day and quarterly reporting on the status of all consultation issues, as well as annual reporting on the outcome of consultation issues. The system will evidence the integrity of consultation and demonstrate our best faith effort to advance meaningful working relationships with tribes.

This policy shall be implemented in FY 2001, or by the implementation terms of Executive Order No. 13175 regarding consultation with Indian tribal governments, whichever is later.

Kevin Gover, December 13, 2000

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[1991 Statement Reaffirming the Government-to-Government Relationship](#)