



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

November 13, 2009

Dear Tribal Leader:

At last week's historic White House Tribal Nations Conference, President Obama signed a Memorandum on Tribal Consultation, pronouncing tribal consultations "a critical ingredient of a sound and productive Federal-tribal relationship." The President's Memorandum directs all federal agencies to develop a plan of action to implement President Clinton's Executive Order 13175 on "Consultation and Coordination with Indian Tribal Governments" within ninety days.

The Justice Department actively embraces this responsibility, and aims to develop a comprehensive plan for consultation and coordination with tribal nations. The Justice Department recognizes that the principles of tribal sovereignty and self-determination are sacrosanct, and we are committed to developing a comprehensive plan that improves consultation and coordination with tribal nations.

In recent years, the Justice Department has received tribal input on consultation and coordination practices, including through consultation sessions, work sessions, recommendations from the Office of Justice Programs' Tribal Justice Advisory Group, and, most recently, during the Justice Department's Listening Session with tribal nations.

We are writing to you, and to all other tribal leaders of the federally recognized tribes, to seek your formal written comments for a Justice Department policy on tribal consultation and coordination. To comply with the President's deadline for the submission of agency plans, we request that all comments be submitted to the Department of Justice no later than December 11, 2009.

The Department also will conduct several regional consultation conference calls with tribal leaders, and we invite you to participate in these consultations. The consultation conference call schedule is outlined in the enclosure accompanying this letter. Finally, we are available to provide additional information by phone at (202) 514-8812 or (202) 514-8835 and at other Justice Department events as detailed in the enclosure.

Your tribe's input is invaluable to us as we craft a consultation policy that respects tribal sovereignty and self-governance and maximizes tribal input and coordination. Comments might include, but are certainly not limited to:

- what actions or events should trigger consultation;
- what procedures best ensure meaningful, timely consultation;
- who should participate in consultation;

- how should follow up after consultation be documented and communicated; and
- when are alternatives to consultation, such as conferences, workshop sessions or task forces, appropriate to improve communication and coordination with tribal nations.

We hope you will participate in this important endeavor. The enclosure provides details for the submission of written comments, consultation conference calls, and informational sessions.

We have also enclosed for your convenience President Obama's Memorandum on Tribal Consultation and Executive Order 13175.

If you have any questions, please contact the Justice Department's Office of Tribal Justice at (202) 514-8812 or (202) 514-8835.

Sincerely,

A handwritten signature in blue ink, reading "Eric H. Holder, Jr.", with a stylized flourish at the end.

Eric H. Holder, Jr.
Attorney General

Enclosures

Consultation Participation Information

Formal Written Comments

Please provide written comments no later than December 11, 2009, by e-mail or postal service.

E-mail Address: USAEO.DOJTribalConsultation@usdoj.gov

Mailing Address: Office of Tribal Justice
(by Federal Express U.S. Department of Justice
is recommended) RFK Main Justice Building
950 Pennsylvania Avenue, N.W.
Room 2318
Washington, DC 20530-0001

Consultation Conference Calls

* **Call-in number for all consultation conference calls: 888-282-6007**

* **Access code for all consultation conference calls: 24310**

The schedule for the regional consultation conference calls is as follows:

<u>Tuesday, December 1</u>	<u>Call time (EST)</u>
<i>Eastern Region</i> (all tribes within AL, FL, LA, MS, NC, CT, MA, ME, NY, RI)	10:00 a.m.
<i>Northwest Region</i> (all tribes within ID, OR, WA and Confederated Salish & Kootenai Tribe in MT)	2:00 p.m.
<u>Wednesday, December 2</u>	
<i>Midwest Region</i> (all tribes within IA, MI, MN, WI)	10:00 a.m.
<i>Rocky Mountain Region</i> (all tribes within WY, MT, <i>except</i> Confederated Salish & Kootenai Tribe)	2:00 p.m.
<u>Thursday, December 3</u>	
<i>Eastern Oklahoma Region</i> (all tribes within Eastern OK)	10:00 a.m.
<i>Pacific Region</i> (all tribes within CA)	2:00 p.m.
<u>Friday, December 4</u>	
<i>Southern Plains Region</i> (all tribes within KS, TX, Western OK)	10:00 a.m.
<i>Western Region</i> (all tribes within NV, UT, AZ, <i>except</i> Navajo Nation)	2:00 p.m.
<u>Monday, December 7</u>	
<i>Great Plains Region</i> (all tribes within NE, ND, SD)	10:00 a.m.
<i>Southwest Region</i> (all tribes within CO, NM and Navajo Nation)	2:00 p.m.
<u>Tuesday, December 8</u>	
<i>Alaska Region</i> (all tribes within AK)	3:00 p.m.

Questions?

Please contact the Justice Department's Office of Tribal Justice at (202) 514-8812/514-8835.

Additional Information Opportunities

DOJ Office on Violence Against Women "Mutual Solutions for the Safety of Native Women in P.L. 280 States"

November 19-21, 2009, San Diego, CA

<http://www.nijc.org/pl280.html>

DOJ Office of Justice Programs "Tribal Justice, Safety and Wellness Session"

December 2-3, 2009, Anchorage, AK

<http://www.tribaljusticeandsafety.gov>

DOJ Office on Violence Against Women "Journey to Justice Summit"

December 2-3, 2009, Oklahoma City, OK

<http://www.institutefornativejustice.org/>

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

November 5, 2009

November 5, 2009

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Tribal Consultation

The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies (agencies) are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.

History 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. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.

My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175. Accordingly, I hereby direct each agency head to submit to the Director of the Office of Management and Budget (OMB), within 90 days after the date of this memorandum, a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175. This plan shall be developed after consultation by the agency with Indian tribes and tribal officials as defined in Executive Order 13175. I also direct each agency head to submit to the Director of the OMB, within 270 days after the date of this memorandum, and annually thereafter, a progress report on the status of each action included in its plan together with any proposed updates to its plan.

Each agency's plan and subsequent reports shall designate an appropriate official to coordinate implementation of the plan and preparation of progress reports required by this memorandum. The Assistant to the President for Domestic Policy and the Director of the OMB shall review agency plans and subsequent reports for consistency with the policies and directives of Executive Order 13175.

In addition, the Director of the OMB, in coordination with the Assistant to the President for Domestic Policy, shall submit to me, within 1 year from the date of this memorandum, a report on

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the implementation of Executive Order 13175 across the executive branch based on the review of agency plans and progress reports. Recommendations for improving the plans and making the tribal consultation process more effective, if any, should be included in this report.

The terms "Indian tribe," "tribal officials," and "policies that have tribal implications" as used in this memorandum are as defined in Executive Order 13175.

The Director of the OMB is hereby authorized and directed to publish this memorandum in the *Federal Register*.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Executive departments and agencies shall carry out the provisions of this memorandum to the extent permitted by law and consistent with their statutory and regulatory authorities and their enforcement mechanisms.

BARACK OBAMA

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Presidential Documents

Title 3—**Executive Order 13175 of November 6, 2000****The President****Consultation and Coordination With Indian Tribal Governments**

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) “Policies that have tribal implications” refers to 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.

(b) “Indian tribe” 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, 25 U.S.C. 479a.

(c) “Agency” means any authority of the United States that is an “agency” under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) “Tribal officials” means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

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

(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.

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. *Special Requirements for Legislative Proposals.* Agencies shall not submit to the Congress legislation that would be inconsistent with the policy-making criteria in Section 3.

Sec. 5. *Consultation.* (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the

need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. *Increasing Flexibility for Indian Tribal Waivers.*

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. *Accountability.*

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. *Independent Agencies.* Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. *General Provisions.* (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

Sec. 10. *Judicial Review.* This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.



THE WHITE HOUSE,
November 6, 2000.

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