I. Purpose

This Instruction implements Management Directive (insert MD #), “Consultation and Coordination with Tribal Governments.” It describes the responsibilities, requirements, and procedures for consulting with Indian tribes and Alaska Native Corporations. The Instruction serves as a foundation for collaboration and consultation in meeting the requirements of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments” (E.O. 13175).

II. Scope

This Instruction applies across the Department. Each component and office shall appoint at least one tribal government affairs practitioner as its primary subject matter expert in tribal consultation who is responsible for implementing this Instruction.

This Instruction replaces the Deputy Secretary Lute, November 3, 2009, memorandum outlining requirements for tribal government affairs points of contact across the Department.

III. References


D. Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”

E. Executive Order 13647, “Establishing the White House Council on Native American Affairs”

F. DHS Delegation 24000, “Delegation to the Assistant Secretary for Intergovernmental Affairs.”
DHS Directive ___-___, “Consultation and Coordination with Tribal Governments.”

IV. Definitions

A. **Accountable Process**: An accountable process is one by which a component or office is able to track and report on the efforts on any given consultation, from initial outreach, collaboration, and consultation activities to how the results of the consultation were used to inform decision making and how the results were communicated with consultation participants. It is a process where a responsible tribal consultation official has been appointed as responsible for preparing, notification, adjudication, and closure of consultation.

B. **Alaska Native Corporation**: 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 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 an Indian tribe and a component or office working together on a policy or practice that benefits both the component or office and the Indian tribe.

D. **Communication**: Refers to the verbal, electronic, or written exchange of information. Communication is a component of both collaboration and consultation, but not necessarily either.

E. **Consultation**: Is the formal, timely, meaningful, and substantive dialogue between component or office officials who have delegated authority to consult, and the tribal government representatives of federally recognized Indian tribes, appropriate and appointed representatives of Alaska Native Corporations, or their designated representatives, pertaining to actions that may have tribal implications.

F. **Coordination**: Is the ongoing communication of planned or potential activities of various entities.

G. **Tribal Consultation Official**: Is the duly appointed federal employee responsible for carrying out a specific consultation effort. Consultation may only be conducted by employees who have delegated authority at appropriate levels to speak at a level of parity with tribal officials in consultation on a specific matter.
The Department has a primary consultation official who is delegated the responsibilities for carrying you the directives and policies of E.O. 13175.

H. **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.

I. **Tribal Government:** Refers to the recognized governing body of an Indian tribe.

J. **Tribal Implication:** Exists when a proposed 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 an Indian tribe; (b) the relationship between the Federal Government and Indian tribes; or (c) the distribution of rights and responsibilities between the Federal Government and Indian tribes.

K. **Tribal Official:** means elected or duly appointed officials of Indian tribal governments or authorized tribal or intertribal organizations.

V. **Responsibilities**

A. **Assistant Secretary for the Office of Partnership and Engagement** is the principal DHS official responsible for tribal consultation and is the Secretary’s senior advisor on tribal government affairs matters. The Assistant Secretary is the Department’s principal tribal consultation official and adjudication official on related matters.

B. **Deputy Assistant Secretary for Intergovernmental Affairs** is generally delegated the responsibilities 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.

1. The Director serves as the designated staff lead for tribal government affairs and intergovernmental relations and is the main point of contact at the Department for Indian tribes, Alaska Native Corporations, and tribal organizations with homeland security interests.

2. The Director provides coordination of tribal government affairs activities that strengthen external and internal coordination and communication about tribal concerns and programs as related the mission
3. The Director coordinates, recommends, develops, and supports workshops, education, and training for employees focused on working effectively with Indian tribes, Alaska Native Corporations, and tribal organizations.

4. The Director chairs and coordinates the internal Executive Order 13175 Working Group and other ad-hoc groups and efforts necessary for internal and external coordination.

5. The Director supports component and office tribal government affairs practitioners in efforts related to this implementing Instruction and enabling Directive.

6. The Director serves as the Office of Partnership and Engagement tribal government affairs practitioner identified in paragraph E. and accomplishes the duties therein.

D. Component and Office Heads where there is interaction or potential for the creation of tribal implication will appoint one headquarters senior-level official to serve as its primary tribal government affairs practitioner and coordinate its tribal government affairs efforts. Components and offices may develop or modify existing component level policies or instructions to meet the minimum standards and practices as established in this Instruction.

E. Each component or office appointed tribal government affairs practitioner serves as the component principal tribal government affairs subject matter expert. Duties are established by the component or office based on operational needs and mission space. Duties may include, but are not limited to:

1. A component or office tribal government affairs practitioner works in a collaborative and consultative manner with tribal government and association partners in areas of responsibility.

2. A component or office tribal government affairs practitioner advises on tribal government interests during policymaking processes, program delivery, collaboration, and consultation.

3. A component or office tribal government affairs practitioner monitors outreach and coordination with Indian tribes, including implementing and maintaining culturally responsive and appropriate engagement programs to explain programs and initiatives.

4. A component or office tribal government affairs practitioner develops and assists 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.

5. A component or office tribal government affairs practitioner serves as the primary point of contact for meetings and information requests from tribal government leaders, their staff representatives, and tribal organizations.

6. A component or office tribal government affairs practitioner coordinates and communicates tribal government affairs matters to other offices or components that may have equities or interests.

7. A component or office tribal government affairs practitioner contributes to efforts in carrying out Executive Order 13175, including participation in the Tribal Consultation Policy Working Group by actively participating in related activities.

VI. Content and Procedures

A. **About Consultation:** It is essential to distinguish between consultation and other more common forms of collaboration, communication, and coordination actions. For instance, the distribution of information from a component or office to one or more tribes is not consultation; it is just the distribution of information. Neither are day-to-day communications or routine collaboration between government staff without an understanding by all parties involved that consultation is occurring. While notification, technical communications, and outreach are all essential and are often used as part of the consultation, they alone do not constitute consultation.

1. **Actions commonly confused with consultation.** It is also important to distinguish between consultation and other actions. Notification in the form of distribution of information to one or more tribes is not consultation. Neither are technical communications or outreach activities, however important or influential, between 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 or office and tribal officials mutually agree that consultation is taking place. The component or office should be clear when an action or set of actions is determined to be consultation.

3. **Principle of Component or Office Executive Authority.** Although consultation does not require fulfillment of actions a tribal or ANC representative requests, but rather requires the tribal consultation official take those views, information, rights, and interests into serious,
deliberative consideration. Consultation should be part of an effort to cooperate and collaborate in good faith with tribal and ANC representatives.

B. **Consultation Officials:**
   1. Consultation may only be conducted by employees who have delegated authority for consultation. This delegation may exist in a formal delegation of authority for a specific position or may also come from appropriate management. This delegation most often will be seen in a notice in the federal register or notification of intent to engage in consultation through a "Dear Tribal Leader" letter. The level of authority of the consultation official should be based on the nature of the regulation, policy, program, or planning. The consultation official should be considered in parity with the tribal officials or representatives from Indian tribes or ANC’s.

   2. For the tribes, 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 the Indian tribes themselves as sovereign governments, and offices or components shall not prescribe delegation requirements to speak on behalf of Indian tribes or ANCs.

C. **Four Steps of Consultation.** The process of ensuring the implementation of Executive Order 13175 can be viewed through 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 foundational knowledge of the consultation process and requirements. A step to preparation is becoming knowledgeable of various aspects of federal Indian law, tribal treaties and trust responsibility, laws that trigger requirements for consultation, standards and practices for working with Indian tribes and developing intergovernmental relations with Indian tribes. Identifying actions or activities that have potential tribal implications requires continuous scanning of component or office actions to identify tribal implications such as funding, policy, or program changes, in its context of complexity, implications, time constraints, and issues.

   Part of preparation is identifying 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 and office consultation officials shall work to adhere to consultation processes established by tribes.
2. **Notification of Consultation.** Components and offices shall ensure that appropriate notification is provided to potentially affected Indian tribes and ANCs and shall establish and adhere to a formal schedule of consultation meetings and engagement opportunities. Upon the determination of the level of consultation necessary, proper notice of the level of consultation utilized shall be communicated to potentially affected tribes inviting their participation. Notice shall be made using appropriate methods, including mailing, broadcast e-mail, Federal Register Notice, conference call information sessions, and other outlets. Notices shall include clear and explicit instructions for the submission of comments. Components and offices must 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 shall provide an opportunity for potentially impacted Indian tribes or ANCs to share their input and recommendations. The tribal consultation official shall adjudicate substantive and informative comments received in consultation. The consultation official shall facilitate adjudication of substantive input received in a timely manner to the consultation and

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 an office 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 or office 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.

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

1. **Request.** Waivers can be submitted in any form appropriate to the governance, customs, or traditions of a Tribal Nation. Components and offices shall not be prescriptive in establishing request requirements and should assist tribes seeking a request. A waiver request may lead to the initiation of formal consultation.

2. **Internal Reporting.** All requests for waivers under this Instruction will be forwarded to the Department’s Tribal Consultation Official along
with a component or office 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 in consideration for approving a waiver to increase flexibilities for Tribal Nations. First, the component or office should determine whether it can provide the waiver. The second action is to determine if a waiver will be authorized.

4. **Response.** A component or office will render a determination no later than 120 days of receipt of the request. An effort should be made to be timely on time-sensitive requests and as soon as a determination is made. The response will identify the reasons for the denial of the waiver request.

E. **Training, Education, and Workshops:** In an effort to assure compliance with this Instruction, training and workshop attendance will be afforded 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 and office 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 training, 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 involve components of legal issues as well as 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 this tier.

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-605b. “Building Partnerships with Tribal Governments.”

VII. Questions

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