

U.S. DEPARTMENT OF AGRICULTURE
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SUBJECT: Tribal Consultation, Coordination, and Collaboration	DATE: January 18, 2013	
	OPI: Office of Tribal Relations	

Background and Policy

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Background and Policy

1. Introduction

The U.S. Department of Agriculture (USDA) and Federally recognized Indian Tribes (Tribes) share the goals of developing sound agricultural production practices, enhancing food safety, improving nutrition and health through food assistance and nutrition education and promotion, managing and protecting the United States' lands and natural resources, and working cooperatively to ensure that American Indians and Alaska Natives (AI/AN) have full access to the programs and services of the Department. To achieve this goal, it is essential that all agencies of the USDA engage with Tribes in timely and meaningful consultation on policies that have substantial direct effects on one or more Tribes. Consultation, coordination, and collaboration are different but not mutually exclusive; rather, they are mutually supportive. Together, they lead to

information exchange, mutual understanding, and informed decision-making. The importance of consultation and coordination with Indian Tribes was affirmed through Presidential Memoranda in 1994, 2004 and 2009, and in Executive Order “Consultation and Coordination with Indian Tribal Governments” EO 13084, issued in 1998 and replaced by EO 13175 in 2000, as well as in numerous statutes and policies. The value of collaboration is fully recognized within the USDA for all of its constituents, including Tribes.

This Departmental Regulation builds upon these requirements. It establishes over-arching Department-wide guidance upon which the USDA and its many agencies shall rely, thereby providing a baseline from which individual agencies shall further develop and refine their own specific, supplemental tribal consultation policies for government-to-government consultation. USDA agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and meet the responsibilities that arise from the unique legal relationship between the Federal Government and Tribal governments.

2. Special Instructions

The provisions of Departmental Regulation 1340-007 (which superceded Departmental Regulation 1340-006), concerning "Policies on American Indians and Alaska Natives" and the provisions of Departmental Regulation 1350-001, concerning "Tribal Consultation and Collaboration" are hereby further clarified and complemented by the provisions of this Departmental Regulation.

3. Purpose

- a. This Departmental Regulation implements President Barack Obama's November 5, 2009 Memorandum to the Heads of Executive Departments and Agencies on Tribal Consultation, which directed the Departments and Agencies to commence complete and consistent implementation of Executive Order 13175, *Consultation and Coordination with Tribal Governments*.
- b. This Departmental Regulation directs the USDA and its agencies to provide Federally recognized Tribes the opportunity for government-to-government consultation and coordination in policy development and program activities which have direct and substantial effects on their Tribe, thereby ensuring that tribal perspectives on the social, cultural, economic, and ecological aspects of agriculture, as well as tribal food and natural resource priorities and goals are heard and fully considered in the decision-making processes of the Department and its agencies. This Policy therefore:
 - (1) sets forth criteria that all USDA agencies will use to identify actions that require an invitation be extended to Federally recognized Tribes to engage in consultation,

- (2) establishes a minimum set of requirements and expectations with respect to consultation and coordination throughout the USDA, including the Office of the Secretary and each of the Department's agencies,
- (3) holds the head of each USDA agency accountable for the implementation of this policy, and
- (4) affirms that each USDA agency is responsible for appropriate consultation and collaboration with Tribes.

This Departmental Regulation also serves to establish structures and processes within the USDA and its agencies to accomplish the requirements for Tribal consultation and collaboration. This Policy therefore:

- (1) Provides background on Tribal sovereignty and self-determination;
- (2) Explains the unique legal relationship that Federally recognized Tribes have with the Federal Government and the requirement for government-to-government consultation; and
- (3) Delineates the roles of entities that may be involved in Tribal consultation, coordination, and collaboration.

4. Background

Since before its formation, the United States has recognized Tribes as sovereign governments. A unique legal relationship exists between Federally recognized Tribes and the Federal government which evolved from this recognition of Tribal sovereignty. This relationship is the basis of the "government-to-government" consultation requirement. The treaties in which many Tribes ceded lands to the United States in exchange for protection and provisions for their Tribal citizens were based on the premise of two sovereign governments interacting on an equal basis, just as foreign governments negotiate and sign treaties with the United States today. This relationship is incorporated in the Constitution, and has been expressed through numerous treaties, statutes, executive directives and court decisions as well as political, legal, moral, and ethical principles.

The USDA Policy on Tribal Consultation is particularly linked to a series of directives from U.S. Presidents, specifically Presidential Memoranda and Executive Orders. In addition, some federal statutes, *e.g.*, the Tribal Forest Protection Act of 2004, Pub. L. No. 108-278, 118 Stat. 868 (codified at 25 U.S.C. § 3115a) (2004), and Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651 (codified at 25 U.S.C. §§ 3051-3057) (2008), may impose specific consultation requirements and duties beyond those contained in this Departmental Regulation.

On April 29, 1994, a Presidential Memorandum was issued reaffirming the Federal government's commitment to operate within a government-to-government relationship with Federally recognized American Indian and Alaska Native tribes, and to respect self-governance for such Tribes. This Presidential Memorandum directs each executive department and agency to consult with Tribal governments prior to taking actions that would affect them. It stated that in order to ensure that the rights of sovereign Tribal governments are fully respected, all such consultations were to be open and candid so that Tribal governments could evaluate for themselves the potential impact of relevant proposals.

On May 14, 1998, Executive Order 13084, "Consultation and Coordination with Indian Tribal Governments," was issued. This Executive Order was revoked and superseded on November 6, 2000, by the identically titled Executive Order 13175, which sets forth guidelines for all Federal agencies to: (1) establish regular and meaningful consultation and collaboration with Tribal officials in the development of Federal policies that have Tribal implications; (2) strengthen the United States' government-to-government relationships with Tribes; and (3) reduce the imposition of unfunded mandates upon Tribes. EO 13175 directs each executive department and agency to consult with Tribal governments prior to taking actions that would have substantial direct effects on Tribes. On November 5, 2009, President Barack Obama issued a Presidential Memorandum to the heads of executive departments and agencies on the subject of Tribal Consultation. In this Memorandum, the President stated that "[m]y 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." The Memorandum directed each Federal agency to develop and submit to the Office of Management and Budget (OMB) a plan of action to implement the Executive Order, as well as annual progress reports on the status of those plans.

5. Policy

Each USDA agency shall provide an opportunity for Tribes to participate in policy development to the greatest extent practicable and permitted by law. Each Tribe will be provided the opportunity for timely and meaningful government-to-government consultation regarding policy actions which may have tribal implications. Tribal implications are defined as 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. Pursuant to Executive Order 13175, policies that have tribal implications may include regulations, legislative comments or proposed legislation, and other policy statements or actions. This policy does not preclude any office or agency from consulting with a Tribe when the Tribe and the office or agency agree that consultation may be desirable, even if consultation is not specifically required.

Specifically, it is the policy of the USDA that:

- a. Sovereignty. All USDA agencies and personnel shall respect and uphold the sovereignty of all Federally-recognized Tribal governments. This policy does not diminish any Tribal governmental rights, including treaty rights, other reserved rights, sovereign immunities or jurisdiction. Additionally, this policy does not diminish any rights or protections afforded AI/AN persons or entities under Federal law.
- b. Accountability. Each USDA office and agency shall maintain an accountable process to ensure regular and meaningful consultation with Tribal officials in the development of policies that may have Tribal implications. These processes shall incorporate the requirements for critical triggers, minimum standards, consultation processes, reporting, education, training, and other aspects explained in Part II of this document. In order to ensure accountability, each agency shall maintain an administrative record of all relevant decision making, information, and communications associated with each consultation. This includes initial outreach, consultative meetings and dialogue, and how the results of consultation were considered by the agency in the decision-making processes. These administrative records shall be retained by the pertinent agency and entered into the USDA Tribal Consultation Database once it is established by the Office of Tribal Relations. An accountable process shall include, as a minimum, the ability for OMB, the Secretary, Under Secretaries, Agency Heads, and Agency Consulting Officials to determine:
- (1) The subject of the consultation;
 - (2) The critical trigger or decision to initiate consultation;
 - (3) Materials provided to, and received from, Consulting Officials relevant to the consultation topic;
 - (4) Names, titles and contact information of the Consulting Officials (Federal and Tribal Representatives) and any additional individuals who were involved in the consultation process (staff, etc.);
 - (5) How the consultation was conducted (the type and mode);
 - (6) The consultation schedule (dates, times, locations);
 - (7) Agendas, meeting minutes, or other records of consultation meetings;
 - (8) The outcome(s) of the consultation, including follow-up commitments, any agreements or points of disagreement;
 - (9) How the results of the consultation were considered in any decision-making process by the agency and whether they were incorporated or rejected in the final decision(s);
 - (10) What additional steps may need to be taken; and
 - (11) Appropriate public disclosure of the consultation record.
- c. Point of Contact. The USDA Office of Tribal Relations (OTR) is the designated responsible organization within USDA for Department-wide implementation and monitoring of EO 13175, relevant Presidential Memoranda, and this Policy. OTR reports directly to the Secretary, and serves as the Department's point of contact in accessing department-wide information regarding Tribal issues. The Senior

Advisor to the Secretary for Tribal Relations serves as the single point of contact within the OTR for Tribes and other Native American organizations. In addition, the OTR shall:

- (1) Facilitate communication regarding USDA initiatives as they relate to Tribal governments.
 - (2) Coordinate periodic Tribal consultation sessions, within available and allowable funds, to regularly consult with Tribal leaders or their designated representatives on USDA programs at field locations. The Office of Tribal Relations will act as a coordinating office working across all agencies of the Department in order to maximize the effectiveness and efficiency of joint regional consultation events. Other Federal partners will be invited to attend as appropriate.
 - (a) The goal of these efforts is to systematically, efficiently, and effectively provide an opportunity for Tribal consultation and focus the USDA on Tribal issues to continue to enhance the government-to-government relationship between Tribes and the United States Government. These periodic sessions will augment, not replace, the agency-specific consultation efforts.
 - (b) Upon completion of each consultation session, the OTR and participating agencies will document and follow up on any unresolved issues that would benefit from ongoing involvement of Tribes.
 - (3) Consult periodically with Tribal leaders or their designated representatives on the execution of USDA Tribal Consultation Policy to ensure effective and meaningful participation and implementation.
 - (4) Inform Tribes and others about the USDA Tribal Consultation Policy by conducting meetings, roundtables, teleconferences, and forums, by participating in national and regional Native American-focused conferences, and by placing information on the USDA web site homepage and other appropriate web sites.
 - (5) Advise and oversee the development or modification of USDA office- and agency-specific policies and processes for consultation.
 - (6) Develop and maintain a USDA-wide Tribal Consultation Database consistent with funding availability.
- d. Agency Policy Development. Each USDA agency shall develop its own or shall modify its existing policies for Tribal consultation and meet the minimum standards as established in this policy.

- e. Consulting Officials (Agency and Tribal Representatives). Government-to-government consultation only occurs between USDA senior officials, or their designees, and the official leadership of Federally recognized Tribes, or their designated representative(s). All USDA Officials charged with Consultation must complete a level of training in Tribal law, consultation, and Federal/Tribal relations as identified by the Secretary prior to conducting consultation. Agency delegations must be made part of the consultation record as indicated in the accountability process.
- f. Compliance. To the extent practicable and permitted by law, no USDA agency shall promulgate any regulation or policy that has Tribal implications, that imposes substantial direct compliance costs on Tribes, that is not required by statute, unless:
- (1) Funds necessary to pay the direct costs incurred by the Tribe in complying with the regulation or policy are provided by the Federal Government; or
 - (2) The agency, prior to the formal promulgation of the regulation or policy:
 - (a) consulted with Tribal officials in the process of developing the proposed regulation or policy;
 - (b) provided a Tribal Summary Impact statement; and
 - (c) made available to the Secretary and the Director of OMB any written communications submitted to the agency by Tribal officials.
- g. Tribal Summary Impact Statement. In a separately identified portion of the preamble to each regulation to be issued in the Federal Register, the issuing office or agency shall provide a Tribal summary impact statement, which shall consist of:
- (1) a description of the tribal implications and the extent of the agency's prior consultation with Tribal officials,
 - (2) a summary of the nature of the Tribe's concerns and the agency's position supporting the need to issue the regulation, and
 - (3) a statement of the extent to which the concerns of Tribal officials have been met.
- h. Negotiated Rulemaking. On issues relating to Tribal self-governance, Tribal self-determination, Tribal trust resources including land resources, or Tribal treaty and other rights, each office or agency should explore, and where appropriate in

consultation with the USDA Office of General Counsel, use consensual mechanisms for developing regulations, including negotiated rulemaking. USDA agencies should examine the appropriateness in consultation with the USDA Office of General Counsel the negotiated rulemaking process for those programs and policies affecting Tribal land resources.

- i. Conflict Resolution. A Tribe may seek conflict resolution through the USDA Office of Tribal Relations when:
 - (1) a Tribe engaged in consultation believes that the USDA or its offices or agencies have not appropriately or adequately considered the needs, desires, or requests of the Tribe, or
 - (2) a Tribe believes the USDA, or its offices or agencies, should engage with them in consultation and the USDA has not done so.

Consultation Process and Guidance

6. About Consultation

- a. Consultation – an operational definition. While there is no universal definition of Tribal consultation, this operational definition expresses three essential elements: who can consult (those with delegated authority), the qualities of process (timely, meaningful, substantive), and the inclusiveness of communication (two-way dialogue between parties).

Tribal consultation is the timely, meaningful, and substantive dialogue between USDA officials who have delegated authority to consult, and the official leadership of Federally recognized Indian Tribes, or their designated representative(s), pertaining to USDA policies that may have tribal implications.

- (1) Actions commonly confused with consultation. It is also important to distinguish between consultation and other actions. Notification – the distribution of information from a USDA office or agency to one or more Tribes - is not consultation. Neither are technical communications or outreach activities, however important or influential, between staffs without leadership involvement. While notification, technical communications and outreach are all essential, and are often used as part of consultation, they alone do not constitute government-to-government consultation.
- (2) Consultation Record. A record of Tribal consultation must be produced and maintained by the consulting agency. At a minimum, the consultation record must include the elements noted in section 5 subsection b.

- b. Principle of Mutual Concurrence. As a general principle, consultation only occurs when the office or agency and Tribal officials mutually agree that consultation is taking place. Office and agency consulting officials and their staffs should be clear in identifying, in collaboration with the relevant Tribal official(s), when an action or set of actions constitutes government-to-government consultation.
- c. Principle of Agency Executive Authority. Consultation does not require the office or agency to do anything a Tribal representative requests, but rather requires USDA to take the Tribes' 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 representatives. Consultation and collaboration with Tribes help the USDA better serve Tribal communities.
- d. Consulting Officials.
 - (1) For USDA, consultation may only be conducted by employees who have delegated authority for consultation. This delegation occurs through the Secretary to Department Leadership, and flows from the Under Secretaries to the agencies. Whether the USDA consulting official is the Secretary, Deputy Secretary, Assistant Secretary, Under Secretary, agency head, or another agency official depends on the nature of the regulation, policy, program or planning decision and how it may affect the consulting Tribe(s).
 - (2) For the Tribes, consultation is conducted by elected Tribal representatives or Tribal employees or designees who have delegated authority from their Tribal government for consultation. This delegation is determined by the Tribes themselves as sovereign governments. The consulting official must be designated by the Tribe, and agencies should get written confirmation from the Tribe that any official participating in consultation has authority from their Tribal government.
- e. Critical Triggers. A Tribe, the USDA, or another party may take action that could initiate consultation, or at least an evaluation of whether consultation is required or desired. Under EO 13175 the term "policies with tribal implications" includes "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."

If there is any potential for an effect, consultation may be required, depending on the extent (significance) of the effect. If the agency does not know the significance of the effect, or even whether there will be an effect, the agency should inquire of potentially affected Tribes whether the Tribe thinks there would

be an effect, how significant such an effect may be, and whether they would like to consult.

The list below is based on the EO 13175; EO 13175 serves as the baseline for description of triggering events and the list below provides examples of other potential triggering events and is based on historical requests for consultation that have been made to various USDA officials and agency administrators. The list is meant to serve as a guide to some of the actions that might trigger consultation, and should not be considered exhaustive, only illustrative:

- (1) Tribal Initiated
 - (a) Request from Tribal Leader
 - (b) Request from Intertribal organization representing Federally Recognized Tribes

- (2) USDA Agency Initiated
 - (a) USDA Structure
 - 1 Agency Roles
 - 2 Program Delivery, i.e. any agency program action that directly affects one or more Indian Tribes; to the extent practicable and permitted by law or policies that have Tribal implications.
 - 3 Formulation and Implementation of Policies
 - (b) Rulemaking
 - (c) Legislative Proposals
 - (d) Legislative Positions
 - (e) Statutory Implementation
 - (f) Directives
 - (g) Physical Infrastructure/Lands
 - (h) Land Use, including water issues
 - (i) Budget Proposals
 - (j) Planning (Strategic)
 - (k) International Policies

- (3) Other Federal Agency Initiated
- (4) Emergency Actions

7. Consultation and Related Roles

While this Policy applies to the USDA and its component agencies, several organizations in a variety of categories may play roles in Tribal consultation. This section delineates those roles.

- a. Federally Recognized Indian Tribes. The government-to-government relationship between the U.S. and Federally recognized Indian Tribes dictates that the principal focus for USDA consultation is with individual Tribal governments. Government-to-government consultation is with individual Tribal governments. Government-to-government consultation generally occurs with a Tribal executive such as a Chairman, President, Governor, or their designee.
- b. Alaska Native Corporations. 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 Tribes in Alaska. This category generally includes both Regional and Village corporations.
- c. Tribally Designated Entities (TDE). The USDA is able to engage with groups other than Federally recognized Tribes, though not in a government-to-government manner. For specific issues, Tribal leadership may delegate authority, by resolution or letter to a Native organization for consultation purposes, subject to the requirements of the Federal Advisory Committee Act (FACA). If the Tribe or Department wants to include organizations which do not represent a specific Federally recognized Tribal government on advisory committees or workgroups, Federal Advisory Committee Act requirements must be followed, where applicable. Collaboration with TDEs should be conducted separately from consultation processes conducted with Federally recognized Tribes, as the obligations and issues vary due to the nature of the relationship.
 - (1) Non-Federally Recognized Tribes. There are groups of American Indian/Alaska Native people who are either self-organized or recognized by States, but which do not have status as Federally recognized Tribes. The Federal government does not have the authority or responsibility to consult with these groups on a government-to-government basis.
 - (2) Intertribal Organizations. These organizations are comprised of officially delegated members who represent their Tribe's interest in conjunction with other Tribes, often relating to a specific issue or policy area. These organizations serve and represent Native issues and concerns that might be negatively affected if these organizations were excluded from USDA policy development processes. Examples of Intertribal organizations include the Intertribal Agriculture Council, the National Congress of American Indians, and the Intertribal Timber Council.
 - (3) Other Native-oriented Organizations. These organizations are not necessarily operated by Native Americans, but the nature of their business is to serve Native communities' issues and concerns. Examples of these

kinds of organizations include businesses, non-governmental organizations, foundations, and some educational organizations.

- d. USDA Agencies. The Department is made up of numerous agencies. Each of these operating units shares in the Department-wide responsibility to coordinate, communicate and consult with Tribes on issues that affect these governments, and each is responsible for conducting Tribal consultation to the extent practicable and permitted by law on policies that have Tribal implications. All agencies will comply with the Department Tribal Consultation Policy. Additionally, all agencies will comply with this policy and develop or revise their own Tribal consultation policies or plans to conform to this Policy. All agencies will designate within 30 days after the effective date of this policy an official with principal responsibility for the agency's implementation of this policy.

8. Consultation Processes

a. Types of Consultation

One type of consultation does not fit every situation. There are at least three types:

- (1) Single event: Sometimes a single meeting between the consulting officials will suffice;
- (2) Multiple events as part of a process: Some policies, programs or planning decisions may require multiple consultation meetings. For instance, consultation may need to be conducted prior to publication of the proposed rule, then continued prior to publishing the final rule; and
- (3) Ongoing as part of a relationship: Often, USDA leaders have regularly scheduled meetings – as well as interactions on an “as needed” basis – with Tribal officials.

b. Formal Consultation

The lexicon of consultation includes words like “formal consultation” and “informal consultation.” These may mean very different things to people in different contexts. The mutual understanding of the parties will determine whether the ongoing discussions are part of the formal consultation process or simply a continuation of dialogue. Government-to-government consultation requires an official record be made and maintained.

c. Modes of Consultation

There are many ways, or modes, for conducting meaningful consultation. Of these, real-time, in-person dialogue is the preferred method; however, the parties to the consultation may agree to carry out consultation by other modes.

Sometimes there is a need to be creative about how to conduct consultation, regardless of whether it is a single session, multiple interactions, or part of an ongoing relationship. Consultation is based on dialogue, and dialogue can occur in many forms. We often think of consultation as taking place between a USDA representative and a Tribal representative in the form of a face-to-face meeting, but it may also occur via telephone or video conference. Budget constraints of both parties must be taken into consideration when planning consultation sessions. Postal mail, email or other forms of communications media are generally utilized to ensure that all parties are in possession of relevant documents, maps, etc., prior to the start of consultation. Consultation by written correspondence (paper or electronic) is possible, but rightfully rare; in such circumstances, all consulting parties should agree that consultation is indeed taking place in such an exchange, and it should be documented as such. Filing and record-keeping is essential to ensure the accountability of the process as required by Executive Orders and Presidential Memoranda. Modes of consultation are not mutually exclusive and may include one or more of these:

- (1) Meeting(s): The agencies may convene one or more meetings with affected, or potentially affected, Tribes to discuss all pertinent issues in a national, regional, or local forum, as appropriate, to the extent practicable and permitted by law, within allowable and available funding, when a proposed plan, policy or program may significantly affect one or more Tribes.
 - (a) Tribes may request to meet one-on-one with an office or agency head, or their designated representative, to consult on issues specific to that Indian Tribe. Agencies should attempt to meet these requests when practicable and offer other means of consultation as an alternative. Other types of meetings and/or conferences occur which may not be considered consultation sessions, but these non-consultation meetings may provide an opportunity to share information, conduct workshops, and provide technical assistance to Tribes.
 - (b) **Regional Tribal Consultation**: USDA has held Regional Tribal Consultation Sessions in the past. USDA will strive to continue holding regionally-based tribal consultation events, as funding allows. When funding constraints make execution of such events impossible, USDA will nonetheless endeavor to provide meaningful consultation venues. Regular collaboration will be held to solicit Tribes' priorities and needs on agriculture, rural development, food and natural resource services and programs. These sessions will provide an opportunity for Tribes to articulate their comments and concerns on budgets, regulations, legislation and USDA policy matters. When conducted, regional in-person or

telephonic venues will be preceded by informational sessions conducted primarily through electronic means.

- (c) Field Offices/Directors and agencies will work collaboratively with the Tribes in their respective States or regions on the development of consultation meetings, roundtables and annual sessions. Field Offices/Directors should develop protocols for consultation with the Tribes in their respective States or regions and should establish regular, meaningful consultation and collaboration relationships.
 - (d) Field Offices/Directors and agencies will work with the Tribes to identify Tribal and Native organizations that can assist in working with Tribes in planning Tribal consultation sessions.
 - (e) Field Offices/Directors and agencies will work collaboratively to facilitate Tribal-State relations regarding USDA programs and services as they affect Tribes and AI/ANs.
- (2) Paper Correspondence. A series of correspondence between consultation officials may serve as consultation. Written communications should clearly provide affected, or potentially affected, Tribes with information regarding the critical trigger.
 - (3) Electronic Correspondence. Similarly, emails or electronic documents shared between consultation officials may serve as consultation.
 - (4) Tribal Resolution. Communications from Tribes frequently come in the form of Tribal resolutions. These resolutions may be the most formal declaration of a Tribe's position for the purpose of Tribal consultation. Once an office or agency receives a Tribal resolution, the office or agency should respond appropriately. Appropriate response may include continued Tribal consultation using other modes.
- d. Leveraging Intertribal meetings. Several national and regional Intertribal organizations hold one or several conferences each year. Tribal leaders, including many who may have delegated authority to consult with USDA, attend these sessions. It can be worthwhile to inquire whether an Intertribal organization would be interested in scheduling consultation sessions with USDA officials during their meetings. This has the potential to leverage the attendance of multiple Tribal leaders in a setting that is conducive to this type of discourse. Keep in mind, however, that such arrangements require consent of the Intertribal organization and planning far in advance. USDA officials should avoid 'taking over' an intertribal organization's meeting and be sensitive to the organization's needs. USDA officials should also keep in mind that consultation in these

settings occurs between agency officials and delegated Tribal officials, not with the sponsoring Intertribal organization.

e. Consultation Steps

The degree and extent of consultation will depend on the identified critical trigger. While this policy does not provide specific guidelines, agencies shall utilize the following criteria to ensure that the requirements of this policy are satisfied.

- (1) Identify the Critical Trigger (funding, policy, programs) and its context: complexity, implications, time constraints, issues.
 - (a) The need to develop a policy may be identified from within the office or agency, or may be identified by Tribes. This need may result from external forces such as Executive, Judicial, or Legislative Branch directives. See Critical Triggers, above.
 - (b) Once the need to develop a policy is identified, a consultation planning process should begin. The agencies may request technical assistance from OTR for planning or conducting the Tribal consultation process.
- (2) Identify the affected/potentially affected Tribe(s)
- (3) Identify the level and mode of consultation to be offered
- (4) Coordinate the Schedule for Consultation. Agencies should establish and adhere to a formal schedule of meetings to consult with Tribal governments and representatives.
 - (a) Agencies are encouraged to establish additional forums for Tribal consultation and participation, and for information sharing with Tribal leadership. Consultation schedules should be forwarded to OTR to be posted on the OTR website and to check for duplication or conflicts with other national Tribal events and USDA consultation sessions.
 - (b) Work sessions may be held to solicit official Tribal comments and recommendations on policy and budget matters affecting Tribes. These sessions at roundtables, forums and meetings will provide the opportunity for meaningful dialogue and effective participation by Tribes.
- (5) Provide Notice. Upon the determination of the level of consultation necessary, proper notice of the critical trigger and the level of consultation utilized shall be communicated to affected, and potentially affected, Tribes

inviting their participation. Notice shall be made using all appropriate methods including mailing, broadcast e-mail, Federal Register, fax and other outlets. Notices shall include clear and explicit instructions for the submission of comments. Notice is not, by itself, consultation, but rather the communication of the opportunity for consultation. Agencies must provide reasonable and timely notice of consultation events initiated by the agencies. 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. In emergencies, shorter periods may be necessary.

- (6) Consultation Record. A record of Tribal consultation must be made and maintained. For reporting and oversight purposes, the agency is responsible for entering select components of the consultation record into its own recordkeeping system and a USDA Tribal Consultation Database to be created and maintained by the Office of Tribal Relations. The entry of reporting data into the Database does not affect the agency's obligation to maintain the full consultation record in accordance with this policy and any other applicable statutory or regulatory requirements, such as the Federal Records Act. When developing further details on the contents and process for maintaining the consultation record, agencies are encouraged to consult with their agency records officer.
- (7) Report Outcome. The agency shall report on the outcomes of the consultation to the OTR.
- (8) Incorporate Results of the Consultation Effort into the Critical Trigger or Event as Appropriate. For instance, if rulemaking is the subject of consultation, the preamble to the regulation must contain a discussion of the consultation effort, the comments received and how the agency addressed the comments received during consultation. How results of the consultation are incorporated into the agency action will depend on the nature of the critical triggering event.

f. Dialogue, Coordination and Collaboration with Other Groups

- (1) In cases where a government-to-government relationship does not exist, consultation is encouraged to the extent practicable and permitted by law. Some aspects of these kinds of consultation are set out in statute and administrative policy.
- (2) The Department is able to interact with organizations and/or groups that do not represent Federally recognized Tribal governments. However, if the Tribe or Department wants to include organizations which do not represent specific Federally-recognized Tribal governments on advisory

committees or workgroups, then FACA requirements must be followed. The intergovernmental committee exemption to FACA is found in the Unfunded Mandates Reform Act (2 U.S.C. 1534).

- (3) The OTR, office and agency heads will work closely to identify those instances when other Native American organizations and groups may be negatively affected if excluded from the consultation process. Native American organizations and groups include urban Indian organizations, non-Federally recognized Tribal groups, governing bodies of Tribes on Federal and State Reservations, State Recognized Tribes, other Indian organizations, Native Hawaiians, Native American Pacific Islanders (including American Samoan Natives), and other Native American groups that, by the nature of their business, serve American Indians, Alaska Natives or Native Americans.
- (4) Although consultation may be allowed with these organizations and groups, non-Federally recognized Tribes and organizations and groups that do not represent Federally recognized Tribes do not fall under the intergovernmental committee exemption to FACA found in 2 U.S.C. 1534. As a result, the agency is required to adhere to FACA when such organizations are made a part of an advisory committee or workgroup. The OTR and USDA agencies will work to facilitate any required consultation forums, the level of consultation required, recording of meetings, evaluate the results, determine whether additional consultation on policy items may be needed, and report to the affected Native American groups and organizations.

- g. Involving States. In some instances, the authority and appropriations for USDA programs and services that affect Tribes flow through the States for the benefit of Tribes, based on statute, regulation or USDA policy. It is important that USDA facilitate collaboration and communication between States and Tribes under appropriate circumstances as determined by all parties involved.

9. Consultation Reporting

A USDA Tribal Consultation Database shall be developed and maintained by the Office of Tribal Relations to enable effective oversight of all USDA tribal consultation activities. Each Agency Administrator or Office Director shall identify a single point of contact for reporting consultation activities. That individual shall be responsible for entering all required information into the Database, responding to requests for access to the full consultation record, and fulfilling all other requests for data related to agency consultation activities from the Director of OTR. The individual is not necessarily responsible for identifying critical triggers, conducting consultation, or creating and maintaining the consultation record.

To the extent practicable, all consultation shall be reported within 30 days of a critical trigger, and the consultation record completed within 30 days of final conclusion. The agency shall update the record throughout the consultation process, and within a reasonable period of time as requested by the Director of OTR. The Office of Tribal Relations shall periodically provide information to the Secretary, Under Secretaries, Assistant Secretaries, Agency Administrators, and Office Directors, on agency compliance with reporting requirements and data quality.

10. Training and Education

Annual trainings will be mandatory for all USDA employees upon the following “Tier” groupings:

Tier 1 includes senior staff and management of USDA and its constituent agencies and offices. This category is comprised of primarily political appointees or Senior Executive Service career employees. It is important for these USDA leaders to understand the background and process in order to successfully implement the President’s Tribal Consultation agenda. This group includes the Office of the Secretary; the Under and Assistant Secretaries; and their senior staffs.

Tier 2 includes regional or State-based senior management and staff designated to conduct Tribal Consultations. This group includes the Farm Service Agency (FSA), Rural Development (RD) State Directors; the State and Regional Conservationists in the Natural Resources Conservation Service (NRCS); District Managers with the Food Safety and Inspection Service (FSIS); the Agricultural Marketing Service (AMS); the Animal Plant Health Inspection Service (APHIS) Area Veterinarians-in-Charge and State Plant Health Directors; high-level managers at regional offices; and the leaders of other types of programs where those individuals would personally be involved in the consultation process.

Tier 3 includes all USDA employees.

Tier 1 and Tier 2 trainings should be conducted with a team comprised of professional non-governmental Tribal Consultation trainers and expert USDA staff. Inclusion of Tribal governments as active participants in both the development and implementation of training programs is suggested.

Tier 1 and Tier 2 training sessions will explain the history of the legal relationship between Tribes and the U.S. Government; the definition of Tribal sovereignty; the definition of trust responsibility; and the ramifications of the USDA Tribal Consultation per the President’s agenda. Tier 1 and Tier 2 trainings will involve components of legal issues as well as cultural competency trainings.

Tier 3 training will be offered from the Office of Personnel Management (OPM) Go-Learn program, “Working Effectively with Tribal Governments” that can be accessed via the Internet.

Ongoing tribal consultation training will be developed and offered as appropriate.

11. Definitions

- a. **Accountable Process**
An accountable process is one by which the office or agency is able to track and report on the efforts on any given consultation, from initial outreach and consultation activities to how the results of consultation were used by the USDA agencies.
- b. **Agency**
Any of the operational sub-units of the USDA, e.g. the Forest Service (FS), the Natural Resource Conservation Service (NRCS), or the Food Safety and Inspection Service (FSIS).
- c. **Consultation**
Tribal consultation is the timely, meaningful, and substantive dialogue between USDA officials who have delegated authority to consult, and the official leadership of Federally recognized Indian Tribes, or their designated representative(s), pertaining to USDA policies that may have tribal implications.
- d. **Coordination**
Coordination is the orchestration of the activities of different entities.
- e. **Collaboration**
Collaboration 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 a Tribe and a USDA agency working together on a USDA policy that benefits both the agency and the Tribe.
- f. **Consulting Official**
Consultation may only be conducted by employees who have delegated authority for consultation. This delegation occurs through the Secretary to Department Leadership, and flows from the Under Secretaries to the agencies. Whether the consulting official is the Secretary, Deputy Secretary, Assistant Secretary, Under Secretary, agency head, or another agency official depends on the nature of the regulation, policy, program or planning decision and how it may affect the consulting Tribe(s).

For the Tribes, consultation is conducted by elected Tribal representatives or Tribal employees or their representatives who have delegated authority from their Tribal government for consultation. This delegation is determined by the Tribes themselves as sovereign governments. The consulting official is usually the Tribal Chairman/Governor/President or another official from the Executive Branch, though it could be a member of the Tribal Council or even a Tribal employee with specialized knowledge of the topic of the consultation.

g. Government-to-government

In Federal Indian law, the term is used to characterize the unique legal relationship that exists between Federally recognized Tribes and the Federal government. This relationship evolved from the recognition of tribal sovereignty expressed in treaties between Tribes and the Federal government and in the U.S. Constitution. This relationship is the basis of the government-to-government consultation requirement and has been expressed through numerous statutes, executive directives and court decisions

h. Negotiated Rulemaking

A technique used to bring interested parties into the rule-drafting process at an early stage. Rules are developed by reaching consensus among committee members representing affected interests. If consensus is achieved, the agency publishes the draft rule based on that consensus in a notice of proposed rulemaking. Negotiated rulemaking is endorsed in E.O. 12866 and in the Negotiated Rulemaking Act of 1990 (5 U.S.C. 561-570).

i. Office of Tribal Relations (OTR)

In FY 2010, the Department received appropriations to launch a new Office of Tribal Relations (OTR). USDA OTR serves as the primary point of contact for Tribal issues, including those dealing directly with Tribal governments and Alaska Native Claims Settlement Act (ANCSA) Corporations, as well as those impacting Tribal members as individuals; is responsible for serving as the single point of contact within the Department on Tribal Affairs; advises the Secretary concerning Tribal issues and concerns; and works cooperatively and collaboratively across all agencies of the Department to build a cooperative, collaborative, and integrated approach to issues, programs and services addressing the needs of American Indians and Alaskan Natives, including the conduct of Tribal consultation.

Organizationally, the OTR is situated within the Office of the Secretary and is the Department's lead office for Tribal consultation in accordance with Executive

Order 13175-Consultation and Coordination with Indian Tribal Governments. Additional duties and responsibilities of the OTR will include: coordination and management of USDA's American Indian and Alaska Native policy issues and serve as the Department's expert and informational resource to the Secretary; collaboration with and outreach to Tribes and national Native organizations; coordination of USDA participation in national Tribal meetings and Tribal site visits for USDA executive leadership; advice and assistance to the USDA regional and state field offices and Senior staff on Tribal affairs, coordination of the interdepartmental working group on Tribal Consultation and Collaboration; oversight of the Department's agency and office policies and processes for consultation; and coordination of the Secretary's policy development for Tribes.

j. Policies with Tribal Implications

Policies that have tribal implications may include regulations, legislative comments or proposed legislation, and other policy statements or actions. Actions, in turn, include deliberations, decisions, directives and implementation of USDA programs and services. Policies that have tribal implications will include those with "substantial direct effects" as identified in the language of EO 13175.

k. Substantial Direct Effect

Direct means that there is an uninterrupted causal connection between the action and the group or individual being affected. Effects may be positive, neutral, or negative. These elements should be considered:

- (1) If there is definitely potential for an effect that is substantial and direct, consultation is required.
- (2) If there is any potential for an effect, consultation may be required, depending on the extent (significance) of the effect. If the agency does not know the significance of the effect, or even whether there will be an effect, the agency should inquire of potentially affected Tribes whether the Tribe thinks there would be an effect, how significant such an effect may be, and whether they would like to consult.
- (3) If there is no potential for an effect, consultation is not required (but may still be valuable).

l. Tribe

Tribe is shorthand for "Indian tribe" as used in Executive Order 13175, which 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.

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