

IMPLEMENTING CONSULTATION AND COORDINATION WITH TRIBAL NATIONS

I. Purpose

This Instruction implements DHS Directive 071-04, “Consultation and Coordination with Tribal Nations,” and describes the responsibilities, requirements, and procedures for consultations with Tribal Nations and Alaska Native Corporations.

II. Scope

This Instruction applies throughout the Department. To the degree that any Components have Component-specific Tribal Consultation policies and programs, such policies must meet the standards outlined in this Instruction.

This Instruction replaces former Department Deputy Secretary memorandum, *Delegation of Component Tribal Liaisons*, November 3, 2009, outlining requirements for tribal government affairs points of contact across the Department.

This Instruction serves as a foundation for consultation in meeting the requirements of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments” (E.O. 13175).

III. References

- A. Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*. (2000)
- B. Executive Order 13647, *Establishing the White House Council on Native American Affairs*. (2013)
- C. Presidential Memorandum of January 26, 2021, Tribal Consultation and Strengthening Nation to Nation Relationships.
- D. DHS Delegation 24001, Rev. 00, “Delegation to the Assistant Secretary for Partnership and Engagement,” December 1, 2020.
- E. DHS Designation Number 00-24002, “White House Council on Native American Affairs” of May 8, 2021.

- F. DHS Designation Number 00-24012, Rev. 00, "Designation of the Assistant Secretary of the Office of Partnership and Engagement as the Official with Principal Responsibility for Implementation of Executive Order 13175, June 13, 2022.
- G. DHS Directive 071-04, "Consultation and Coordination with Tribal Nations."

IV. Definitions

- A. **Accountable Process**: An accountable process is one by which a Component can track and report on the efforts for any given consultation, from initial outreach, collaboration, through consultation activities to show how the results of the consultation were used to inform decision making and how the results were communicated with consultation participants.
- B. **Alaska Native Corporations (ANC)**: Created under the Alaska Native Claims Settlement Act, these organizations manage lands and resources for Alaska Natives. While not federally recognized tribes, consultation is required with these organizations in some instances in the same manner as if they were tribes. Their shareholders are generally members of federally recognized tribes in Alaska. This includes both regional and village corporations established pursuant to the Alaska Native Claims Settlement Act.
- C. **Collaboration**: This occurs when two or more people or organizations work together in an intersection of common goals by sharing knowledge, learning, and building consensus. Collaboration is the mutual development of perspectives or actions that are of mutual interest, as in a Tribal Nation and a Component working together on a policy or practice that benefits both the Component and the Tribal Nation.
- D. **Communication**: Refers to the verbal, electronic, or written exchange of information. Communication is an element of both collaboration and consultation.
- E. **Component**: Refers to all Operational and Support Components of DHS.
- F. **Consultation**: Is the timely, meaningful, substantive, and accountable dialogue pertaining to actions that may have tribal implications between Component officials who have delegated authority to represent the U.S. Government and the tribal government representatives of federally recognized Tribal Nations, appropriate and appointed representatives of Alaska Native Corporations, or their designated representatives.

- G. **Coordination**: Is the ongoing communication and collaboration related to planned or potential activities of various entities.
- H. **Tribal Consultation Official**: Is the duly designated Component official responsible for carrying out a specific consultation effort. The Consultation Official should be an employee of the federal government who has been delegated decision making authority over the issues to be discussed in the consultation. The Consultation Official should be at the D/AS level or higher. Consultation Officials are designated by Component Heads or the Secretary.
- I. **Indian Tribe or Tribal Nation**: 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 the Federally Recognized Indian Tribe List Act of 1994 and as defined in 25 U.S.C. § 5130.
- J. **Tribal Government**: Refers to the recognized governing body of a Tribal Nation.
- K. **Tribal Government Affairs Practitioner**: Refers to a tribal government affairs subject matter expert. There are Tribal Government Practitioners at both the Secretarial and Component level who provide expertise in all tribal matters, support Tribal Consultation Officials, serve as Departmental points of contact for tribal entities and represent their respective leadership as delegated.
- L. **Tribal Implication**: Exists when a proposed regulation, policy, legislative recommendation, or planned action causes, or is likely to cause, a substantial direct effect on (a) the self-government, trust interests, or other rights of a Tribal Nation; (b) the relationship between the Federal Government and Tribal Nations; or (c) the distribution of power and responsibilities between the Federal Government and Tribal Nations.
- M. **Tribal Official**: Means elected or duly appointed officials of Tribal governments or authorized tribal or intertribal organization.

V. Responsibilities

- A. **Assistant Secretary for the Office of Partnership and Engagement** is the principal DHS official responsible for implementing E.O. 13175 and is the Secretary's senior advisor on tribal government affairs matters.
- B. **Deputy Assistant Secretary for Intergovernmental Affairs** is responsible for the implementation of E.O. 13175 and manages the execution of this Instruction and enabling Directive. The Deputy Assistant

Secretary is also the Secretary's designated principal serving on the White House Council of Native American Affairs established in Executive Order 13647.

C. **The Director of Tribal Government Affairs, Office of Intergovernmental Affairs** carries out the activities of the tribal government affairs program. The Director:

1. Serves as the designated staff lead for tribal government affairs and intergovernmental relations and is a subject matter expert at the Department for Tribal Nations, Alaska Native Corporations, and tribal organizations with homeland security interests.
2. Serves as the primary point of contact to the DHS Office of Partnership and Engagement's Office of Intergovernmental Affairs to coordinate tribal intergovernmental relations activities and outreach.
3. Provides coordination of tribal government affairs activities that strengthen external and internal coordination and communication about tribal concerns.
4. Chairs and coordinates the internal E.O. 13175 working group and other ad-hoc groups and efforts necessary for internal and external coordination.
5. Supports Component tribal government affairs practitioners and designated tribal consultation officials in efforts related to this implementing Instruction and its enabling Directive.
6. Serves as the Office of Partnership and Engagement tribal government affairs practitioner.

D. **Components** that have programs that interact with Tribal Nations, citizens of Tribal Nations, or may have tribal implications:

1. Designate full-time tribal government affairs practitioners or dedicated points of contact for tribal relations.
2. Designate Tribal Consultation Officials for specific consultation efforts.
3. Develop their own Component level policies or instructions to carry out the requirements of E.O. 13175 consistent with the requirements of this Directive and Instruction.

- E. **Component Tribal Consultation Officials** are the duly designated government officials who carry out consultation on a specific matter in the manner prescribed in this instruction.
- F. **Component appointed tribal government affairs practitioners** serve as the Component principal tribal government affairs subject matter experts. Duties are established by the Component based on operational needs and mission space. Component appointed tribal government affairs practitioners:
1. Support Component Tribal Consultation Officials in specific consultation efforts.
 2. Work to support Executive Order 13647, “Establishing the White House Council on Native American Affairs” and implement the Presidential Memorandum of January 26, 2021, “Tribal Consultation and Strengthening Nation to Nation Relationships;”
 3. Coordinate with tribal government and association partners in areas of responsibility.
 4. Assist in various interagency activities and identify where Component equities may exist.
 5. Assist in the drafting of guidance, establishment of training requirements and programs, providing input for strategic planning and other correspondence, participating in workshops and tribal government affairs coordination activities, and addressing general tribal issues.
 6. Serve as the Component primary point of contact for meetings and information requests from Tribal Nations and tribal organizations.
 7. Represent the Component in White House Council on Native American Affairs committees, participating in interagency councils and efforts, contributing to the development of the annual workplan to implement E.O. 13175 and annual reports, and leading engagement with Tribal Nations.
 8. Coordinate and communicate tribal government affairs matters to other Components that may have equities or interests in specific matters.

VI. Content and Procedures

- A. **Tribal Consultation Officials:**

1. Consultation may only be conducted by employees who have been delegated authority for consultation. This delegation may exist in a delegation of authority for a specific position or may also come from appropriate management. The level of authority of the tribal consultation official should be based on the nature of the regulation, policy, program, plan or action. The tribal consultation official should be a representative of the federal government who has decision making authority over the issues to be discussed in the consultation.
2. Consultation is generally conducted by elected tribal representatives, tribal members with authority to speak on behalf of the tribe, or tribal employees who have delegated authority from their tribal government. This delegation is determined by each Tribal Nation itself as a sovereign government and Components shall not prescribe delegation requirements to speak on behalf of Tribal Nations or ANCs.

B. **Four Steps of Consultation.** Implementation of Executive Order 13175 involves four steps. The degree and extent of consultation will depend on the identified potential tribal implication. While this Instruction does not provide specific guidelines for every potential scenario, the following steps should be utilized to ensure that the requirements of consultation are satisfied.

1. **Preparation and Identification.** Preparing for consultation requires obtaining foundational knowledge of the consultation process and requirements by familiarizing oneself of various aspects of federal Indian law, tribal treaties and trust responsibilities, laws that trigger requirements for consultation, and standards and practices for working with Tribal Nations. Tribal consultation officials develop intergovernmental relations with Tribal Nations. Tribal consultation officials also identify actions or activities that may have potential tribal implications, which requires continuous scanning of Component actions to consider tribal implications such as funding, policy, or program changes.

Tribal consultation officials identify consultation policies or customs and traditions of tribes that are a focus of the consultation. Just as the federal government establishes its requirements, so do tribes. Component Tribal Consultation officials work to adhere to consultation processes established by tribes.

2. **Notification of Consultation.** Components ensure that appropriate notification is provided to potentially affected Tribal Nations and ANCs. Components establish and adhere to a schedule of consultation meetings and engagement opportunities. Upon

determining consultation is appropriate, Components communicate this determination to potentially affected tribes inviting their participation. Components give notice using appropriate methods, including mailing, broadcast e-mail, a Federal Register Notice, conference call information sessions, and other outlets. Notices include clear and explicit instructions for the submission of comments. Components provide reasonable and timely notice of the consultation. The minimum standard notice period should be 30 business days, but in some instances involving complex policies or multiple policies, the notice period may extend for up to 120 days.

3. Input and Adjudication. The tribal consultation official provides an opportunity for potentially impacted Tribal Nations or ANCs to share their input and recommendations. The tribal consultation official adjudicates substantive and informative comments received in consultation. The tribal consultation official facilitates adjudication of substantive input received in a timely manner to the consultation.
4. Follow-up and Closure. How the results of the consultation are incorporated will depend on the nature of the action and the tribal implication. For instance, if a Component is promulgating a rule with a tribal implication, the preamble to the regulation should contain a discussion of the consultation effort, the comments received, and how the Component addressed the comments received during the consultation. Generally, a summary of the incorporation of recommendations should be prepared and shared with those providing input in the consultation.

C. **Waiver Requests:** Section 6, *Increasing Flexibility for Indian Tribal Waivers*, of E.O. 13175 provides requirements for the Department to consider a request from a Tribal Nation to any statutory or regulatory requirement that is discretionary, where Congress has not specifically and explicitly excluded the ability for the Department to grant such waiver. This includes policies, guidance, directives, etc., implementing DHS and Component authorities.

1. Request. Waiver requests are submitted in writing by a Tribal Nation or Alaska Native Corporation in any form appropriate to the governance, customs, or traditions of the Tribal Nation. A waiver request may itself lead to the initiation of consultation.
2. Internal Reporting. All requests for waivers under this Instruction are forwarded to the Assistant Secretary for Partnership and Engagement along with a Component request for any needed

assistance and a plan of action. A final determination and copy of the response to a waiver request will also be forwarded when completed.

3. Determination. There are two parts to considering approval of a waiver request to increase flexibilities for Tribal Nations.
 - a) First, the Component makes a determination as to whether delegated authority exists to provide the waiver, and
 - b) Second, the Component determines if a waiver will be authorized.
 4. Response. A Component renders a determination no later than 120 days of receipt of the waiver request. The determination outlines the determination of whether the waiver could be considered and then, if appropriate, whether the waiver is granted. In the event that the determination is a denial. The response identifies the reasons for the denial of the waiver request. If there is a time-sensitive request, every effort is made to issue a determination forthwith, acknowledging the urgency.
 5. A Tribal Nation may submit a written appeal of a Component waiver denial determination to the Secretary. The Assistant Secretary for Partnership and Engagement, in consultation with Component Heads and at the behest of the Secretary, coordinates evaluation and adjudication of the appeal and provides a response to the Tribal Nation within 20-days of receipt. Note: Notwithstanding the availability of this appeals process to contest waiver denials, nothing shall preclude Tribes from appealing directly to the President where appropriate, such as with respect to waiver requests concerning the Robert T. Stafford Disaster Relief and Emergency Assistance Act, nor shall this process preclude Components from providing, where appropriate, information regarding appeals made directly to the President.
- D. **About Consultation:** Consultation is a form of legal communications and collaboration distinct from routine coordination and communications between federal staff and Tribal Nations government staff.
1. Actions commonly confused with consultation. It is also important to distinguish between consultation and other more common forms of collaboration, communication, and coordination activity. Notification in the form of distribution of information to one or more tribes is not

consultation. Neither are technical communications or collaboration between a Tribal Nation and DHS staff. While notification, technical communications, and outreach are all essential and are often used as part of a consultation, they alone do not constitute government-to-government consultation.

2. Principle of Mutual Concurrence. As a general principle, consultation only occurs when the Component and tribal officials mutually agree that consultation is taking place. The Component should be clear when an action or set of actions is determined to be consultation. A Component needs to provide for consultation and cannot force consultation, i.e., imply that a Tribal Nation *must* participate, on potential actions that may have tribal implications. A Tribe's non-participation in consultation is neither concurrence of a proposed action or non-concurrence. The Component is not bound by prior approval to an action, and although consultation is desired, a tribe not participating in offered consultation does not stop a Component from taking the action.
3. Principle of Component Executive Authority. Consultation should be part of an effort to cooperate and collaborate in good faith with tribal and ANC representatives. Consultation requires the tribal consultation official take the solicited views, information, rights, and interests into serious, deliberative consideration.

E. **Training, Education, and Workshops:** In an effort to assure compliance with this Instruction, training and workshop attendance will be provided to all employees with tribal government affairs responsibilities upon the following "Tier" groupings:

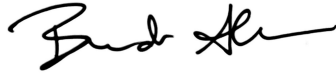
1. Tier 1 includes senior management. This category is comprised primarily of political appointees or Senior Executive Service and GS14 and 15 career employees.
2. Tier 2 includes Component senior management and staff that may be designated to conduct tribal consultations. This group includes high-level managers of programs where those individuals would be involved in consultation and collaboration processes.
 - a) Tier 1 and Tier 2 are competence and sensitivity level trainings, respectively. Sessions will explain the history of the legal relationship between tribes and the U.S. Government, tribal sovereignty, trust responsibility, etc. Tier 1 and Tier 2 will cover Component legal issues and cultural competency training. This type of training or workshop is generally face-to-face or asynchronous classroom delivery.

The Department of Interior University's course "Consulting with Tribal Nations" is an appropriate course for Tier 1 and Tier 2 training.

3. Tier 3 includes all employees.
 - a) Tier 3 training is awareness level training and will be offered through platforms like the Office of Personnel Management Go- Learn program, "Working Effectively with Tribal Governments," that can be accessed via the Internet. FEMA's Emergency Management Institute offers online delivery of its independent study course, IS-650b. "Building Partnerships with Tribal Governments."

VII. Questions

Address any questions or concerns regarding this Instruction to the Director of Tribal Government Affairs, Office of Intergovernmental Affairs, Office of Partnership and Engagement.



2/8/2023

Brenda F. Abdelall

Date

Assistant Secretary, Office of Partnership and
Engagement