

**White House Meeting with Tribal Leaders  
Background Paper on Tribal Consultation and Tribal Sovereignty**

**August 25, 2009**

Two of President Obama's key campaign commitments to Indian country were that he would meet with tribal leaders on an annual basis, and that his Administration would respect the Nation-to-Nation relationship with Indian tribal governments. Recently, the White House Domestic Policy Council sent an invitation to tribal leaders for two listening sessions on August 31, 2009 in Washington, DC. The purpose of the sessions is to bring together tribal leaders and White House staff, led by Senior Policy Advisor for Native American Affairs Kimberly Teehee, to engage in an informal dialogue on the process of tribal consultation. These meetings are intended to prepare the Obama Administration to address Tribal Consultation and the Nation-to-Nation relationship.

**Meeting Details:** The White House Domestic Policy Council and Office of Public Engagement will host two listening sessions on August 31, 2009, in the Eisenhower Executive Office Building Room 450, in Washington, DC. Space is limited, so please limit your delegation to two persons per tribe and reply to [GeneralTribalIGA@who.eop.gov](mailto:GeneralTribalIGA@who.eop.gov) by August 28, 2009. The White House will coordinate further details after hearing from you. If you have any questions, contact Jodi Gillette at 202-456-1414.

**NCAI Pre-Meeting Conference Call** – NCAI will hold a conference call on Friday, August 28, 2009 at 1:00 pm eastern time, for additional discussion of upcoming White House meetings and consideration of Executive Order 13175. The dial in number is (712) 432-9998. Participant Access Code: 329810#

**Background and Recommendations on Tribal Consultation and Government-to-Government Coordination**

This background paper is intended to assist tribal leaders in preparing for these meetings. Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments, was issued by President Clinton on November 9, 2000. The Executive Order was required by the Unfunded Mandates Reform Act of 1995, and is the companion to E.O. 13132 – Federalism – which applies to state governments. Although E.O. 13175 was created during the Clinton Administration, it is rooted in the longstanding relationship found in the U.S. Constitution, the Indian treaties, and the federal trust relationship.

In general, tribal leaders have strongly supported E.O. 13175, but have significant concerns about the way it has been implemented. NCAI conducted a review of tribal comments on the Executive Order, particularly last year's House Natural Resources Committee hearing record on H.R. 5608 regarding tribal consultation; the comments provided by tribal leaders to the Tribal Justice, Safety and Wellness consultations; and the comments provided during the development of the Bureau of Indian Affairs consultation policy.

Although there has been a great deal of discussion, tribal concerns can be boiled down to two points. 1) The E.O. is viewed by federal agencies as merely a procedural requirement with no focus on the substantive goals of tribal self-government and fulfillment of the federal trust responsibility. Tribal leaders spend a great deal of time and resources engaging with a federal agency and receive little response directed toward tribal recommendations. 2) On some occasions, federal agencies will ignore or refuse to carry out their responsibilities under the Executive Order, and there are no mechanisms for accountability. Although these are serious concerns about the consultation process, tribal leaders also generally acknowledge that the E.O. is a useful tool for informing federal officials about the federal-tribal relationship, and that some consultation processes work well and have positive results.

### Recommendation #1 – Refocus the Executive Order on Tribal Sovereignty, the Trust Responsibility and the Goal of Building Consensus Between Nations

To address the first concern, tribal leaders should consider asking President Obama to refocus the Executive Order to emphasize its substantive requirements of respecting tribal sovereignty and the trust responsibility. Too often, federal agency officials do not read the Executive Order beyond the word “consultation” in the title, and view it as only a procedural requirement -- another hoop to jump through. This misunderstanding undermines the effectiveness of the Executive Order.

Section 3 of the Executive Order contains substantive “Policymaking Criteria” that lie at the heart of the federal-tribal relationship: “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.” Section 3 specifically supports tribal self-government, directing federal agencies to “defer to Indian tribes to establish standards,” and “preserve the prerogatives and authority of Indian tribes.”

Refocusing the Executive Order on its action components would educate federal officials that tribal consultation is a tool that is used to implement larger policy goals -- respect for tribal sovereignty and the federal trust responsibility. In a Nation-to-Nation relationship, tribal consultation should be redefined as a process of decision-making that works in a cooperative process toward reaching a consensus before a decision is made or action is taken. The goal of consultation is to reach a mutually agreeable understanding and decisions that acknowledge the interests of both the federal and tribal governments.

Further, the Executive Order should also acknowledge the fundamental purpose of tribal self-determination and the federal trust responsibility as longstanding agreements intended to assure that Indian tribes will maintain their cultures and viability as distinct groups of people. An understanding of the values of tribal cultures is needed in order to instill meaning into what are otherwise abstract principles.

## Recommendation #2 – Develop New Accountability Provisions

From the beginning, tribal leaders have been concerned with creating accountability under the Executive Order. Section 7 of the Executive Order contains provisions on accountability to be carried out by the Office of Management and Budget (OMB), but these have not been effective. It has been too easy for federal officials to ignore the Executive Order when convenient. For example, in 2006 the Department of Justice submitted Adam Walsh Act amendments to Congress that seriously undermine tribal sovereignty. The DOJ intentionally bypassed tribal consultation in order to avoid certain tribal opposition. (Tribal leaders strongly support the goals of the Adam Walsh Act, but oppose the provisions that shift jurisdiction to states.)

We recommend two changes to increase accountability for meaningful consultation. First, tribal leaders should consider asking the Administration to support legislation such as last Session's H.R. 5608, which would have created a cause of action for failure to consult with tribal leadership. Secondly, while OMB has the primary responsibility for overseeing the agencies' conduct in the creation of regulations and legislation, OMB is not organized to effectively review tribal government issues. This lack of focus on tribal government issues also exists with regard to OMB's primary role in developing the federal budget. NCAI recommended to the Obama Transition Team that the President create an OMB Assistant Director for Tribal Government Programs. Currently, tribal programs are organized under natural resources programs and budgets. We strongly urge a reorganization of OMB to appropriately prioritize Indian programs and ensure that meaningful consultation occurs with tribal governments.

## Recommendation #3 – Create Opportunities for both Formal Consultation on Developed Proposals and Early Informal Scoping on Tribal Issues

There is sometimes a Catch-22 in the consultation process that exists with tribal governments, and with any effort by the federal government to consult with outside entities. The dilemma is that most of the opportunities for sharing information and views happen very early in the decision-making process, long before any specific proposal has been committed to paper. But it is difficult to hold a consultation on a proposal that has not been written down. At the other end of the scale, once a large bureaucracy like the federal government has begun to formulate written proposals, it is easy to hold a consultation meeting, but decisions have already been made on the most fundamental questions regarding the need for action and the scope of issues to be considered. In sum, it becomes more and more difficult to influence federal government decisions if you wait until they are ready for a formal consultation.

There will always be a need for formal consultation with tribal governments on major federal regulatory proposals. At the same time, the consultation requirement should not become a barrier to the regular communications that enable federal officials to learn about tribal issues. NCAI actually heard this comment recently from a federal official: "I wanted to talk to the tribes about this issue, but I hadn't taken the training, and we didn't have time for a consultation." The purpose of consultation should not be lost in the formalities.

Federal officials should be encouraged to pick up the phone and engage in informal discussions with tribal leaders so that they can begin to understand the basic parameters of an issue. Without

early discussions, the federal agency will develop proposals based on an incomplete and anecdotal understanding of the issues that surround a particular matter. As a result, federal agency proposals often create severe unintended consequences for tribal governments. Issues in Indian country are often more complex than they seem at first, in part because of the great diversity among tribes. An open process in the initial stages creates better and more efficient consultation. For example, early discussions may provide the basis for the federal agency determining that no action is necessary. More broadly, pre-draft consultation helps insure that real problems are identified at the beginning and properly studied; that issues that are of no concern do not consume time and effort; that subsequent drafts are balanced and thorough; and that the delays and costs occasioned by redoing an inadequate draft are avoided.

Conclusion – This paper is intended to provide some background information and a few recommendations for tribal leaders to consider in their upcoming meetings with the White House. We expect that many more ideas will come forward in the process of those discussions. If you have any questions or comments on this issue, please contact Jacqueline Johnson Pata, NCAI Executive Director at [jpata@ncai.org](mailto:jpata@ncai.org), or John Dossett, NCAI General Counsel at [jdossett@ncai.org](mailto:jdossett@ncai.org).