

# Framing Paper

## Improving Interior's Consultation with Tribes: Development of the U.S. Department of the Interior's Plan for Improving Implementation of EO 13175, *Consultation and Coordination with Indian Tribal Governments*

On January 26, 2021, President Biden issued a Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, which reaffirms the Presidential Memorandum of November 5, 2009 (Tribal Consultation) and states:

It is a priority of my Administration to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy.

President Biden's memorandum directs each Federal agency to consult with Tribes before developing a **detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*** (Nov. 6, 2000), and to submit the plan to the Office of Management and Budget (OMB) by April 26, 2021. Following President Biden's direction, the U.S. Department of the Interior, including its bureaus and offices (Interior) seeks Tribal input on how to best improve its implementation of E.O. 13175 to consistently achieve meaningful consultation.

To prepare for these upcoming consultations, Interior has reviewed the following materials:

- ✓ Input received during the consultation on the 2009 Presidential Memorandum on Tribal Consultation;<sup>1</sup>
- ✓ Input received during the 2016 consultation on Tribal involvement in Federal infrastructure decisions, which resulted in the January 2017 Report *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions* (hereafter referred to as the "January 2017 Report");<sup>2</sup> and
- ✓ Interior's current policy on Tribal Consultation in the Departmental Manual (DM).<sup>3</sup>

As a starting point for discussions on what actions Interior should take to better implement the E.O. 13175, Interior poses the following questions to Tribes:

- Question 1: Does the input received in 2009 still reflect Tribal views about consultation today? Are there any additional comments or suggestions?
- Question 2: Should Interior include the actions recommended by the January 2017 Report in its plan to improve consultation?
- Question 3: Are there additional suggested steps Interior could take to improve Tribal consultation and make it more meaningful?
- Question 4: What actions to improve Tribal consultation should be made the top priorities in Interior's plan?

Context for each of these questions is provided on the following pages. Page 4 includes directions for submitting comments and a point of contact for further information.

---

<sup>1</sup> See "Executive Summary: Tribal Comments Received during U.S. Department of the Interior Consultations on the November 5, 2009 Presidential Memorandum"

<sup>2</sup> See "January 2017 Report: Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions"

<sup>3</sup> See 512 DM 4 and 5

**Question 1: Does the input received in 2009 still reflect Tribal views about consultation today?  
Are there any additional comments or suggestions?**

The following is a high-level summary of 2009 Tribal input on what is necessary for consultation to be “meaningful.” Interior welcomes any input Tribes have on whether there are additional comments or suggestions for addressing each topic.

**A. The Meaning of “Consultation.”**

“Consultation” must be two-way dialogue and opportunity for joint decision-making on a nation-to-nation level, that is more than a procedural or “check the box” exercise.

**B. The “Substantial Direct Effects” That Should Trigger Consultation.**

Tribes should have the opportunity to say whether an action requires consultation and agencies should be aware that Tribes may be affected not just by on-reservation actions, but also by funding and personnel decisions related to Federal Indian programs and off-reservation actions.

**C. When Consultation Should Be Initiated.**

Consultation should be initiated as early as possible.

**D. When Notices of Consultation Should be Given.**

Notice should be sent sufficiently in advance of a consultation session to allow time for Tribes to review and develop recommendations.

**E. What Notices of Consultation Should Contain.**

Notice should include all the necessary background information on the topic to be consulted on and the consultation plan.

**F. How Notices of Consultation Should Be Distributed.**

The form of notice should include Tribal leader letters and several methods of distribution based on an up-to-date database of Tribal leaders.

**G. Who Should Participate in Consultation.**

Consultation should include both Federal and Tribal representatives with expertise in the matter to be discussed and representatives with the authority to make decisions.

**H. What Form Consultation Should Take.**

Agencies should increase accessibility to and affordability of consultations by holding in-person consultations in Indian Country and geographical regions accessible to Tribes, in conjunction with other events Tribes will attend, and offering other technological ways of participating.

**I. How Interior Should Follow-Through on Consultations.**

Agencies should create a feedback loop and accountability system to ensure Tribes’ concerns are addressed.

**J. Coordinating Consultation Within and Across Interior.**

Agencies should improve coordination and consistency in their approaches to consultation.

## **Question 2: Should Interior include the actions recommended by the January 2017 Report in its plan to improve consultation?**

The following summarizes the recommendations for agency action in the January 2017 Report, but reframes them to address Interior specifically and, where possible, adapts them to apply not just to infrastructure decisions but to all Interior actions subject to E.O. 13175:

### **A. Ensuring Consistent Consultation Policies Across Interior.**

Provide results of the following to the White House Council on Native American Affairs (WHCNAA) and post online:

- a. The results of a thorough review of Tribal consultation policies and practices of all Interior's bureaus and offices to ensure that they reflect the **Key Principles** outlined in the January 2017 Report (see page 4 of this Framing Paper); and
- b. Updates to Interior bureaus' and offices' consultation policies and practices, staffing, and training practices as necessary to reflect the **Key Principles**.

### **B. Timing of Consultation.**

Use mechanisms to involve Tribes early in project-planning whenever possible, including through:

- a. Procedures that avoid pre-decisional commitments from applicants for Federal action (e.g., permitting);
- b. Programmatic, landscape-level planning mechanisms that ensure thoughtful and meaningful consultation on infrastructure projects; and
- c. Procedures for consulting with and including Tribes as early as possible in National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA) processes, including in pre-decisional scoping discussions.

### **C. Scope.**

Interior's bureaus and offices should work with Tribes to ensure robust indirect and cumulative impacts analysis in the NEPA documents, recognizing that Tribal impacts are not necessarily limited to on-reservation activities and consider conducting regional analysis of their actions' potential impacts to Tribal interests, such as Tribal treaty rights or climate change impacts that may be associated with agency actions.

### **D. Stronger Federal-Tribal Relationships.**

Work with Tribes to identify areas of concern on an ongoing, non-project specific basis (e.g., through a Statement of Relationship or Memorandum of Agreement), to allow local agency decision-makers to know in advance when their decisions will impact Tribal interests.

### **E. Education & Training.**

Prioritize and make available robust training for all Interior bureau and office staff who may be involved in programs and decision-making that may impact Tribes to ensure staff have an appropriate understanding of basic Indian law and policy, treaty rights, and the Federal-Tribal relationship.

### **F. Integrate Tribal Input into Existing Federal Decision-Making Processes.**

Review clearance processes of Interior bureaus and offices to ensure they take Tribal interests into account, and research resources and how methods could be established to make it easier for Interior offices and bureaus to determine which Tribal governments might be impacted by a particular Federal undertaking.

### **G. Resources & Tribal Capacity.**

Research ways to help Tribes increase their capacity to participate in meaningful consultation through new funding streams, training and technical support to Tribes, structures for coordinating consultation across geographies or Interior bureaus and offices, or other options.

### **Question 3: Are there additional suggested steps Interior could take to improve Tribal consultation and make it more meaningful?**

Interior welcomes any input Tribes have on additional or alternative suggestions that Interior should include in its plan to improve consultation. Additionally, Interior welcomes suggestions for ensuring that all Tribes have the opportunity to consult, without burdening Tribes with “too much” consultation, under challenging circumstances due to resource constraints or extenuating circumstances such as the current pandemic that may impede or prevent in-person consultation sessions. Interior also welcomes suggestions on what reasonable steps could be taken to demonstrate Interior sought to fully understand Tribal concerns.

### **Question 4: What actions to improve Tribal consultation should be made the top priorities in Interior’s plan?**

Recognizing that Tribes have suggested many actions in the past for improvement of consultation, are there any items that Interior should make its top priorities?

#### **Key Principles for Consultation (as stated in January 2017 Report)**

1. Act consistently with the government-to-government and trust relationship and treaty rights, and understand the historical context for Tribal interests.
2. Establish staff-level and leadership-level relationships with Tribes. Relationships between Federal and Tribal officials can provide a foundation for effective communication and a meaningful understanding of a Tribe’s concerns.
3. Initiate consultation at the earliest point possible, and provide sufficient information in the invitation. Federal agencies should reach out to Tribes and initiate consultation as soon as they are contemplating a Federal policy or action that may impact Tribal interests.
4. Make good-faith efforts to obtain a response from the Tribe and be cognizant of the limits of Tribal resources.
5. Ensure Federal decision-makers actively participate.
6. Seek to fully understand Tribal concerns, reach a consensus where possible, and when necessary, explain clearly why Tribal concerns could not be addressed.
7. Exchange information.

#### **Directions for Submitting Comments**

Please submit any comments you have for Interior’s plan to improve Tribal consultation to: **consultation@bia.gov** by midnight Eastern Time on Friday, **March 19, 2021**.

This deadline will ensure that Interior has time to consider Tribes’ input in developing its plan for submission to the OMB by the April 26, 2021 deadline established by the Presidential Memorandum.