

Jeff Crawford, Attorney General
Jo Swamp, Senior Attorney
Amanda K. Frazer-Collins, Attorney

Jo Deen B. Lowe, Deputy Attorney General
Bruce Elliott Reynolds, Senior Attorney

**FOREST COUNTY POTAWATOMI COMMUNITY
LEGAL DEPARTMENT**

313 N. 13th Street
Milwaukee, WI 53233
(414) 847-7750
Fax: (414) 847-7721

P.O. Box 340
Crandon, WI 54520
(715) 478-7258
Fax: (715) 478-7266

February 18, 2010

By Electronic Mail to Rodger.J.Boyd@hud.gov and
tribalconsultationcomments@hud.gov

Rodger Boyd
Deputy Assistant Secretary
for Native American Affairs
United States Department of Housing and Urban Development
451 7th Street S.W.
Washington, D.C. 20410

Re: Department of Housing and Urban Development tribal consultation policy

Dear Deputy Assistant Secretary Boyd:

The Forest County Potawatomi Community ("FCPC" or "Tribe") is pleased to submit these comments on how the United States Department of Housing and Urban Development (the "Department") can effectively implement President Obama's November 5, 2009 Memorandum ("President's Memorandum"), which directs all federal agencies to submit a detailed plan of action to implement the policies and directives of Executive Order 13,175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (2000) ("EO 13175"). *Id.* Our response first briefly describes FCPC and its history, and then discusses the well-settled legal principles on which EO 13175 is based. We then set out our suggestions for the development of the Department's tribal consultation policy.

Rodger Boyd
Deputy Assistant Secretary
United States Department of Housing and Urban Development
February 18, 2010
Page 2

Background

The Forest County Potawatomi Community is a federally recognized Indian tribe with a government-to-government relationship with the United States. 74 Fed. Reg. 40,218 (Aug. 11, 2009). The Tribe is organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 461-479, has a membership of more than 1,200 people, and exercises governmental authority under a Constitution originally adopted on February 6, 1937. The FCPC landbase includes a Reservation of over 12,000 acres located in northern Wisconsin, and a small amount of trust land in the Milwaukee area.

The Tribe regulates persons and activities in tribal territory, operates a tribal court system, and provides services in numerous areas that include education, environmental protection, natural resources, cultural resources, health services, and emergency management. The Tribe also operates numerous federal programs pursuant to contracts entered into with the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act (“Self-Determination Act”), 25 U.S.C. §§ 450-458bbb-2, the purpose of which is to enable FCPC to develop a “strong and stable tribal government[,]” capable of administering quality programs and developing the econom[y] of their [] communit[y].” 25 U.S.C. § 450a(b). In addition, after years of carrying out programs of the Indian Health Services (“IHS”) under Title I of the Self-Determination Act, in 2005 FCPC entered into a Compact and Funding Agreement with the Secretary under Title V of the ISDEAA.

The Potawatomi have a long history in what is now Wisconsin and the Midwest states, and are parties to over forty treaties with the United States involving the traditional territory of the Potawatomi in southern Michigan, the northern half of Indiana and Illinois, and eastern Wisconsin. These include the Treaty of Fort Harmar in 1789 and the Treaty of Greenville in 1785 – under which the United States established peace and friendship with the Potawatomi and recognized their rights to the territory they occupied.

In the early 1800s, pressure by non-Indian settlers for land increased, and the United States sought to acquire more Potawatomi land by treaty. In the treaties that were subsequently negotiated, the United States recognized the rights of the Potawatomi to the lands that they used and occupied, and assumed an obligation to protect them. Under the treaties, the United States promised not only to compensate the Potawatomi for the lands acquired, but also agreed to provide for their education, subsistence and support, and to establish reservations where the Potawatomi could continue to live. However, after the

Rodger Boyd
Deputy Assistant Secretary
United States Department of Housing and Urban Development
February 18, 2010
Page 3

Treaty of Chicago in 1833, most of the Potawatomi people were forcibly removed from the last of their lands east of the Mississippi River. Some of the Potawatomi, opposing the forced removal and fearing for their lives, fled north. As a result, several thousand Potawatomi moved to refuges in upper Canada, many hundreds moved north along both shores of Lake Michigan to territory away from non-Indian settlement, and a few hundred remained in southeast Wisconsin and southern Michigan.¹

The Forest County Potawatomi Community descends from the Potawatomi Indians who would not leave Wisconsin.² For many years, these Potawatomi simply lived on lands in northeastern Wisconsin. After petitioning Congress for relief, Congress appropriated funds in 1913 to allow them to acquire land in trust under the 1884 Indian Homestead Act and to build homes on those lands.³ In the years that followed, Congress continued to appropriate funds to assist in the education and support of the Potawatomi Indians in Wisconsin.⁴ In 1988, the Tribe's lands were recognized as having reservation status.

Significantly, the dispersion of the Potawatomi throughout the United States and Canada as a result of federal Indian policy following the 1833 Treaty of Chicago did not separate the Potawatomi from one another. The Potawatomi Tribes, including those in Canada, meet annually for a Potawatomi Gathering. These Gatherings play a vital role in

¹ James Clifton, *The Prairie People, Continuity and Change in Potawatomi Indian Culture 1665-1965*, University of Iowa Press (1998) at 185, 309-310.

² Clifton, *supra* note 1 at 310-11.

³ Act of June 30, 1913, 38 Stat. 102.

⁴ *E.g.*, Act of April 4, 1910, 36 Stat. 269 (appropriates \$25,000 for the support, education and civilization of the Potawatomi Indians who reside in the State of Wisconsin and to investigate their condition); Act of August 24, 1912, 37 Stat. 518 (appropriates \$7,000 for the support, education and civilization of the Potawatomi Indians who reside in the State of Wisconsin); Act of May 18, 1916, 39 Stat. 123 (appropriates \$100,000 for the support and civilization of the Wisconsin Band of Pottawatomie Indians, which funds are to be reimbursed from the annuities estimated to be due to these Indians under their treaties with the United States); Act of March 2, 1917, 39 Stat. 969 (similar to 1916 Act); Act of May 25, 1918, 40 Stat. 561 (appropriates \$75,000 for the support and civilization of the Wisconsin Band of Pottawatomie, to be reimbursed from the funds due under their treaties with the United States).

Rodger Boyd
Deputy Assistant Secretary
United States Department of Housing and Urban Development
February 18, 2010
Page 4

maintaining the Potawatomi Tribes' shared culture and history. The location of the Potawatomi Gatherings is rotated among the Potawatomi Tribes, including the Canadian Potawatomi. The August 2008 Potawatomi Gathering and Language Conference was hosted by the Potawatomi of Wapole Island.⁵

Discussion

A. The Consultation Duties Imposed by EO 13175 are Based on Settled Principles of Federal Law.

The basic purpose of EO 13175 is to direct that all federal agencies conduct their relationships with Indian tribes in accordance with the Fundamental Principles, set forth in Section 2 of that order, which recognize the federal trust responsibility, tribal rights of self-government and tribal sovereignty, and reaffirm the Self-Determination policy which has guided the Federal Government's relationship with Indian tribes since 1970.⁶ Section 2 of EO 13175 provides as follows:

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following principles:

(a) 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. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

⁵ See *Potawatomi Traveling Times*, Vol 14, Issue 5 (September 1, 2008) available at <http://www.fcpotawatomi.com/index.php/2008-PDF-Archives/Sept-2008.html>

⁶ See Richard Nixon, Special Message to the Congress on Indian Affairs, 213 Pub. Papers 564 (July 8, 1970).

Rodger Boyd
Deputy Assistant Secretary
United States Department of Housing and Urban Development
February 18, 2010
Page 5

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. 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.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Id.

In recognizing the separate sovereign status of Indian tribes and the trust relationship between Indian tribes and the United States, the Fundamental Principles reflect well-settled law. Since Justice Marshall issued his seminal opinions in the Cherokee cases over 175 years ago, federal law has made clear that Indian tribes are separate sovereigns, with a relationship to the United States that is based on the federal trust responsibility. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

In the first of these cases, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court held that it lacked original jurisdiction over a suit filed by the Cherokee Nation to enjoin the enforcement of Georgia statutes on persons residing on lands secured to the Cherokee by treaty because the Cherokee Nation was not a “foreign state” within the meaning of that term in Article III of the Constitution. Chief Justice John Marshall, writing for the Court, agreed with the Cherokee Nation’s contention that it was a “state” in the sense of being “a distinct political society . . . capable of managing its own affairs and governing itself.” *Id.* The Court went on to hold that rather than being “foreign states,” Indian tribes were subject to the protection of the United States and might “more correctly, perhaps, be denominated domestic dependent nations.” *Id.* at 17. Chief Justice Marshall concluded that “[t]heir relation to the United States resembles that of a ward to his guardian.” *Id.*

Rodger Boyd
Deputy Assistant Secretary
United States Department of Housing and Urban Development
February 18, 2010
Page 6

In the second Cherokee case, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Court invalidated the Georgia statutes at issue in *Cherokee Nation*, holding that Indian tribes are “distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.” *Id.* at 557. In so ruling, the Court construed the Cherokee treaties as “explicitly recognizing the national character of the Cherokee and their right of self-government . . . [and] assuming the duty of protection, and of course, pledging the faith of the United States for that protection.” 31 U.S. (6 Pet.) at 556. Taken together the Cherokee decisions impose a trust duty on the federal government to protect Indian tribes’ rights of self-government, treaty rights, and property rights.

Since then, the Court has repeatedly reaffirmed these basic principles, acknowledging that “[o]riginally the Indian tribes were separate nations within what is now the United States.” *William v. Lee*, 358 U.S. 217, 218 (1959), and that as separate nations they “exercised virtually unlimited power over their own members as well as those who were permitted to join their communities.” *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). Then, as now, Indian tribes relied on their inherent sovereignty as a source of power to govern. As the Court explained in *United States v. Wheeler*, 435 U.S. 313 (1978), “[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their independent status.” *Id.* at 323.

The Court has also repeatedly “recognized the distinctive obligations of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.” *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (citations omitted), and has reaffirmed the “undisputed existence of a general trust relationship between the United States and the Indian People,” *United States v. Mitchell*, 463 U.S. 206, 225 (1983). In addition, the trust relationship is the basis of the well-established rules that Congress will not be presumed to abridge Indian treaty or property rights absent a clear expression of intent, *e.g.*, *United States v. Dion*, 476 U.S. 734, 738-40 (1986), and that ambiguous statutes affecting Indians must be construed liberally in favor of adherence to the trust responsibility. *E.g.*, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

Rodger Boyd
Deputy Assistant Secretary
United States Department of Housing and Urban Development
February 18, 2010
Page 7

The federal trust responsibility also includes the duty to consult with tribes to ensure their understanding of federal actions that may affect their rights and to ensure federal consideration of their concerns and objections with regard to such actions. The basic principles on which the duty to consult is based are simply stated. The relation of the United States to Indian tribes is a trust relationship, *Cherokee Nation*, 30 U.S. at 17, under which the United States has a duty to protect Indian tribes' rights of self-government, treaty rights, and property rights. See *Worcester*, 31 U.S. at 556-557. Unless the United States communicates regularly and effectively with Indian Tribes, it cannot know how its actions will impact their rights – nor can it avoid such impacts – and it thus cannot protect the rights for which it responsible under the trust responsibility. As the Court explained in *Klamath Tribes v. United States Forest Service*, 1996 WL 924509 (D. Or. 1996), “[i]n practical terms, a procedural duty has arisen from the trust relationship such that the federal government must consult with an Indian Tribe in the decision-making process to avoid adverse effects on treaty resources.” *Id.* at 8. Moreover, consultation accords respect to the tribes' status as separate sovereigns and reflects the commitment of the United States to honor their rights. These basic principles have been applied in a variety of circumstances. E.g., *Morton v. Ruiz*, 415 U.S. 199 (1974) (denial of general assistance benefits to Indians living near the reservation where the BIA had failed to publish eligibility requirements in accordance with BIA Manual held to be “inconsistent with ‘the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.’” *Id.* at 236 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)); *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) (“in some contexts the fiduciary obligations of the United States mandate that special regard be given to the procedural rights of Indians by federal administrative agencies”) (quoting *Felix S. Cohen's Handbook of Federal Indian Law* 225 (1982)); *Midwater Trawlers Cooperative v. U.S. Dep't of Commerce*, 139 F.Supp. 2d 1136, 1145-46 (W.D. Wash. 2000) (consultation grounded in the trust relationship) *aff'd in part and rev'd in part*, 282 F.3d 710 (9th Cir. 2002).

Simply stated, the purpose of EO 13175 is to protect the rights recognized in the Fundamental Principles through the consultation process. In so doing, EO 13175 implements established principles of federal Indian law, and makes clear that the long venerated principles of federalism in our constitutional structure apply equally to tribal governments.

Rodger Boyd
Deputy Assistant Secretary
United States Department of Housing and Urban Development
February 18, 2010
Page 8

B. The Importance of Consultation by the Department of Housing and Urban Development.

Consultation is the process by which representatives of the Federal Government and Indian tribes discuss agency actions that may affect tribal rights and interests. In recent decades, consultation has become more important as a result of the tribes' implementation of Supreme Court decisions recognizing tribal authority over persons and activities in Indian country, and legislation enacted by Congress in furtherance of the Self-Determination policy. Indian tribes are now protecting natural resources and the environment, operating judicial systems, running hospitals, and managing tribal enterprises, among other activities. In addition, many tribes are now partners with federal and state government agencies on important issues, including law enforcement, child welfare and environmental matters. For example, working with the Environmental Protection Agency to protect the Reservation environment, the Tribe recently redesignated its Reservation from Class II to Class I status under the Clean Air Act. As the range of tribal interests has expanded, so too has the potential for federal action to affect the tribes' exercise of their rights. This includes many activities of the Department of Housing and Urban Development.

As the President's Memorandum makes clear, "[c]onsultation is a critical ingredient of a sound and productive Federal-tribal relationship." *Id.* The consultation process seeks to ensure that Indian tribes are participants in the making of federal policy that affects their communities. As a result, federal decisionmakers are informed of tribal concerns, suggestions, and objections before they act, which makes for better decisionmaking and enhances federal-tribal cooperation in implementing the final decision. As a policy matter, consultation seeks to reconcile the tribes' rights of self-government and sovereignty with proposed federal action in a manner that protects the tribes' rights and fulfills the federal responsibilities that arise from the trust relationship. *See* EO 13175, §§ 2, 3(a). These are critically important objectives. As the President's Memorandum states, "[h]istory has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results." *Id.* When conflicts between the tribes' rights and proposed federal actions arise, the Department's policy should be to resolve those conflicts in a manner consistent with the Federal Government's trust responsibility to Indians, and tribal rights to self-government, sovereignty, lands and natural resources. While this will not always be easy, we emphasize that the challenges

Rodger Boyd
Deputy Assistant Secretary
United States Department of Housing and Urban Development
February 18, 2010
Page 9

of the consultation process are largely a reflection of the importance of that process to both the Federal Government and Indian tribes.

C. Suggestions for the Department's Tribal Consultation Policy.

We turn then to our specific suggestions on how the Department can develop a meaningful consultation policy that meets the requirements of EO 13175. We make suggestions in three areas. First, we discuss the scope of the consultation requirements, that is when consultation should be initiated with the tribes. Second, we consider how consultation should occur with respect to policy making and other areas. In this discussion, we also address how far in advance notice of consultation should be provided; the use of timelines in the consultation process; the procedures that should be used to follow up consultation; how consultation should be documented; and the use of alternatives to improve communication and coordination with Indian tribes. Third, we address who should participate in consultation for the Department.

We begin by offering a suggestion that would improve the Department's communication and coordination with Indian tribes, and in so doing, enhance the productivity of consultation. A major barrier to effective consultation is often the failure of agency staff to recognize issues that should be subject to consultation. To address this problem, the Department should complement its formal consultation policy with internal education initiatives, such as incorporating into staff training and development plans information regarding the government-to-government relationship with tribes, tribal rights of self-government, sovereignty and property, and the value of tribal consultation. Tribes should be invited to participate in the development of such training materials and in presenting such information. Training should not be limited to those employees who have actively engaged with tribes, but should be extended to all employees. In addition, the Department should hold an annual meeting with Indian tribes to discuss the effectiveness of the consultation that occurred in the preceding year, as well as to preview policies with tribal implications which are likely to arise in the following year.

1. Under EO 13175, Consultation is required when the Department's actions affect Indian tribes.

As a general matter, consultation is required under EO 13175 when action proposed by the Department involves "policies with tribal implications," which means "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." *Id.*, § 1(a). This definition has two elements. The first describes *which* actions of the Department may be subject to consultation. This is done in terms that include virtually all legislative, policy, and regulatory actions of the Department, that is all "regulations, legislative comments or proposed legislation, and other policy statements or actions . . ." *Id.* The second element describes *when* the Department's actions are subject to

Rodger Boyd
Deputy Assistant Secretary
United States Department of Housing and Urban Development
February 18, 2010
Page 11

consultation, namely, when the action has a direct effect on tribal interests or the tribes' relationship with the United States, including, particularly, the distribution of power and responsibilities between the two governments. *Id.*

Taken together, the elements of this definition show that consultation duties are triggered by the effect of proposed federal action on Indian tribes and their rights, and thus apply to the development of national policies which make no specific mention of Indian tribes, but which nevertheless affect their rights. Indeed, one basic purpose of EO 13175 is to ensure that the rights of Indian tribes are not ignored in the formation and implementation of national policies. This extends the consultation policy beyond the limits of federal actions which are specifically intended to apply to Indian tribes, and implements the federalism principles on which EO 13175 is based. *Cf.* EO 13175, § 1(a) and Executive Order 13,132, Federalism, 64 Fed. Reg. 43, 255 (1999).

Sections 3-5 of EO 13175 then set forth the consultation duties that arise when the Department's policy, legislative, or regulatory actions have tribal implications. The Department's consultation policy should also describe these duties. We discuss each separately below.

Section 3 addresses consultation in the formulation and implementation of policymaking that affects Indian tribes. *Id.*, sec. 3. Significantly, section 3 applies to the *formulation* of policy, as well as its implementation. Thus, tribal views must be considered *before* such policy decisions are made by the Department. In formulating and implementing policy, Section 3 requires that the Department adhere to the Fundamental Principles set forth in § 2, and to the additional criteria set forth in Sections 3(a) to (c). The additional criteria require that the Department respect tribal self-government, tribal rights, and the trust responsibility, *id.* at 3(a); grant tribal governments maximum administrative discretion with respect to statutes administered by tribal governments, *id.* at 3(b), encourage the tribes to develop their own policies to achieve program objectives, *id.* at 3(c)(1), and defer to Indian tribes to establish their own standards where possible. *Id.* at 3(c)(2). Additional requirements apply when, in making policy that affects Indian tribes, the Department is determining whether to establish federal standards, in which case the consultation must include discussion of the need for federal standards, and alternatives to limit their scope and preserve tribal autonomy. *Id.* at 3(c)(3).

To maximize its effectiveness, consultation under Section 3 should be initiated as soon as the need to develop policy that has tribal implications has been identified by the Department. In some instances, consultation at this stage may result in a decision that the problem, though initially seen as creating the need to make policy that would affect Indian tribes, is best left to the tribes to address in the exercise of their rights of self-

Rodger Boyd
Deputy Assistant Secretary
United States Department of Housing and Urban Development
February 18, 2010
Page 12

government. It is also possible that the Indian tribes, rather than the Department, will identify a need to develop a policy, in which case consultation should also be initiated.

Section 4 of EO 13175 addresses legislative proposals, which the Department shall not submit to Congress if they are inconsistent with the policymaking criteria in Section 3. In some instances, the Department will want to consult with Indian tribes to determine whether there is such an inconsistency – and should do so if consultation is requested by a tribe. Section 3 further provides that a legislative proposal that has tribal implications which seeks to establish Federal standards may be submitted *only* if the consultation that is required by Section 3(c)(3) has been completed. In such consultation, the Fundamental Principles set forth in Section 2, as well as the specific criteria set forth in Section 3(a) and (c)(1) and (2), should be addressed. Consultation on legislative proposals under Section 4 should be initiated by the Department as soon as it becomes clear that the legislation would implement policies that have tribal implications.

Section 5 addresses consultation in the development of regulatory policies that have tribal implications. Again, consultation duties arise from the tribal implications of the policy – rather than being limited to policies which are specifically intended to apply to Indian tribes. Like the reference in § 3 to the “formation” of policy, the reference to its “development” in § 5(a) recognizes that consultation should include discussion of both the problem to be addressed and how to solve it, rather than simply providing an opportunity for tribes to comment on the agency’s proposed solution. Under Section 5, consultation on the development of regulatory policies that have tribal implications should begin once the Department has identified a problem that affects Indian tribes that it plans to address.

To enhance accountability, the consultation policy must be written, and the Department must identify who is primarily responsible for its implementation. Under Section 5(a), the Department must develop “an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” The Department must also designate an official with primary responsibility for ensuring that the Department consults with Indian tribes in accordance with the requirements of EO 13175. *Id.*, § 5(a).

In two instances, Section 5 conditions the Department’s power to issue regulations that have tribal implications on compliance with additional consultation duties: *first*, when the regulation would impose “substantial direct compliance costs” on tribal governments that are not statutorily required, § 5(b); and *second*, when the regulation would preempt tribal law, § 5(c).

Rodger Boyd
Deputy Assistant Secretary
United States Department of Housing and Urban Development
February 18, 2010
Page 13

Direct compliance costs may be imposed if the funds needed to pay such costs are provided by the federal government, § 5(b)(1), or if prior to promulgating the regulation, the Department has satisfied the detailed requirements of § 5(b)(2). That subsection requires the Department to do the following: show that it consulted with tribal officials “early in the process of developing the proposed regulation,” § 5(b)(2)(A); provide a tribal impact statement in a separate part of the preamble to the regulation describing the consultation with tribal officials, summarizing their concerns and the Department position on the need for the regulation, and stating the extent to which tribal officials’ concerns were met, § 5(b)(2)(B); and make available to the Director of OMB any written communications submitted to the Department by tribal officials. § 5(b)(2)(C).

Regulations that would preempt tribal law may be promulgated only if the Department satisfies the same requirements as are set forth in § 5(b)(2). That is, the Department must show that it consulted with tribal officials “early in the process of developing the proposed regulation,” § 5(c)(2)(A); provide a complete tribal impact statement, § 5(c)(2)(B); and make available to the Director of OMB any written communications submitted to the Department by tribal officials. § 5(c)(2)(C).

In addition, section 5 requires that when issues that relate to tribal self-governance, tribal trust resources, or treaty or other Indian rights are concerned, the Department must consider other consensual mechanisms for developing regulations, including specifically negotiated rulemaking. § 5(d).

Section 6 of EO 13175 requires each agency to review and streamline its processes for waivers of statutory and regulatory requirements. § 6(a). Section 6 also specifically requires an agency to consider any application for a waiver of statutory or regulatory requirements of agency programs with a view towards increasing flexibility at the tribal level where a waiver is consistent with Federal policy objectives. § 6(b). Agencies are required to make a decision on such a request within 120 days of its receipt, or as otherwise provided by law, and if it is not granted, must provide a timely written decision explaining why it was denied. § 6(c). These requirements apply to statutory and regulatory requirements that are discretionary and subject to waiver by the agency. § 6(d).

Finally, section 7 of Executive Order 13175 addresses accountability by imposing specific requirements on the transmittal of regulations and legislative proposals to OMB. In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866, the Department must include a certification from the official designated to ensure compliance with Executive Order 13175 “that the requirements of this order have been met in a meaningful and timely manner.” § 7(a). A similar

Rodger Boyd
Deputy Assistant Secretary
United States Department of Housing and Urban Development
February 18, 2010
Page 14

certification must accompany the transmittal to OMB of any proposed legislation that has tribal implications. § 7(b).

2. How should timely consultation occur?

We first describe two essential elements to meaningful and timely consultation, and then address the stages of an effective consultation process. For consultation to be meaningful, the lines of communication with the Department must be open and the Department decision-making process must be transparent throughout the consultation process. For this purpose, the Department should maintain a real-time, public listing, available on its web page of all consultation activities and their status. This is essential to document consultation and will also provide a resource that will make consultation more effective. In addition, the Department should give priority to tribal correspondence, which will both improve communication and coordination with the Department and enhance participation in consultation. For example, out of respect for tribal sovereignty and self-government, the Department of Transportation has adopted a requirement since 1999 which directs its agencies to “[t]reat correspondence from leaders of federally recognized tribes in the same manner as congressional correspondence” to ensure that timely and comprehensive written responses are provided to tribes. DOT Order 5301.1 (November 16, 1999). A standardized process for monitoring and responding to tribal inquiries within a certain time period would greatly facilitate the consultation process.

We suggest that the Department should adopt a consultation policy with the following stages. First, notice of the consultation must be given sufficiently in advance to allow the tribes to prepare for it. The more complex the matter, the more lead time should be afforded the tribes to prepare for the consultation. We would propose that absent exigent circumstances, a minimum of 30 days notice should be required.

The notice should also identify the policy with tribal implications that is the subject of consultation, indicate whether it involves policy formation, proposed legislative action, or a proposed regulatory measure, describe the proposal in detail, and identify any specific consultation requirements which EO 13175 makes applicable to the proposal, as well as any specific questions on which tribal views are specifically requested. The notice should also describe the plan for consultation – when, and where it will occur, the stages it will consist of, and the timetable for the completion of each stage of the consultation process. The timetable is likely to require adjustment in some instances, but providing a timetable is important, as it allows tribes to schedule their own participation in the consultation process. In addition, the notice should identify who the tribes may contact for further information on the subject of the consultation.

The second stage of the consultation process should seek to provide a complete understanding of the Department's proposal to the tribes. Discussion topics should include the problem which the proposal seeks to address, how the proposal addresses that problem, the goals that the proposal seeks to achieve, the alternatives to the proposal that were considered, and the Department's assessment of the proposal's impact on tribal interests. This discussion is essential to effective consultation – in order to identify its concerns, the tribe must first understand the Department's proposal. In some instances, particularly where the Department's proposal is complex, this stage of the consultation might be conducted most effectively in a conference or workshop format, at which the sole objective would be to ensure the tribes' understanding of the proposal.

The third stage of the consultation process should provide an opportunity for the tribes to present their full views on the proposal, its impact on tribal interests, suggestions for improving it, and alternatives for achieving the proposal's objectives in a manner that does not negatively affect tribal interests. In less complex matters, this stage might be combined with the second. In other instances, it will require an additional meeting, and sufficient time for the tribes to prepare. At this stage, a primary objective of the Department should be to gain a full understanding of the tribes' views. The Department's representatives will want to ask questions at this stage, just as the tribes' representatives did at the second stage. Once that understanding has been achieved, an informed exchange may occur on the issues raised by the proposal. Do they relate to how the problem that the proposal seeks to address is defined? Or is it the proposed solution? Or the process that the proposal employs? Or its impact on tribal interests? This discussion should provide the foundation for consideration of the strengths and weaknesses of various means for addressing those issues, including alternatives that would reconcile the proposal with the tribes' rights and the self-government objectives of the Self-Determination policy. In some instances, it may be useful to establish a Taskforce to examine in detail one or more problems that have been identified, and offer suggestions for how those problems might be resolved. But the decision on whether to support such suggestions – and if so on what terms – should be the tribes' alone.

In the fourth stage of consultation, the Department should – before taking final action – state how it plans to proceed, including of course the action it intends to take, and describe the extent to which the Department's plan addresses tribal concerns. The tribes should then have an opportunity to submit their views on that plan, how it affects the tribe, and how it might be improved. Otherwise, the tribes will have no opportunity to bring the benefit of the consultation process to bear on the Department's decision. The fourth stage is thus both essential to the effectiveness of the consultation (by providing tribes an opportunity to comment on the action that Department intends to take), and

Rodger Boyd
Deputy Assistant Secretary
United States Department of Housing and Urban Development
February 18, 2010
Page 16

necessary to show compliance with EO 13175 (by showing how the Department addressed the tribes concerns).

The final stage of the consultation process involves the announcement of the Department's action, accompanied by a statement of its compliance with the consultation policy of the agency.

3. Who should participate in consultation for the Department?

The Department's policy should clearly indicate who will participate in consultation for the Department. In our view, the Department's representatives should include the following: first, a person who is well informed about the Department's proposal and the reasons for advancing it; second, a Department decisionmaker, that is, a person who has responsibility for making the decision on the matter that is the subject of consultation; third, the Department official with primary responsibility for implementing the Department consultation policy. This will allow the Department to bring the benefit of prior consultation experience to bear on the consultation process in each instance.

On the tribal side, the decision on who should participate is a matter for the Tribe to determine in the exercise of its powers of self-governance. Tribes will likely direct the participation of tribal officials who are best informed on the subject matter to which the consultation relates, and a tribal policymaker, who can speak more generally to the questions of tribal policy that discussion of the impact of the Department's proposal on the tribe is likely to raise.

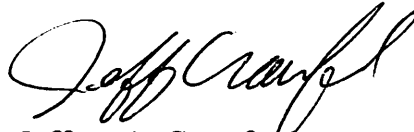
In some situations, regional and national tribal organizations may have valuable input and can play a helpful role in the consultation process. Frequently, the national tribal organizations have contact information and mechanisms for communication that are more likely to get information to the appropriate tribal official than those of federal agencies who have relatively limited contact. This is not a substitute for direct communication and consultation with each tribe, but should be used to supplement and improve the Department's communications with Indian tribes.

Rodger Boyd
Deputy Assistant Secretary
United States Department of Housing and Urban Development
February 18, 2010
Page 17

Conclusion

Meaningful consultation improves policy-making because it results in increased knowledge on the part of both the federal agency staff and tribes. We look forward to working with the Department to formulate a comprehensive consultation process that is practical and effective.

Respectfully submitted,
FOREST COUNTY
POTAWATOMI COMMUNITY



Jeffrey A. Crawford
Attorney General

cc: Forest County Potawatomi Community Executive Council