



United States Department of the Interior

OFFICE OF NATURAL RESOURCES REVENUE

Washington, DC 20240

MAY 29 2012

Memorandum

To: All Office of Natural Resources Revenue Employees

From: Gregory J. Gould
Director

Theresa Walsh Bayarri

Subject: Office of Natural Resources Revenue Tribal Consultation Policy

Executive Order 13175 obligates Federal agencies to engage with Indian Tribes on a government-to-government basis. Additionally, the Department of the Interior, through Secretarial Order 3317, requires that all agencies and bureaus update policies or develop new policies addressing Tribal consultation. Attached is the Office of Natural Resources Revenue (ONRR) Policy on Tribal Consultation, which is effective immediately. Through this policy, ONRR works to strengthen its government-to-government relationship with Indian Tribes. ONRR will implement Consultation Procedures in Fiscal Year 2013, to provide employees with more specific guidance and tools for consulting with Indian Tribes.

I have designated the Program Manager for State and Indian Coordination to serve as ONRR's Tribal Liaison Officer (TLO). As indicated in the attached Policy, please coordinate all consultation efforts with the TLO:

Attachment

**Office of Natural Resources Revenue
Policy on Consultation with Indian Tribes**

May 29, 2012

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I. Preamble

The obligation for Federal agencies to engage with Indian Tribes¹ on a government-to-government basis is based on the U.S. Constitution and Federal treaties, statutes, executive orders, and policies. Federal agencies help to meet that obligation through meaningful consultation with Indian Tribes.

The Office of Natural Resources Revenue (ONRR) is committed to fulfilling its Tribal consultation obligations. Tribal consultation obligations may arise due to new or existing statutes or administrative action such as Executive Order (EO) 13175, Consultation and Coordination with Indian Tribal Governments, or other applicable Secretarial Orders or policies. By adhering to the consultation framework described in this Policy ONRR fulfills its consultation obligations. Through this Policy, ONRR works to strengthen its government-to-government relationship with Indian Tribes and will consult when office actions and decisions may affect Tribal interests.

Consultation is a process of meaningful communication and coordination between ONRR and Tribal officials, prior to ONRR taking actions or implementing decisions that may affect Tribes. As a process, consultation includes several methods of interaction that may occur at different levels. The appropriate level of interaction is determined by past and current practices, adjustments made through this Policy, and the continuing dialogue between ONRR and Tribal governments.

This Policy establishes guidelines and controls for consultation across ONRR. ONRR Program Offices have the primary responsibility for consulting with Tribes. All Program Office consultation plans and practices must be in accordance with this Policy.

In accordance with the Department of the Interior (DOI or Department), the Office of Natural Resources Revenue will report to the Secretary, through ONRR's designee, on its efforts to comply with the Department of the Interior Policy on Consultation with Indian Tribes (referred to herein as the DOI Policy).

II. Guiding Principles

This Policy broadly defines provisions for enhancing the Office of Natural Resources Revenue's consultation processes with Indian Tribes. This Policy shall complement, not supersede, any existing laws, rules, statutes, or regulations that guide consultation processes with Indian Tribes and is implemented using existing ONRR structures to the extent possible.

This Policy requires a government-to-government consultation between appropriate Tribal officials and ONRR officials. The appropriate ONRR officials are those individuals who are knowledgeable about the matters at hand, authorized to speak for ONRR, and exercise delegated authority in the disposition and implementation of an agency action. For actions involving

¹Indian Tribes are one or more Tribes recognized by the United States Government pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. §479a. This policy does not apply to Alaska Native Corporations, individual Indian mineral owners, or mineral owner groups or associations.

Tribal mineral revenues, ONRR officials will identify appropriate Tribal officials early in the planning process and provide Indian Tribes a meaningful opportunity to participate in the consultation process, as described in Section VII. ONRR officials will participate in the consultation process in a manner that demonstrates a meaningful commitment and ensures continuity in the process. The Policy thus honors the government-to-government relationship between the United States and Indian Tribes, and complies with the Presidential Memorandum of November 5, 2009, and Secretarial Order (SO) 3317, dated December 2, 2011, which are the basis for the Department of the Interior Policy on Consultation with Indian Tribes. The Executive Order specifies that each Agency must have an accountable process ensuring meaningful and timely input by Tribal officials in actions having Tribal implications; Secretarial Order 3317, provides guidance for Bureaus and offices within the Department of the Interior to implement supporting policies.

Consultation is a deliberative process that aims to create effective collaboration and informed Federal decision-making through a government-to-government exchange of information. It promotes enhanced communication that emphasizes trust, respect, and shared responsibility. Communication is open and transparent without compromising the rights of Indian Tribes or the government-to-government consultation process. Federal consultation conducted in a meaningful and good-faith manner, further facilitates effective ONRR operations and governance practices. To that end, ONRR will seek and promote cooperation, participation, and efficiencies between bureaus and offices with overlapping jurisdiction, special expertise, or related responsibilities regarding ONRR actions, with Tribal implications. Efficiencies derived from the inclusion of Indian Tribes in ONRR's decision-making processes through Tribal consultation will ensure that future Federal action is achievable, comprehensive, sustainable, and reflective of Tribal input.

III. Definitions

ONRR Action with Tribal Implication is any ONRR regulation, rulemaking, policy, guidance, legislative proposal, funding formula changes, or operational activity that may have a substantial direct effect on an Indian Tribe. Such actions do not include matters where a court order limits ONRR's discretion to engage in consultation, such as litigation and settlement negotiations. Routine administrative interactions between ONRR staff and Tribes are not subject to this Policy.

Annual Report is a comprehensive report provided to the Secretary by ONRR on an annual basis. The report may include, but is not limited to, the scope of consultation efforts, the cost of these efforts, and the effectiveness of consultation activities. Additionally, ONRR will provide a comprehensive listing of the topics on which consultations were held, training, innovations, and the engagement of senior leadership in these efforts. Reports shall include feedback received from any Indian Tribes ONRR has consulted. Reports should reference the documents and correspondence with Indian Tribes that address the Implementation of the Final Federal Action Stage, as described in Section VII of this Policy; a description of budget expenditures in the execution of consultation efforts, narratives describing significant consultation efforts, and forthcoming consultation opportunities.

Collaboration means The Office of Natural Resources Revenue and Indian Tribes working together to implement this Policy on changes that may impact Indian mineral revenues.

Consultation Procedures are a set of procedures developed by ONRR's Tribal Liaison Officer (TLO), to establish uniform practices and common standards regarding Tribal consultation conducted by ONRR.

Indian Tribe or Tribe means any Indian or, Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe, pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. §479a.

Program Managers are responsible for an operational group within the Office of Natural Resources Revenue, specifically Senior Executives and Quality Steering Committee members.

Program Offices are operational groups responsible for the mission of the Office of Natural Resources Revenue. The program offices have the lead in conducting the actual consultation on a specific project.

Tribal Governance Officer (TGO) is an individual designated by the Department to carry out responsibilities defined in the DOI Policy.

Tribal Liaison Officer (TLO) is one or more individuals designated by ONRR, as defined in the Consultation Procedures, to carry out responsibilities defined in this Policy and the DOI Policy. The role of the TLO is to ensure consistency across ONRR in the application of the ONRR Tribal Consultation Policy. Further, the TLO serves as a facilitator and advisor to the program offices and subject matter experts regarding Tribal consultation.

Tribal Official is an elected or appointed Tribal leader or official designated in writing by an Indian Tribe to represent the Tribe in government-to-government consultations with ONRR.

IV. Accountability and Reporting

Methods that ensure accountability and reporting are essential to regular and meaningful consultation. In accordance with the DOI Policy, the Office of Natural Resources Revenue will include appropriate performance measures consistent with this Policy in annual performance plans of employees and managers.

The Secretary will provide an annual report to Indian Tribes on implementation of the DOI Tribal Consultation Policy. ONRR will report the results of efforts to promote consultation with Indian Tribes to the Secretary.

- A. The Role of Program Managers in Reporting: Program Managers will notify ONRR's TLO when the Initial Planning Stage of the consultation process begins. Program Managers will report to the TLO the results of the consultation for each ONRR Action with Tribal Implication in accordance with the Consultation Procedures. Reporting is comprehensive and should include, but is not limited to, the scope of consultation

efforts, the cost of these efforts, and the effectiveness of consultation activities. Reports should reference the documents and correspondence with Indian Tribes that address the Implementation of the final Federal Action Stage. In addition to this reporting, Program Managers must supply the TLO with a copy of required documents per the Consultation Procedures.

- B. The Role of the Tribal Liaison Officer in Reporting: ONRR's TLO will prepare the Annual Report for the Secretary as required by the DOI Policy. This report will provide a comprehensive listing of the topics on which consultations were held, training, innovations, and the engagement of senior leadership in these efforts. Where possible, such reports will include feedback from Indian Tribes ONRR consulted. Reports should reference the documents and correspondence with Indian Tribes that address the Implementation of the Final Federal Action Stage described in Section VII of the DOI Policy, a description of budget expenditures in the execution of consultation efforts, narratives describing significant consultation efforts, and forthcoming consultation opportunities. To support the Department's reporting requirements the TLO will maintain reporting documents provided by the Program Manager per the Consultation Procedures.

V. Records

Records are defined by 44 U.S.C. 3301 as including, "all books, papers, maps, photographs, machine readable materials or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government, under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them". ONRR employees have a responsibility to protect and maintain all Indian fiduciary trust records. Employees will seek guidance from existing regulations, policies, and procedures regarding proper records management. Specifically, the following sources provide guidance:

- ONRR Records Management Manual 380.2-H
- DOI Department Manual 380DM 1: Records Management Program and Responsibilities
- DOI Departmental Manual 303 DM 2: Principles for Managing Trust Assets
- DOI Departmental Manual 303 DM 6: Indian Fiduciary Trust Records
- 36 CFR Subchapter B: Records Management

In addition to maintaining Indian fiduciary trust records, the following responsibilities pertain to the Tribal Consultation Process:

- A. The Role of Program Managers in Maintaining Records: During the entire consultation process, ONRR Program Managers will ensure their offices maintain the consultation record for a specific project. The record will contain, at a minimum, all correspondence to Indian Tribes and Tribal officials, meeting notes, supporting documents used during

the consultation process, and reports provided to the TLO. When the Tribal consultation is complete, Program Managers will provide all required documents to the TLO as specified in the Consultation Procedures.

- B. The role of the Tribal Liaison Officer in Records: The Tribal Liaison Officer will establish and communicate the procedures and standards for maintaining consultation records. Because the Tribal Liaison Officer is responsible for reporting ONRR's tribal consultation results to the secretary, the TLO will maintain a copy of the required reporting documents as specified in the Consultation Procedures.

VI. Training

The Office of Natural Resources Revenue will comply with the training requirements as outlined in Section V, of the DOI Policy. When appropriate, ONRR employees will participate in training for the purpose of promoting collaboration with Indian Tribes and executing the consultation provisions of this Policy. Additionally, employees may be required to attend ONRR provided training.

VII. Consultation

In addition to this Policy, ONRR developed Consultation Procedures to establish uniform practices and common standards across the organization. The Consultation Procedures will provide greater efficiency and transparency in office practices to maximize Tribal participation. ONRR Actions with Tribal Implications that are regional or impact a limited number of Indian Tribes will be carried out in a manner consistent with this Policy, while allowing discretion to employ only appropriate parts of the Consultation Procedures.

A. Roles and Responsibilities in the Tribal Consultation Process

1. *The Tribal Liaison Officer will:*
 - a. Work with ONRR Program Offices to achieve compliance and ensure consistency across ONRR with this Policy, the DOI Policy, and any future policies related to EO 13175 or other government-to-government consultation policies;
 - b. Promote, facilitate, and provide advice on consultation and collaboration between Indian Tribes and Program Offices;
 - c. Advocate opportunities for and consideration of the positions of Indian Tribes on ONRR Actions with Tribal Implication, consistent with ONRR's mission;
 - d. Serve as the principal point of contact for the TGO concerning compliance with the DOI Policy, including reporting requirements;
 - e. Strive to enhance a trusting and on-going relationship with Indian Tribes, consistent with applicable laws and executive orders;
 - f. Serve as an initial contact for Indian Tribes to request or inquire about consultation when it is not clear who to contact in the organization;

- g. Identify and disseminate the name and contact information of the TGO and the TLO to facilitate contacts by Tribal officials; and
- h. Maintain required reporting documents provided by the Program Office in accordance with the Consultation Procedures.

2. *Program Managers will:*

- a. Ensure compliance with this Policy and Consultation Procedures;
- b. Notify the TLO as soon as it is apparent that there may be an ONRR Action with Tribal Implication;
- c. Request guidance from the TLO when uncertain how to proceed with Tribal consultation;
- d. Maintain Indian records in accordance with Section V of this Policy and the Records Management Handbook;
- e. Provide required document to the TLO at the conclusion of the consultation, as specified in the Consultation Procedures.

B. What Activities May Involve Consultation

The broad scope of consultation in this Policy creates a large number of actions that may be appropriate for consultation. The following list of ONRR activity categories provides a general framework for the TLO and Program Managers to determine whether any particular action or decision is appropriate for consultation. The final decision on consultation is normally made by the Program Manager after examining the complexity of the activity. Program Managers will also take into consideration implications for Tribes, time and/or resource constraints, and interaction with Tribal partnership groups and Tribal governments.

The following, non-exclusive list of ONRR activity categories are normally appropriate for consultation, if they have a substantial direct effect on an Indian Tribe:

- Regulations or rulemaking
- Policies, guidance documents, directives
- Priority planning development
- Legislative comments²

C. Consultation Guidelines

1. *Initiating Consultation:* When considering an ONRR Action with Tribal Implications, the Program Office must notify the appropriate Indian Tribes of the opportunity to consult, pursuant to this Policy. The Program Office will strive to ensure that notice is given at least 30-days prior to scheduling a consultation. If exceptional circumstances prevent notice within 30-days of the consultation, the

²Legislative comments are a special case where, due to short legislative timeframes, consultation in advance of comment submission may not always be possible. Nevertheless, ONRR will strive to inform Tribes when it submits legislative comments on activities that may have a substantial direct effect on an Indian Tribe.

Program Office will provide an explanation for the abbreviated notification in the invitation letter. An Indian Tribe may request an extension for timelines associated with this Policy.

Adequate notice will provide a description of the discussion topic(s), a timeline of the process, and possible outcomes. The consultation notification will include sufficient detail of the discussion topics to allow Tribal leaders an opportunity to fully engage in the consultation. The notice should also give Tribal leaders the opportunity to provide feedback prior to the consultation, including any request for technical assistance or request for clarification of how the consultation process conforms to this Policy.

Beginning at the Initial Planning Stage, see Section VII, Part D, Subsection 1, the Program Office will consult with Indian Tribes on the ONRR Action with Tribal Implications.

2. *Response to Request for Consultation:* An Indian Tribe may request that the Office of Natural Resources Revenue initiate consultation, when the Indian Tribe believes that the organization is considering an ONRR Action with Tribal Implications. Tribes should make requests in writing to ONRR's designated TLO and describe the specific ONRR Action with Tribal Implications. The TLO will confirm receipt of a request for consultation from a Tribal Official. When the Tribe directs the request to the TLO, the TLO will forward the request to the appropriate Program Office. The Program Office will expedite the official request for consultation.

If the Program Office initiates consultation with a Tribe, but does not receive a response, the office must make reasonable and periodic efforts to repeat the invitation and, whenever feasible, should allow an Indian Tribe to join an ongoing consultation. The Program Office will document these efforts of engagement.

3. *Consultation Planning Process Support:* In planning the consultation processes as outlined below, Program Offices are encouraged to consider best practices for engagement; including the use of neutral facilitation and other collaborative problem-solving approaches to promote effective dialogue and conflict resolution. When needed, ONRR may utilize the Department's Office of Collaborative Action and Dispute Resolution. This office can assist in planning and facilitating an effective consultation process, negotiated rulemaking, or other collaborative approach to decision-making.

D. Stages of the Consultation Process

Program Offices shall carry out the consultation stages described below for an ONRR Action with Tribal Implications.

1. *Initial Planning Stage:* The Program Office will consult with Indian Tribes as early as possible when considering an ONRR Action with Tribal Implications. An office may conduct a meeting or other form of interaction with Indian Tribes to receive and evaluate comments as part of the Initial Planning Stage. Offices will collaborate with other Program Offices and Federal agencies, where appropriate, to avoid duplicative consultations.

2. *Proposal Development Stage:* The Proposal Development Stage begins when the Office of Natural Resources Revenue discloses the scope of an ONRR Action with Tribal Implications. ONRR considers Indian Tribes appropriate collaborative partners, particularly where negotiated rulemaking is involved. The Program Office will develop a process for the Proposal Development Stage that maximizes timely input by Indian Tribes and is consistent with both Tribal and office schedules. The Program Office will solicit the views of affected Indian Tribes regarding the process timeline to consult on an ONRR Action with Tribal Implications. The office will work with Indian Tribes to structure a process that considers specific Indian Tribal structures, traditional needs, and schedules of the Indian Tribes. The Program Office will make all reasonable efforts to comply with the expressed views of the affected Indian Tribes regarding the process timeline at this stage, taking into account the level of impact, the scope, and the complexity of the issues involved in the ONRR Action with Tribal Implications, along with the other factors driving the schedule. The process will be open and transparent. The Program Office may then proceed with the expectation that interested Indian Tribes will respond within a reasonable time period. When the matter under consultation involves confidential or culturally sensitive information, the office will work with the Indian Tribe to develop a consultation process that addresses the sensitivity of the information to the extent permitted by Federal law. If litigation or legal requirements impact an office's schedule for conducting consultation, the office will explain these constraints to the Indian Tribe. Examples of appropriate processes for the Proposal Development Stage include the following:
 - Negotiated Rulemaking: Where appropriate, the Office of Natural Resources Revenue will consider using negotiated rulemaking for developing significant regulations or other formal policies in accordance with the Federal Advisory Committee Act (FACA) and the Negotiated Rulemaking Act.
 - Series of Open Tribal Meetings: The Program Office may send invitations to Tribal leaders to attend a series of open meetings. Open meetings are for national, regional or subject-matter specific issues.
 - Single Meetings: The Program Office may host Tribal officials in a single meeting to discuss an ONRR Action with Tribal Implications under consideration. Single meetings are particularly appropriate for local or regional issues, or a Tribe-specific issue. If the Program Office determines that the Administrative Procedure Act or other Federal law or regulation expressly prohibits continued discussion at a specified point in the decision-

making process, the Program Office will inform the Indian Tribes at the earliest opportunity.

3. *Implementation of the Final Federal Action Stage:* An office may consider implementing a post-consultation review process consistent with laws, regulations, and EO 13175. The review process will not limit ONRR's deliberative process privilege regarding internal considerations or any other applicable privilege. At the conclusion of the consultation, ONRR will provide feedback to the Tribe to explain how ONRR considered their input in the final action. This feedback should be formal, written communication from a senior ONRR official involved in the consultation. Additionally, ONRR may invite feedback from the Indian Tribe regarding the consultation process at this stage. ONRR also will consider the need for training or technical assistance concerning the final Federal action.

E. Impact of Consultation Guidelines

Consultation does not preclude requests or recommendations by the Program Offices or Indian Tribes to work in partnership and foster collaborative relationships between the Office of Natural Resources Revenue and Indian Tribes outside of the processes described in this Section.

VIII. Compensation for Participation in the Consultation Process

The Office of Natural Resources Revenue does not compensate individuals or organizations – including Indian Tribes, Indian communities, and Indian organizations – for contributing information or comments to ONRR's administrative or consultation process. Costs associated with Tribal participation are borne by the respective Tribal government.

When conducting tribal consultation, Program Offices may find the need to acquire services, facilities, or other items necessary to complete consultation activities. When appropriate, ONRR may contract for the services of qualified individuals, firms, or organizations through the ONRR/National Business Center acquisition and procurement procedures. Such services will not constitute "consultation" as used in this Policy. The ONRR Program Manager or their designee must fully comply with all Federal procurement rules. Program Offices must exercise care to prevent any expectations on the part of Tribal officials, Tribal elders, or individual Tribal members that ONRR will routinely pay for input from such parties.

IX. Supplemental Policies and Procedures

Program Offices will review existing policies and procedures to ensure they conform to this policy and the DOI Policy.

ONRR has no actions which affect Alaska Native Corporations; royalties due from lands owned by Alaska Native Corporations are paid directly to the Corporations. ONRR has determined that

consistent with Federal law no additional consultation policies, specific to Alaska Native Corporations, need to be developed.

X. Disclaimer

Except to the extent already established by law, this Policy is intended only to improve the internal management of the Office of Natural Resources Revenue, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the Department or any person. The Office of Natural Resources Revenue also does not waive by virtue of this Policy any applicable privilege that it may hold.