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Tribal Consultation Policy of the U.S. Department of Justice

Consultation is a formal process through which tribal input is sought regarding the development of new or amended policies, regulations, and legislative actions initiated by the Department of Justice. The principle of consultation has its roots in the unique relationship between the Federal government and the governments of federally recognized Tribes. This government-to-government relationship has a more than 200 year history, and is built on the foundation of the U.S. Constitution, treaties, legislation, executive action, and judicial rulings. Most recently, tribal consultation was recognized as formal Federal policy in Executive Order 13175 of November 6, 2000 (Consultation and Coordination with Indian Tribal Governments), and President Obama's Memorandum on Tribal Consultation signed on November 5, 2009.

Coordination between tribes and the Department of Justice encompasses a variety of forms of communication that include: formal consultation; listening sessions; meeting with individual tribes; and informal discussions with tribal leaders. The obligation to consult can arise at all levels within the Department and, as appropriate, can be conducted by both career staff and political leadership. Executive Order 13175 and this policy focus on the more formal aspects of consultation. However, communication between tribes and the Department of Justice is not limited to formal consultation. To this end, the Department of Justice will engage in ongoing communication with tribes beyond formal consultation.

Initiating Consultation

The Department of Justice will consult with federally recognized Tribes before adopting policies that have tribal implications. Executive Order 13175 describes such policies that have tribal implications as “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.” Such policies do not include matters that are the subject of anticipated or active litigation or in settlement negotiations. The requirements of Executive Order 13175 and this policy statement generally will be construed liberally in favor of consultation on any given policy with tribal implications. All decisions regarding whether and how to conduct a consultation, or whether a given policy or topic has tribal implications, will be coordinated with the Office of Tribal Justice.

In addition, the Office of Tribal Justice – in conjunction with affected Departmental components – will consider requests from tribes to engage in consultation on any new policy initiated by the Department of Justice, even if the Department has not identified that policy previously as having tribal implications. The affected component, in coordination with the Office of Tribal Justice, shall prepare and send to the requesting tribe(s) a written response to the request.

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Consultation Guiding Principles

Because of the wide variety of topics that may be the subject of consultation between tribes and the Department of Justice, the structure of any individual consultation may vary. However, there are four guiding principles for all consultation conducted by the Department of Justice:

- Consultation will involve timely, adequate notice to the appropriate parties.
 - Consultation will be accessible and convenient to tribal participants.
 - Consultation will be a meaningful process involving appropriate participants.
 - Consultation will be conducted through a transparent and accountable process.
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- **Adequate Notice**

Adequate notice has two components. First, adequate notice means that relevant tribal parties will be made aware of an upcoming consultation sufficiently in advance of the event to ensure an opportunity for participation. Second, adequate notice entails providing a full description of the topic(s) to be discussed and draft materials if they are available at the time of the notice.

Generally, every effort will be made to provide notice at least 30 days prior to a scheduled consultation. If exceptional circumstances, such as legislative deadlines or other factors beyond our control warrant a shorter period of advance notice, the consulting component will provide an explanation for the abbreviated notification in the invitation letter. Invitations to consultations will be published on the Office of Tribal Justice and the Tribal Safety and Justice web sites and sent by e-mail to appropriate individual tribal leaders using an up-to-date, tribal leaders list, or sent by other means reasonably designed to reach all affected federally recognized tribes.

Adequate notice of a consultation should include sufficient detail of the topic to be discussed to allow tribal leaders an opportunity to engage meaningfully in the consultation. The Department's experience has been that providing tribes with specific information about the issues and questions the Department deems most relevant to the topic(s) of a particular consultation benefits both tribal participants and the Department by helping to ensure that tribal comments are focused enough to be useful in the Department's decision making process. This does not mean that the affected Department component has reached a preliminary decision on the issue that is the topic of the consultation. However, the Department should provide a brief discussion of the issues, a timeline of the process, potential outcomes, and if possible, an overview of any specific questions on which the Department would like tribal input.

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- **Accessibility**

Consultations should be accessible to the relevant tribal audience. Whenever possible, consultations should be conducted in person. In appropriate circumstances, consultation may be conducted via video conferencing, conference calls, interactive web technology, and similar means. If an individual reservation or region is primarily impacted by the issue that is the subject of the consultation, the consulting component within the Department should attempt to hold the consultation in that area. This will sometimes mean holding multiple consultation sessions in different regions. If the consultation involves joint action with other Federal agencies, the consulting component should attempt to hold a joint consultation with the other agencies. Finally, components will explore opportunities for supplementing in-person consultation with other sources such as video conferencing, conference calls and interactive web technology, to ensure the opportunity to hear from Tribes that may not be able to attend in person.

- **Meaningful Process**

To be meaningful, a consultation must involve individuals who have decision making authority on the issue that is the subject of the consultation. This will generally mean that the component should make every effort to ensure that elected tribal leaders or their designees will be substantively involved in the consultation. Also, the component should ensure that political leadership or other relevant decision makers are substantively involved in the consultation for the Department of Justice, even if they are not personally able to attend. If the ultimate decision makers are not present for the consultation, the Department representatives should ensure that those decision makers are aware of the relevant issues in advance of the consultation, and are apprised of tribal input after the consultation and before relevant decisions are made.

Consultation should occur at a point in the deliberative process before the affected Department component has arrived at an internal decision. Consultation is not meaningful if the component has already decided the issue, and tribal input is only *pro forma*. To this end, components need to be aware of their duty to consult with Tribes and factor consultation into their deliberative process as early as possible.

- **Accountability**

At the conclusion of a consultation event, and after due consideration, the component will prepare, in consultation with the Office of Tribal Justice and any other component with a potential interest in the subject matter of the consultation, a summary of the consultation. This will include a synopsis of tribal concerns and issues and a description of the component's consideration of these concerns and issues. After input from the Office of Tribal Justice, the component will convey to all participants this summary of the issues discussed during the consultation in a timely fashion.

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Development of Supplemental Consultation Guidance

The Department of Justice is made up of nearly forty components. Some of these components have frequent and substantive contact with tribal governments, while other components have limited interaction with tribes. The Office of Tribal Justice is available to assist components with implementing this policy for their tribal consultation process. Components with frequent and substantive contact with tribes may wish to develop more specific consultation guidance supplementing this policy. Those components are encouraged to develop such guidance to assist in the accomplishment of their mission as it affects tribes. Supplemental guidance shall be approved by the Office of Tribal Justice to ensure consistency and compatibility with Executive Order 13175 and this Department-wide policy.

Interagency Consultation

Beyond issues requiring tribal consultation by the Department of Justice, there may be overarching topics involving other federal agencies that merit a broad policy discussion. Examples of such topics might include sacred sites, courts, law enforcement, crime data collection, taxation, and juvenile justice. As necessary and appropriate, the Department may initiate an interagency tribal consultation on such topics. Relevant federal agencies will be invited, along with representatives from interested tribes. This interagency consultation will ordinarily be convened in Washington, D.C.; however, the Department will also consider other venues where appropriate. The purpose of such a consultation is to fully consider important existing policies with tribal implications, many of which may pre-date Executive Order 13175. The Office of Tribal Justice will consult with the Tribal Nations Leadership Council to develop appropriate topics.

Judicial Review

This policy is intended only to improve the internal management of the Department, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the Department or any person.