

**Department of  
Interior Government-  
to-Government  
Consultation Policy  
Discussion Draft IV**

10/2/00

• **INTRODUCTION**

More than 550 American Indian tribes in the United States are recognized by the Secretary of the Interior as having a special legal relationship with the United States. Within this legal relationship the federal government has a trust responsibility to Indian tribes that is characterized as a government-to-government relationship. It is through this relationship that the Department of Interior has a duty to consult with tribal governments prior to, during, and after any federal action.<sup>(1)</sup>

The following policy provides the guidelines that the Department of Interior shall follow for acceptable consultation with tribal governments.

- **BACKGROUND**

The government-to-government relationship is not new, but has historical roots that took hold with the very earliest contact between the American Indians, Alaska Natives, and the first European settlers. The settlers and the tribal leaders dealt with each other as separate sovereigns and that relationship is the foundation of all relations and exchanges that have taken place between the United States and Indian tribes throughout the history of the Nation. This Indian policy can be found in federal statutes, case law, and Executive orders. As nations separate from the United States, the internal affairs of Tribes are the responsibility of the tribal entity and are not to be tampered or interfered with by the United States.

The Department of Interior, primarily through the Bureau of Indian Affairs is the lead federal agency charged with carrying out the United States' relationship with Indian tribal governments. It is also responsible for overseeing the trust obligations that the

United States has with regard to tribal governments and individual Indians. Thus, most of the contacts between tribal government officials and United States government officials take place within the various offices of the Bureau of Indian Affairs. The BIA consists of 12 regional or "area" offices that deal most closely with day-to-day issues facing tribal governments. The BIA Central office is located in Washington, DC within the U.S. Department of the Interior. At the Department of the Interior's Central Office, tribal leaders work on a government-to-government basis with political officials from various offices which include the Office of the Secretary of the Interior and the Office of the Assistant Secretary - Indian Affairs *Executive Order 13084, May 14, 1998.*

Tribal leaders also have significant government-to-government contact with officials of the local, regional and Central offices of other Department of the Interior agencies, including but not limited to the Fish and Wildlife Service, National Park

Service, Bureau of Land Management, Minerals Management Service, Bureau of Reclamation, and the Office of Surface Mining.

Notwithstanding the relationship between the Agency and Indian tribes, the Department of Interior also works with other Federal agencies outside of the Department in matters involving or affecting tribal interests. Therefore, the need for a comprehensive consultation policy is even more important.

- **PURPOSE**

The purpose of this consultation policy is to set forth appropriate guidelines that are understood and adhered to by all parties. It is vital to the success of the government-to-government relationship that all contacts and consultation with Indian tribal leaders throughout the Department of the Interior be conducted in a professional and respectful manner and in accordance with the following guidelines. By using such guidelines, the working

relations between tribes and the United States will be enhanced, advancing Indian policy.

- **DEFINITIONS**

**"Agency"** means any agency within the Department of Interior including but not limited to the Fish and Wildlife Service, National Park Service, Bureau of Land Management, Minerals Management Service, Bureau of Reclamation, Office of Surface Mining, and the Bureau of Geological Survey.

**"Consultation"** means a process of government-to-government dialogue deliberation and communication between the Department of the Interior and Indian tribes regarding proposed Federal actions in a manner intended to secure meaningful and timely tribal input and or involvement in the decision making process. Consultation shall include the right of the Indian tribes--

1. to receive timely notification of a proposed/contemplated Federal action;

2. to be fully informed on the proposed/contemplated Federal action and of the potential impact of such action on Indian tribes;

3. to be fully informed of those Federal officials who will make the final decisions with respect to the proposed action and the right to consult with, and be consulted by, such officials;

4. to have the input and recommendations of Indian tribes on such proposed action be fully considered by those officials responsible for the final decision, and

5. to participate in a partnership alongside Federal officials involved in the planning and development of the proposed action.

6. to be advised of the acceptance, rejection, or delay of tribal recommendations on such action and to receive an accounting from those Federal officials making such decisions.

DECISIONS.

7. to state that Indian tribes be informed of the process by the Department of Interior and its agencies for its deliberations and decision making used for consultation with tribes.

Consultation does not mean merely the right of tribal officials, as members of the general public, to be consulted, or to provide comments, under the Administrative Procedures Act or other Federal law of general applicability.

**"Federal action"** means any proposed or formally contemplated activity, decision, legislation, regulation, plan, policy, procedure, program, project, or service that uniquely or significantly affects Indian tribes, communities, members, economies, trust resources or assets, treaty rights, sacred sites, public health and safety, welfare or other interest. Effects may be either individual or cumulative. As a general rule, any decision or action which would directly impact or involve tribal governments, its land base

and/or operation of its programs requires consultation with those tribal governments.

**"Indian tribes"** means Indian or Alaska Native tribes, bands, nations, pueblos, villages or communities that the Secretary of the Interior acknowledge to exist as an Indian tribes pursuant to section 479a of title 25, United States Code.

**"Legislation"** means a draft of a law, including existing law or an amendment to an existing law, to be presented to Congress for enactment that will affect tribal governments, communities, members, economies, trust resources or assets, treaty rights, sacred sites, public health and safety or other interests.

**"Collaboration"** means the act of working jointly towards a common objective.

**"Tribal government"** means the governing body of an Indian tribe as recognized by the Federal government.



- POLICY MAKING  
PRINCIPLES

**In formulating policies affecting Indian tribal governments, agencies shall be guided by the following principles:**

**1. Federal actions shall: 1) protect and promote Indian tribal sovereignty and self-determination, as well as tribal treaty and other rights, 2) promote tribal interests, and 3) defer to laws and policies established by Indian tribes unless in direct conflict with federal law.**

**2. The United States serves as trustee to protect tribal self-government, and to manage and administer trust property, resources and funds for both tribal and individual Indian trust beneficiaries. When dealing with Indian trust or restricted property - including land, water, minerals, timber, funds, hunting and fishing rights - the Department has generally the same responsibilities as would a private trustee.**

**3. Where there is any ambiguity in any federal statute, case law or federal policy, ambiguities are to be interpreted in favor of the Indian tribes.**

**4. Federal actions shall favor maximum tribal participation with the goal of collaboration and joint decision-making.**

**5. The Department of Interior recognizes and commits to a Government-to-Government relationship with tribes and will develop appropriate policy and procedures.**

## **VI. THE CONSULTATION PROCESS**

**Consultation with tribal governments by the Department of Interior or its agencies must conform to the following procedures. The procedures allow flexibility and discretion to the agency depending on the matter under consultation. The four major steps of consultation are:**

## **A. Scoping Process**

**Scoping must be initiated as early in the agency's deliberation and decisionmaking process as possible, prior to the development of any draft document or the articulation of any proposed decision. Scoping should begin when the agency knows enough about a proposed action to present a coherent proposal and a suggested initial list of issues.**

**Scoping early with tribal leadership is vital for several reasons. Without early scoping, Interior agencies may develop proposals based on an incomplete and anecdotal understanding of the issues that surround a particular matter. As a result, 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 and**

**the circumstances they face, as well as the long history surrounding the development of federal Indian policy.**

**An open process in the initial stages creates better and more efficient consultation. For example, early scoping with tribal governments on the breadth and impact of an agency proposal may provide the basis for the agency determining that no action is necessary. More broadly, scoping 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 re-doing an inadequate draft are avoided.**

**For example, scoping shall take place:**

**1) Before the agency begins drafting proposed regulations;**

**2) Before the agency publishes proposed regulations in the Federal Register;**

**3) Before any legislation is drafted or introduced at the request of the agency; and**

**4) Before the agency promulgates, proposes or adopts any new policy, initiative or other act affecting tribal interests.**

**1. Begin scoping immediately after adequate information is obtained.**

**Consultation cannot be useful until the agency knows enough about the proposed action to identify most of the affected tribes, and to present a coherent proposal and a suggested initial list of issues. Until that time there is no way to explain to the tribes what matters are under consideration. So the first stage is to gather preliminary information, or to compose a clear picture of the proposal if it is being developed by the agency.**

**2. Prepare an information**

packet.

The agency should assemble a brief information packet consisting of a description of the proposal, an initial list of issues and impacts, maps, drawings, entities involved or affected and any other material or references that can help the interested tribes to understand what is being proposed. At this stage, the purpose of the information is to enable participants to make an intelligent contribution.

**3. Design the scoping process for each project or decision.**

There is no established or required procedure for scoping, but it is intended to be flexible and efficient. The process can be carried out by meetings, telephone conversations, written comments, or a combination of all three. Ad hoc workgroups of tribal leadership and representatives are particularly useful for identifying issues. The

-----  
issue should drive the process, particularly whether its effect will be national in scope, or related to a region or a specific tribe. For example, regional tribal consultation and participation in the development of residual and tribal share funding information is required. It is important to tailor the type, the timing and the location of any meetings to the proposal at hand. For example:

- A site-specific construction project would be a better candidate for a central scoping meeting.
- A proposal for new regulations that would broadly impact all tribes is a good candidate for a series of regional meetings.
- As a general guide, meetings should not be confined to Washington, D.C. Agencies should try to elicit the views of tribal governments throughout various regions

**An important early step is to determine the level of interest in the proposal by contacting known tribal leaders and by suggesting in your initial scoping notice and information packet that all those who desire a meeting should call to request one.**

**It may not be possible to plan the whole scoping process at the outset without knowing who all the potential interested tribes are. The process can start with written comments, move on to an informal meeting, and hold further meetings as needed.**

**4. Identify the participants in the scoping process.**

**The consultation process is a mechanism for achieving understanding and consensus between federal decisionmakers and affected tribes with respect to federal actions.**

**Accordingly, the participants shall be those decisionmakers and the affected tribes.**



**a) Agency participants. To ensure that proper agency participants are involved the agency shall:**

**i) identify, at the outset of the process, all agency personnel who are expected to have a significant role in the agency decision, and specify the expected role of each;**

**ii) communicate the results of subsection i) of this section to tribes involved in the process;**

**iii) seek tribal input on which agency personnel would best serve the purposes of the process; and**

**iv) require that those agency personnel who are requested by the tribes under subsection c) of this section, and who are expected to have a significant, high level role in the agency decision, personally participate in the process.**

**v) identify lead agency**

personnel who are expected to implement the decision, to personally participate in the process.

b) Tribal participants. To ensure that the proper tribal participants are involved the agency shall:

i) determine, at the outset of the process, whether the agency views the proposed agency action as national, regional, subject-matter specific, or tribe-specific in scope;

ii) for proposed agency actions which the agency views as regional or subject-matter specific, seek additional views, including from national or regional Indian organizations and affected tribes, about whether additional tribes, beyond those identified by the agency, may have a significant interest in the proposed agency action;

iii) for proposed agency actions identified as regional or national in scope, identify the regional or national Indian

**organizations that have expertise, and can facilitate dialogue with affected tribes, with respect to the proposed agency action; and**

**iv) after notifying all those potentially affected tribes identified under subsections a), b), and c) of this subsection, defer to the expressed views of the tribes regarding who the tribal participants shall be with respect to any consultation**

**c) Interagency Cooperation. The agency will seek and promote cooperation and participation with other agencies that have jurisdiction over, special expertise with respect to, or related responsibilities regarding the agency's proposed legislation, action or policy. Accordingly, the agency will encourage communication and cooperation with these other agencies early in the process of developing its legislation, action or policy.**

**For budget consultation**

**purposes, non- BIA agencies are encouraged to participate in agency consultation meetings and to conduct their own annual consultation meeting with tribes.**

**5. Issuing notice of the scoping process to tribal governments.**

**The agency shall serve notification under this section by certified mail and by facsimile, to the Chair (or other Chief Executive Officer) of the tribe, unless the tribe specifies a different means of notice or unless a different means of notice is required by law. The provisions of this subsection shall apply both to initial notices of the beginning of a consultation process, and to any subsequent notices regarding such a process. Notice shall also be provided to interested tribal government organizations and representatives. Interior agencies and the tribes have the goal of maximizing the use of technology to**

**facilitate interactive exchanges with respect to proposed decisions.**

**6. Conducting a scoping meeting with tribal governments.**

**Meetings with tribal governments should follow protocols appropriate for a government-to-government meeting that are determined by the participants and appropriate for the nature and scope of the meeting. Federal officials and tribal officials should be placed on an equal status in terms of the agenda and the room arrangements. The focus of a scoping meeting is to initiate a thorough identification and review of all of the issues prior to preparation of a decision, and not to debate the ultimate decisions. The scoping meeting should also identify areas that need further research and gather input from tribal leaders about how the consultation process should proceed.**

**B. Drafting Process**

## **1. What to do with the comments.**

**After written and oral comments have been received through the scoping process from tribal leadership and appropriate tribal organizations, the agency must evaluate them. Every issue that is raised as a priority matter by a tribal leader during scoping should be addressed in the proposed decision, either by in-depth analysis, or by a short explanation showing that the issue was considered.**

**A good practice is to develop a post-scoping document in order to share with tribal leaders the preliminary decisions that have been made on what issues to cover. Especially when scoping has been conducted by written comments, and there has been no face-to-face contact, a post-scoping document is the only assurance to the participants that they were heard and understood. The post-scoping document may**

be as brief as a list of issues selected for analysis; it may consist of the "scope of work" produced by the agency for their own work or for a contractor; or it may be a special document that describes all the issues and explains why they were selected.

## **2. Allocating work assignments and setting schedules.**

Following the scoping process, and the selection of issues to be covered, the agency must allocate the decision preparation work among the available resources. Tribal governments and their organizations should be considered as appropriate partners in the decision making process, particularly where negotiated rule-making or a Tribal Leader Task Force is created. Tribal governments may also be involved in specific research or writing tasks, especially where the tribes have special expertise or jurisdiction by law. A

schedule should be set for completion of the work, a project manager should be designated, and reviewers assigned.

### **C. Formal Consultation on Proposal**

Consultation shall occur in a manner that is consistent with the overriding goal of assuring maximum tribal participation and informed federal decisionmaking.

The agency shall structure each consultation process to the extent feasible to conform to the expressed views of the tribes. In any process, appropriate notification of each stage in the process shall be provided in conformance with Section VI part 5.

In those instances where there is not a tribal consensus about the appropriate means for consultation, the agency shall consult with tribes based on the highest and most effective form of consultation legally permitted in the circumstances. Regardless of the primary method of



of the primary method of consultation used under this subsection, the agency shall also 1) maximize the use of technology to facilitate interactive exchanges with respect to the proposed decision, and 2) notify affected tribes that written comments are permitted and will be considered. The priorities for forms of consultation are as follows:

**a. Negotiated Rulemaking.** The agency shall use negotiated rulemaking for developing significant regulations or other formal policies relating to tribal self-government, trust resources, or treaty and other rights, unless there are clear and articulated reasons why such a process would be inappropriate.

**b. Tribal Leader Task Force.** The agency shall consult with a Tribal Leader Task Force on matters that impact tribes across the country, where negotiated rulemaking is unavailable or not desired by the tribes. In appropriate circumstances, a Tribal Leader Task Force

**a. Tribal Leader Task Force**  
may be used for consulting with tribes on regional or subject-matter specific (e.g. timber) matters. In each instance, the composition of the Task Force shall be determined by the tribes, provided that the Task Force shall be a process open to all tribes and shall to the extent possible represent a cross-section of tribal interests with respect to the matter at issue. The number of meetings to be held, and their location, shall conform to the expressed views of the tribes, to the extent consistent with the requirements of law.

**c. Series of Open Tribal Meetings.** The agency shall consult with tribal leaders in a series of open tribal meetings where other methods of consultation are not available (for example, where time does not permit the negotiated rulemaking or Tribal Leader Task Force methods), or not desired by the tribes. Open tribal meetings can be used for national, regional or subject-matter specific  
----- The number of

issues, the number of meetings to be held, and their location, shall conform to the expressed views of the tribes, to the extent consistent with the requirements of law.

**d. Single Meetings.** The agency shall consult with tribal leaders in a single meeting when appropriate for the federal action under consideration. Single meetings are particularly appropriate for local, regional or single tribe issues.

**1. Length of the Consultation Process.** The agency shall, at the outset of the consultation process, solicit the views of affected tribes regarding how long the consultation process shall take. The agency shall make all reasonable efforts to comply with the expressed views of the affected tribes regarding the length of the consultation process, taking into account the level of impact, the scope and the complexity of the issues involved in the proposed federal action.

Notwithstanding the overall time for the process, consultation shall continue throughout the agency's decisionmaking process, except where expressly prohibited by law. If the agency determines that the Administrative Procedure Act or other federal law expressly prohibits continued consultation at a specified point in the decisionmaking process, the agency shall so inform the tribes at the outset of the consultation process.

#### **D. Final Decision**

##### **Finalizing the Agency Decision**

Agency decisions significantly impacting Indian tribes shall be made in conformance with the Policy Making Principles, above, in Section V, and notice shall be provided to all identified parties as stated in Section VI part 5. Every issue raised as a priority matter during the consultation process should be addressed in some manner in the proposed decision, either by in-depth

**analysis, or at least a short explanation showing that the issue was examined.**

#### **E. Implementation**

**Consultation after a decision is made.**

**In monitoring the impacts of the federal action, the agency shall continue to consult with tribes regarding the manner in which that decision is implemented, its impact on tribes, as well as any need for any follow-up actions including training or technical assistance on a new regulation or policy.**

- **EDUCATION**

**Within 90 days of the effective date of this policy the Director, Office of American Indian Trust in consultation with the Assistant Secretary for Policy, Management and Budget will develop a Department-wide tiered employee education plan calculated to provide introductory, intermediate, and advanced training on**

**the subject of federal Indian Affairs and the policy of government-to-government relations with tribes. All levels of training will explain the nature of the diplomacy and protocols to be observed. A mandatory refresher course must be completed by all personnel every two years.**

**In furtherance of the Indian Self Determination and Education Assistance Act, as amended, (cite other federal laws) the plan will reflect how tribes and intertribal organizations can assist the Department in developing and maintaining an effective education program, including curricula and materials.**

- **MONITORING  
AND  
PERFORMANCE**

**The Director, Office of American Indian Trust in consultation with the Assistant Secretary for Policy, Management and Budget will develop a formal automated system**

for tracking and accounting for consultation issues, matters, and concerns initiated by the Department, Bureaus and Offices or Tribes. The system will include the designation of a Department official who is responsible for day-to-day and quarterly reporting on the status of all consultation issues, as well as annual reporting on the outcome of consultation issues. At a minimum, reporting will include the names of all non-support staff employees with substantial involvement in each consultation issue, including Department, Bureau and Office heads, program directors, program managers, staff assistants, and Solicitor's staff. Minimum reporting will also include the date consultation on each issue was initiated within the system, a summary of each issue in consultation, and the current DOI position on each issue. The system will evidence the integrity of consultation and demonstrate our best faith effort to advance

**meaningful working relationships with tribes.**

**1. How should tribes be notified of DOI**

**Consultation activities?**

**Tribes and National organizations shall be notified of the agency's consultation activities for the year by way of an annual report. The annual report will be compiled by the Office of American Indian Trust in consultation with the Assistant Secretary for Policy, Management, and Budget and distributed to all federally recognized tribes and National Indian organizations.**

**2. What should be contained in the annual report? The report shall contain data, and statistics relating to the status of the consultation process including] how many consultation processes were initiated, [in what form did consultation occur, which tribes and/or national organizations were involved, how many are ongoing, how many were completed, and the cost of**



such consultation processes. The report shall also contain pertinent information relating to positive results and/or problems that occurred in the reporting year relating to consultation process. The report shall discuss and analyze solutions to problems, if any, relating to the consultation process. Additionally, the report shall discuss and analyze information submitted by Indian tribes and regional or national organizations of tribal governments.

**3. Who should the agency distribute the report to?**

The report shall be distributed to the Office of Management and Budget, all agencies within the Department of Interior, to all Indian Tribes, and to regional and national Indian organizations. Indian tribes, regional and national Indian organizations may submit information to the agency and to the Office of Management and Budget to expand, explain, dispute, or clarify the agency's report.

-----

**The agency shall present the report to regional and national Indian organizations' meetings, such as the National Congress of American Indians Winter Session. The report shall also be included in the agency's Annual Performance Report and the agency's Annual Performance Plan, as part of complying with the Government Performance and Results Act.**

**4. Who will receive Tribal inquiries or complaints regarding consultation?**

**Within 90 days of the implementation of this policy the Secretary of the Interior or his/her designee will designate an appropriate office to receive inquiries and complaints on the consultation process or lack thereof. This office will have discipline authority over personnel who disregard the policy and decision authority to correct the situation.**

## **5. Conflict Resolution Process.**

**This policy shall be  
implement by FY 2001, or  
by the implementation  
terms of Executive Order  
No. \_\_\_\_ regarding  
consultation with Indian  
tribal governments,  
whichever is later.**

**1. The concept of the  
federal trust responsibility  
began to develop in the  
Cherokee cases of the  
1830s. *Cherokee Nation v.  
Georgia* and *Worcester v.  
Georgia*. In the first case,  
Chief Justice Marshall said  
that the relationship  
between the Tribe and the  
Federal government  
"resembles that of a ward  
to his guardian."  
Generally, congressional  
statutes affecting Indians  
must be tied rationally to  
the trust obligation. *Morton  
v. Mancari*. Canons of  
construction for statutes,  
treaties and other dealings  
between Indians and the  
Federal government are  
based on the presumption  
that the United States acts  
in the best interests of the  
Indians. *Cherokee Nation v.***

**INDIANS. *Cheokaw Nation v. United States* and *McClanahan v. Arizona State Tax Comm'n.* Even statutes that terminate the trust relationship cannot also be construed to defeat treaty rights absent specific language. *Menominee Tribe v. United States.***

**The powers of agencies of the Federal government are also subject to the limitations of the trust responsibility. According to Cohen: "...the federal trust responsibility imposes strict fiduciary standards on the conduct of executive agencies" and "...the trust obligations are binding upon the United States." *United States v. Creek Nation and Pyramid Lake Tribe v. Morton.***

**\*See generally, Felix S. Cohen's Handbook of Federal Indian Law, 1982 Ed., pp. 220 - 228.**