



Office of the Attorney General
Washington, D. C. 20530

August 29, 2013

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS AND
UNITED STATES ATTORNEYS

FROM: THE ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "Eric Holder".

SUBJECT: Department of Justice Policy Statement on Tribal Consultation

As set forth in President Obama's Memorandum on Tribal Consultation, dated November 5, 2009 ("Presidential Memorandum"), tribal consultations are "a critical ingredient of a sound and productive Federal-tribal relationship." The Presidential Memorandum directed each department or agency to implement the policies and directives of Executive Order 13175 of November 6, 2000 (Consultation and Coordination with Indian Tribal Governments).

In accordance with the Presidential Memorandum, I have approved the attached Department of Justice Policy Statement on Tribal Consultation, which reflects the Department's commitment to regular and meaningful consultation and collaboration with tribal officials. The Policy Statement establishes a formal process through which Department components must seek tribal input regarding the development of new or amended policies, regulations, and legislative actions initiated by the Department that may affect Indian tribes. Questions regarding the policy or a particular consultation should be directed to the Office of Tribal Justice.

Attachment



Approved On: August 29, 2013

DOJ POLICY STATEMENT

TRIBAL CONSULTATION

-
- PURPOSE:** This Policy Statement (Policy) implements the requirements of Executive Order 13175 of November 6, 2000 (Consultation and Coordination with Indian Tribal Governments), and provides Department of Justice (Department or DOJ) guidance on the formal process through which the Department seeks Tribal input regarding the development of new or amended policies, regulations, and legislative actions initiated by the Department.
- SCOPE:** This Policy applies to all Department Components.
- ORIGINATOR:** Office of Tribal Justice (OTJ)
- CATEGORY:** (I) Administrative, (II) Governmental and Public Relations
- AUTHORITY:** Executive Order 13175 (Nov. 6, 2000); President's Memorandum on Tribal Consultation (Nov. 5, 2009).
- CANCELLATION:** None
- DISTRIBUTION:** This Policy is distributed electronically to those components referenced in the "SCOPE" section as well as posted to the DOJ Directives electronic repository (SharePoint).

APPROVED BY:

Eric H. Holder, Jr.
Attorney General



ACTION LOG

All DOJ directives are reviewed, at minimum, every five years and revisions are made as necessary. The action log records dates of approval, recertification, and cancellation, as well as major and minor revisions to this directive. A brief summary of all revisions will be noted. In the event this directive is cancelled, superseded, or supersedes another directive, that will also be noted in the action log.

Action	Authorized by	Date	Summary
Initial Approval	Attorney General	August 29, 2013	This Policy implements the requirements of Executive Order 13175 and provides guidance on the formal process through which the Department seeks Tribal input regarding the development of new or amended policies, regulations, and legislative actions initiated by the Department.

TABLE OF CONTENTS

I. Introduction	4
II. Initiating Consultation	4
III. Consultation Guiding Principles.....	5
A. Adequate Notice	5
B. Accessibility.....	6
C. Meaningful Process.....	6
D. Accountability	6
IV. Development of Supplemental Consultation Guidance	7
V. Interagency Consultation.....	7
VI. Judicial Review	7

DEPARTMENT OF JUSTICE POLICY ON TRIBAL CONSULTATION

I. Introduction

Consultation is the formal process through which the Department of Justice seeks Tribal input regarding the development of new or amended policies, regulations, and legislative actions initiated by the Department (referred to collectively as “policies” and further described below). The principle of consultation has its roots in the unique relationship between the Federal Government and the governments of federally recognized Tribes. This government-to-government relationship has a more than 200-year history, and is built on the foundation of the U.S. Constitution, treaties, legislation, executive action, and judicial rulings. Most recently, Tribal consultation was recognized as formal Federal policy in Executive Order 13175 of November 6, 2000 (Consultation and Coordination with Indian Tribal Governments) and President Obama’s Memorandum on Tribal Consultation, signed on November 5, 2009. This Policy implements Executive Order 13175 and provides guidance regarding the sections most relevant to the mission of the Department of Justice.

Coordination between Tribes and the Department of Justice encompasses a variety of forms of communication that include formal consultation, listening sessions, meetings with individual Tribes, and informal discussions with Tribal leaders. Executive Order 13175 and this Policy focus on the more formal aspects of consultation. However, communication between Tribes and the Department of Justice is not limited to formal consultation. To this end, the Department of Justice will engage in ongoing communication with Tribes beyond formal consultation.

II. Initiating Consultation

The Department of Justice will consult with federally recognized Tribes before adopting policies that have Tribal implications. The term “policies” includes: (1) regulations or regulatory policies; (2) proposed legislation; (3) decisions regarding whether to establish Federal standards; and (4) other policies for which the Department determines consultation is appropriate and practicable. The term “policies” does not include matters that are the subject of investigation, anticipated or active litigation, or settlement negotiations. Nor does it include individual grants or contracts. Executive Order 13175 explains that policies have Tribal implications if they “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.” The requirements of Executive Order 13175 and this policy statement generally will be construed liberally in favor of consultation on any given policy with Tribal implications. All decisions regarding whether and how to conduct a consultation, or whether a given policy or topic has Tribal implications, will be coordinated with the Department’s Office of Tribal Justice.

In addition, the Office of Tribal Justice—in conjunction with affected Department components—will consider requests from Tribes to engage in consultation on any new policy initiated by the Department of Justice, even if the Department has not previously identified that policy as having

Tribal implications. Tribes may contact the Office of Tribal Justice to request a consultation. The affected component, in coordination with the Office of Tribal Justice, will prepare and send to the requesting Tribe or Tribes a written response to the request.

III. Consultation Guiding Principles

Given the wide variety of topics that may be the subject of consultation between Tribes and the Department of Justice, the structure of any individual consultation may vary. However, there are four guiding principles for all Tribal consultations conducted by the Department of Justice:

- Consultation will involve timely, adequate notice to the appropriate parties.
- Consultation will be accessible and convenient to Tribal participants.
- Consultation will be a meaningful process involving appropriate participants.
- Consultation will be conducted through a transparent and accountable process.

A. Adequate Notice

Adequate notice has two components. First, adequate notice means that relevant Tribal parties will be made aware of an upcoming consultation sufficiently in advance of the event to ensure an opportunity for participation. Second, adequate notice entails providing a full description of the topics to be discussed and typically should include draft materials if they are available at the time of the notice.

Generally, every effort will be made to provide notice at least 30 days prior to a scheduled consultation. If exceptional circumstances, such as legislative deadlines or other factors beyond the Department's control warrant a shorter period of advance notice, the consulting component will provide an explanation for the abbreviated notification in the invitation letter. Invitations to consultations will be published on the Office of Tribal Justice and the Tribal Safety and Justice Web sites and sent by e-mail to appropriate individual Tribal leaders using an up-to-date Tribal leaders list, or sent by other means reasonably designed to reach all affected federally recognized Tribes.

Adequate notice of a consultation should include sufficient detail about the topic to be discussed to allow Tribal leaders an opportunity to engage meaningfully in the consultation. The Department's experience has been that providing Tribes with specific information about the issues and questions the Department deems most relevant to the topics of a particular consultation benefits both Tribal participants and the Department by helping ensure that Tribal comments are focused enough to be useful in the Department's decision-making process. This does not mean that the affected Department component has reached a preliminary decision on the issue that is the topic of the consultation. However, the Department should provide a brief discussion of the issues, a timeline of

the process, potential outcomes, and, if possible, an overview of any specific questions on which the Department would like Tribal input.

B. Accessibility

Consultations should be accessible to the relevant Tribal audience. Depending on the circumstances, consultation may be conducted in person, via video conferencing, conference calls, interactive Web technology, or similar means. Written comments will also be accepted. If an issue that is the subject of the consultation primarily affects an individual reservation or region, the consulting component within the Department should ensure that the consultation will be accessible to the tribes that will be primarily affected. This will sometimes mean holding multiple consultation sessions. If the consultation involves joint action with other Federal agencies, the consulting component should attempt to hold a joint consultation with the other agencies.

C. Meaningful Process

Whenever possible, a consultation should involve individuals who have decision-making authority on the issue that is the subject of the consultation. This will generally mean that the component should make every effort to ensure that elected Tribal leaders or their designees will be substantively involved in the consultation. Also, the component should ensure that political leadership or other relevant decision-makers for the Department of Justice are substantively involved in the consultation even if they are not personally able to attend. If the ultimate decision-makers are not present for the consultation, the Department representatives should ensure that those decision-makers are aware of the relevant issues in advance of the consultation and are apprised of Tribal input after the consultation and before relevant decisions are made. A meaningful process includes providing a full description of the topics to be discussed, and in most cases it will include written materials in advance of the event.

Consultation will occur at a point in the deliberative process before the affected Department component has arrived at a decision. Consultation is not meaningful if the component has already decided the issue, and Tribal input is only *pro forma*. To this end, components need to be aware as early as possible of their duty to consult with Tribes and factor consultation into their deliberative process.

D. Accountability

At the conclusion of a consultation event, and after due consideration, the component will prepare, in consultation with the Office of Tribal Justice and any other component likely to have a specific interest in the subject matter of the consultation, a summary of the consultation. This will include a synopsis of Tribal concerns and issues and a description of the component's consideration of these concerns and issues. After input from the Office of Tribal Justice, the component will timely convey to all participants this summary of the issues discussed during the consultation.

IV. Development of Supplemental Consultation Guidance

The Department of Justice is made up of nearly 40 components. Some of these components have frequent and substantive contact with Tribal governments, while other components have limited interaction with Tribes. The Office of Tribal Justice is available to assist components with implementing this Policy for their Tribal consultation process. Components with frequent and substantive contact with Tribes may wish to supplement this Policy with more specific consultation guidance. Those components are encouraged to develop such guidance to assist in accomplishing their mission as it affects Tribes. Supplemental guidance shall be reviewed by the Office of Tribal Justice to ensure consistency and compatibility with Executive Order 13175 and this Department-wide Policy.

V. Interagency Consultation

Beyond issues requiring Tribal consultation by the Department of Justice, there may be overarching topics involving other Federal agencies that merit a broad policy discussion. Examples of such topics might include sacred sites, courts, law enforcement, crime-data collection, taxation, and juvenile justice. As necessary and appropriate, the Department may initiate an interagency Tribal consultation on such topics. Relevant Federal agencies will be invited, along with representatives from interested Tribes. This interagency consultation will ordinarily be convened in Washington, D.C.; however, the Department will also consider other venues where appropriate. The purpose of such a consultation is to fully consider important existing policies with Tribal implications, many of which may pre-date Executive Order 13175. The Office of Tribal Justice will consult with the Tribal Nations Leadership Council to develop appropriate topics.

VI. Judicial Review

This Policy is intended only to improve the internal management of the Department, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable in equity or at law by a party against the Department or any person.

Please contact the Office of Tribal Justice for further information on any of the processes established in this Policy.