

June 2023



NOAA Procedures for
Government-to-Government Consultation
With Federally Recognized Indian Tribal Governments

Table of Contents

I. Executive Summary	2
II. Definitions for the Purposes of This Handbook	3
III. Background	3
IV. Responsibilities within NOAA	5
V. Exchange of Information to Support the Consultation	8
VI. Preparing for the Consultation Process	10
VII. Consultation Process	12
VIII. DOC and OMB Reporting	18
IX. Related Topics	19
A. Working with Tribes without Federal Recognition Status	
B. Culturally Sensitive Information	
C. Section 106 of the National Historic Preservation Act	
D. Alaska Native Entities	
E. Hawaii and U.S. Affiliated Pacific Islands	
F. Regional Fishery Management Councils	
G. Secretarial Order 3206 – American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act	
X. Appendices	24
APPENDIX A: Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments	
APPENDIX B: Presidential Memorandum on Tribal Consultation	
APPENDIX C: Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships	
APPENDIX D: Department of Commerce Administrative Order 218-8	
APPENDIX E: Tribal Consultation and Coordination Policy of the U.S. Department of Commerce	
APPENDIX F: NOAA Policy on Government-to-Government Consultations with Federally Recognized Indian Tribes	

I. Executive Summary

NOAA Procedures for Government-to-Government Consultation with Federally Recognized Tribal Governments (or Handbook) is intended to provide guidance on obtaining meaningful and timely input from federally recognized Indian tribes into the National Oceanic and Atmospheric Administration (NOAA) decision-making process on policies that have tribal implications. Based on the relevant presidential, departmental and agency directives, this Handbook is intended to improve NOAA's internal management of its relations and cooperative activities with tribes. The procedures outlined here provide further guidance to NOAA Offices to support a more consistent, effective, and proactive approach to conducting government-to-government consultations with federally recognized Indian tribes under Executive Order (E.O.) 13175 and the Department of Commerce (DOC) Tribal Consultation Policy.

The relationship between federally recognized Indian tribes and the federal government is one of sovereign to sovereign, and has been described at length by the federal judiciary, and referred to in federal law promoting tribal self-determination and self-governance. The federal government has taken various steps over the years to recognize and formalize this unique legal and political relationship between governments culminating in the issuance of E.O. 13175, "Consultation and Coordination with Indian Tribal Governments" (November 6, 2000; Appendix A). E.O. 13175 requires each federal agency to establish procedures for meaningful consultation and coordination with tribal officials in the development of federal policies that have tribal implications. Presidential Memorandum on Tribal Consultation released on November 5, 2009 (Appendix B), required agencies to prepare and periodically update action plans to implement E.O. 13175. To implement the requirements of E.O. 13175 and the Presidential Memorandum, DOC issued Administrative Order (DAO) 218-8 (Appendix D) and the "Tribal Consultation and Coordination Policy of the U.S. Department of Commerce" (Appendix E), which together constitute DOC's "Tribal Consultation Policy." The DOC Tribal Consultation Policy reconfirms DOC's recognition of the federal government's trust responsibility, as established by federal statutes, federal treaties, and the decisions of the federal courts. In response, NOAA issued a "Policy on Government-to-Government Consultations with Federally Recognized Indian Tribes and Alaska Native Corporations" (Appendix F). The Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (January 26, 2021; Appendix C) reaffirmed the policy and requirements in the 2009 Presidential Memorandum.

These procedures provide a foundation on which NOAA Offices may adopt mission-specific procedures tailored to its needs, and are based on the financial resources available to conduct consultations. These procedures supplement the procedures of Secretarial Order 3206 on American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act, and are in no way intended to substitute for or alter the Secretarial Order. Implementation of these procedures does not create enforceable rights or a cause of action under law.

II. Definitions for the Purposes of This Handbook

Federally recognized Indian tribe (“Indian tribe” or “tribe”): As defined in section 1(b) of E.O. 13175, an Indian or Alaska Native tribe (see VIII (D) for more information), 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. §§ 5130, 5131.

Consultation: As described in section 5 of E.O. 13175, an accountable process that ensures meaningful and timely input from tribal officials on NOAA regulatory policies that have tribal implications.

Consultation protocol: An agreement between NOAA and a federally recognized tribe describing the elements and procedures for implementing government-to-government consultation and E.O. 13175.

Engagement: The range of interactions with tribal governments that may be similar to (but does not rise to) the level of formal government-to-government consultation (e.g., sharing of information, data, perspectives, feedback and concerns, joint projects and education and outreach).

Policies that have tribal implications: As defined in section 1(a) of E.O. 13175, all regulations, legislative comments, 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 tribes, or on the distribution of power and responsibilities between the federal government and tribes.

Tribal official: As defined in section 1(d) of E.O. 13175, an elected or duly appointed official of Indian tribal governments or authorized inter-tribal organizations.

Tribal trust resources: Those resources, either on or off Indian lands, retained by or reserved by or for Indian tribes through federal treaties, federal statutes, judicial decisions and executive orders, which are protected by a fiduciary obligation on the part of the United States.

III. Background

On March 30, 1995, pursuant to the Presidential Memorandum “Government-to-Government Relations with Native American Governments” (April 29, 1994), the Secretary of Commerce signed DOC’s first American Indian and Alaska Native policy (Appendix E). That policy recognized tribal sovereignty and the unique legal and political status of federally recognized American Indian and Alaska Native tribal governments, and required all Department operating units to consult and work with tribal governments before making decisions affecting tribes. The goal of the policy was to ensure that tribal rights and concerns were addressed before developing legislation, regulations or policies that would affect tribal governments, their economic and social development activities or their lands and resources.

On November 6, 2000, the White House issued E.O. 13175 on “Consultation and Coordination with Indian Tribal Governments”(Appendix A), which charges all executive departments and agencies with engaging in regular, meaningful and robust consultation with tribal officials in the development of federal policies that have tribal implications (as defined in the E.O.). The Presidential Memorandum on Tribal Consultation issued on November 5, 2009 (Appendix B), requires each agency to prepare and periodically update a detailed action plan to implement the policies and directives in E.O. 13175.

On April 26, 2012, the Secretary of Commerce issued DAO 218-8 (Appendix D) to implement the requirements of E.O. 13175 and the 2009 Presidential Memorandum. On May 21, 2013, the Acting Secretary issued a Tribal Consultation Policy that builds upon and expands the principles expressed in the 1995 DOC policy. The policy establishes the manner in which DOC works with federally recognized tribes on a government-to-government basis and outlines broad guidelines concerning consultation procedures for all Department operating units when developing policies that have tribal implications. Through this Handbook, and associated NOAA Administrative Order (Appendix F), NOAA implements E.O. 13175 and the DOC Tribal Consultation Policy.

On January 26, 2021, the White House issued a Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Appendix C), which reaffirmed the policy and requirements of the 2009 Presidential Memorandum. As part of this effort, NOAA initiated a process to review and update its existing Handbook.

In November 2021, DOC and 16 other federal agencies entered into the “Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights,” affirming DOC and NOAA’s commitment to protect tribal treaty rights, reserved rights and similar tribal rights to natural and cultural resources. Pursuant to the Memorandum of Understanding, DOC and NOAA are committed to early consideration of treaty and reserved rights in agency decision-making and regulatory processes, enhancing interagency coordination and collaboration to protect such treaty and reserved rights and fully implementing federal government treaty obligations.

Finally, treaties are legally binding formal agreements between tribes and the United States. Treaties, along with the Constitution and federal laws, are the supreme law of the United States. From 1778 to 1871, the United States’ relations with American Indian tribes were defined and conducted largely through treaty-making. Through these treaties, Indian tribes ceded land and other natural and cultural resources to the United States, while retaining all rights not expressly granted or extinguished (“reserved rights”). Many of these treaties guaranteed the signatory tribes a unique set of rights both on and, where applicable, off reservation, including rights to health care, education and rights relating to natural resources, such as the right to hunt, fish and gather on land ceded by tribes, on reservation land retained by tribes and on waters historically utilized by tribes (“treaty rights”). After 1871, other forms of federal government decision-making were utilized by the various branches of government to recognize tribal rights, including, but not limited to: executive orders, military decrees, federal legislation and judicial decisions (referred to in this policy as “other similar rights”). This Handbook establishes procedures to facilitate these commitments.

IV. Purpose

The U.S. government and the governments of federally recognized American Indian tribes have a unique “government-to-government” relationship based on the U.S. Constitution, treaties, federal statutes, federal court decisions and executive branch policies. Central to this relationship is the “trust responsibility” of the U.S. government that was originally established through treaties between the United States and Indian tribes and developed by the federal courts and Congressional actions. The federal trust responsibility is an obligation under which the United States “has charged itself with moral obligations of the highest responsibility and trust” toward Indian tribes (*Seminole Nation v. United States*, 1942). This obligation was first discussed by Chief Justice John Marshall in *Cherokee Nation v. Georgia* (1831). Over the years, the trust responsibility has been at the center of numerous U.S. Supreme Court cases and is generally recognized as a core principle of federal Indian law.

In addition, the United States recognizes the rights of federally recognized Indian tribes to self-government and the exercise of sovereign power over their members and territory. The United States protects those rights by working with Indian tribes on a government-to-government basis to address issues concerning Indian tribal trust resources, treaty rights, reserved rights and similar rights and the unique relationship between the federal government and Indian tribes.

This Handbook provides procedures for formal government-to-government consultation as contemplated by E.O. 13175. These procedures are not a substitute for the routine communications, collaboration, coordination and agency meetings that support, strengthen and enhance NOAA’s relationships with Indian tribes. The procedures in this Handbook describe the formalized process of government-to-government consultation for NOAA actions and policies that have substantial direct effects on an Indian tribe or its relationship with NOAA. Ongoing coordination and communication is essential to support NOAA’s efforts to fulfill its trust responsibility to Indian tribes, and this Handbook offers processes that can be used by the line offices to work with federally recognized Indian tribes on NOAA policies or actions that may have tribal implications.

Through government-to-government consultation and informal staff-to-staff engagement, the United States acknowledges federally recognized tribal governments as separate sovereign governmental entities, under the protection of the United States whose unique political, historical and religious characteristics are reflected in their governmental priorities, concerns and needs. Consultation recognizes and distinguishes the views and policies of tribes from those of the general public and considers those views in the context of the responsibilities of federally recognized tribes and their tribal members.

A. What is a tribal consultation process?

According to the DAO 218-8, which quotes E.O. 13175, “consultation refers to an accountable process ensuring meaningful and timely input from tribal officials on Department policies that have tribal implications.” The DAO further states that “policies that have tribal implications

refers to 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.” To determine whether consultation is required or appropriate, staff should undertake an analysis as early as possible consistent with this Handbook. This analysis should occur regardless of whether a Tribal government requests consultation.

The goal of early engagement and consultation is to enhance governing and management outcomes by avoiding, minimizing or mitigating adverse impacts a federal decision may have on tribal treaty rights, reserved rights, similar rights, resources or interests. The ultimate goal is to strengthen partnership and coordination between tribal governments and NOAA by engaging tribal interests at the earliest stage of scoping or planning activities by using the consultation process to identify possible solutions that avoid, minimize or mitigate adverse impacts to the tribe’s treaty rights, reserved rights, similar rights, resources or governing interests.

B. Government-to-Government consultation

The Government-to-Government consultation process is a formally-structured and planned means of communication between NOAA and the government of a federally recognized tribe. It is a best practice that the communication be mutually recognized by NOAA and the tribe as a formal government-to-government consultation that occurs in a formal setting. Consultation reflects the United States’ recognition of the sovereignty of federally recognized tribes and facilitates the government-to-government relationship between the sovereigns and their leadership. Consultation is used to exchange information, deliberate and address federal policies that have tribal implications. Consultation should strive for consensus in decision-making and should attempt to resolve or address any disputes. Consultation should afford any party the timely opportunity to provide feedback, dissenting opinions or other information. When possible, consultation should provide opportunities to exchange views orally or in writing before federal decisions are made. Likewise, NOAA commits to working with the federally recognized tribe(s) to reach agreement on a path forward or course of action to the extent practicable and consistent with NOAA’s legal requirements.

Steps to increase understanding between tribes and federal agencies are essential, but are not, by themselves, consultation. These engagement steps may include an open and free exchange of information and opinions between governments that can lead to mutual understanding. Effective consultation requires federal representatives to understand the historical circumstances of the tribes in relationship to the U.S. government, including relevant treaties, agreements or statutes, as well as any past conflicts between the tribe and the federal government. As such, engagement may facilitate more effective consultations. Engagement among NOAA employees and tribal officials, employees, consultants and representatives are important elements of NOAA’s ongoing relationship with any federally recognized tribe. These routine communications are the foundation of successful collaboration and cooperation, and they generally include exchange of information about NOAA’s proposals, plans or upcoming decisions and seek tribal input. However, these informal communications are generally not the appropriate forum for the formal exchange of policy views among sovereigns. Regardless of

whether it is an informal engagement or a consultation, such discussions should happen prior to a decision being made.

Government-to-government consultation is a reflection of the responsibility of the U.S. government to sovereign federally recognized American Indian and Alaska Native tribes. State governments are not a part of that relationship, and NOAA should not work through state governments to implement government-to-government consultation obligations. Similarly, these procedures for government-to-government consultation are not required for state-recognized tribes, or other non-federally recognized indigenous groups. These procedures are only applicable to tribes that are federally recognized (including tribes that are both federally and state-recognized). NOAA should, however, endeavor to engage such non-federally recognized indigenous groups to ensure their timely and meaningful participation in the public process for actions having implications to those communities.

In addition, in 2004, through two consolidated appropriations acts, Congress required federal agencies to consult with Alaska Native corporations on the same basis as federally recognized Indian tribes under E.O. 13175. NOAA recognizes the distinct and individual cultural traditions and values of Alaska Native peoples and the statutory relationship between Alaska Native corporations and the federal government, as further discussed in Section IX.

C. Training

NOAA shall provide appropriate annual training to all NOAA personnel involved with outreach, consultation and operations with tribal governments so that they can act consistently with the procedures and policies set forth in this Handbook. This training shall include, at minimum, review of Executive Order 13175, and any applicable Tribal consultation policy of the White House and DOC. The training may also include legal background, history of American Indians and Alaska Natives, cultural protocols, tribal issues and tribal governmental structures. Such training should include a component to educate personnel on identification of tribal treaty rights, reserved rights and similar rights that may be impacted by agency policies and how to incorporate agency consultation upon and consideration of such rights early in the decision-making process. The extent of training provided should be commensurate with the scope and quantity of tribal issues and concerns that regularly occur in a particular region.

D. Tribal liaisons

NOAA requires each line office, staff office and the NOAA Regional Teams to establish a position of “headquarters tribal liaison.” These liaisons serve as a resource to NOAA programs, providing advice on determining the need for consultation, how to conduct consultations and ensuring consultations are properly recorded and that the tribal governments are informed of the results of consultation.

Within NOAA, the NOAA Regional Teams will serve as a cross-line-office group to share information regarding tribal interactions at the regional level. If a NOAA line office or staff office deems necessary, or by request from a tribal government, it also may consider establishing a tribal liaison within a program or region.

The NOAA office proposing the policy or action should lead any consultation on that policy or action, with the advice of the tribal liaison as appropriate. The line/staff office consultation lead is responsible for keeping a record of the consultation, including all letters, pertinent email and meeting notes related to the consultation in accordance with NOAA policy and federal record-keeping procedures and laws.

In addition to aiding in consultations, the duties for the headquarters line office tribal liaison duties frequently include:

- Helping the NOAA tribal liaison fulfill the requirements of the NOAA tribal policy and ensure compliance with DAO 218-8 and E.O. 13175.
- Participating in monthly NOAA tribal team meetings.
- Developing and executing a yearly work plan, these include topics such as: Policy Implementation; Program Delivery; Training; Employee Education; Guidance; National Outreach and Communication; and other issues.
- Attending meetings between tribes and NOAA Leadership.
- Facilitating discussion and dissemination of information to field offices.
- Bringing information, suggestions, issues from the field offices to the NOAA tribal team.
- Ensuring their line office is aware of and complying with the tribal Handbook.
- Ensuring consultations and meetings are entered by the regions into the NOAA tribal tracker in accordance with the guidance.
- Reviewing and providing information as requested by the NOAA tribal liaison.

V. Exchange of Information to Support the Consultation

A. Communication

Ongoing communication should be a regular part of the government-to-government relationship with federally recognized tribal governments. Methods of communication include, as appropriate, formal letters, phone calls, fax transmissions, emails, webcasts, webinars, video conferences, NOAA website postings, on-site visits, presentations at regional/national events and notifications in the *Federal Register*. When planning to communicate with tribes, it is important to gain tribal input on the best method to reach them, when to reach them and adequate timelines for responses.

Tribes need timely and accurate information to understand, plan and make decisions. In order to have a meaningful consultation, NOAA will provide available information to the tribes in advance of the consultation to allow the tribes to prepare. NOAA will work with tribes to provide information in a format that tribes can access and use. As part of the exchange of information, NOAA should identify any treaty rights, reserved rights and similar rights that may be impacted by agency policies and similarly encourage tribal governments to identify any such rights. Information received by NOAA from a tribal government should not be released to the public without permission from the tribal government unless required by applicable law, such

as the Freedom of Information Act (FOIA), or in response to litigation obligations or as required by court order. Communications with tribal officials should be appropriate to the recipient and avoid the use of profession-specific jargon. Tribes may request relevant information from NOAA without submitting a request under FOIA, subject to the confidentiality requirements of applicable federal law.

NOAA will provide available information about its actions and policies at the earliest practical time. Line offices are encouraged to develop routine methods of communication to keep Indian tribes and NOAA informed of possible effects of NOAA actions and policies on federally recognized Indian tribes and tribal resources.

Proposed NOAA policies or actions requiring meetings or other communication with tribal staff or officials may not rise to a level requiring the formal government-to-government procedures outlined in this Handbook. Line offices should develop, based on the nature of their interactions with Indian tribes, regular communications and contacts for informal meetings and discussions with Indian tribes to ensure that NOAA's mission is achieved, while meeting the substance of NOAA's trust responsibility to Indian tribes and the intent of E.O. 13175.

B. Consultation protocols

Some of NOAA's regions and offices work with federally recognized tribes frequently or on an ongoing basis. As a result, it may be useful and expeditious for those tribes and NOAA offices to develop protocols reflecting their mutually preferred timeline for and means of communication and exchange of information. Protocols can make communication more routine and predictable and can better incorporate tribal needs and views early in the policy or regulatory development process. There is no set template for such protocols, as long as they provide for a government-to-government consultation process consistent with the procedures outlined here. Similarly, some tribes have developed their own policies in consultation with the federal government, and thus may wish to craft protocols with NOAA to reflect those policies.

Protocols may reflect how and what type of communication may occur between technical staff at meetings, through phone contacts, via emails and during onsite visits. They may address routine matters and create procedures for identifying matters best handled through informal meetings, webinars, phone calls, emails and letters. Protocols may also include procedures for setting up formal meetings between NOAA personnel and tribal government staff or designees of tribal leadership. If a tribal government agrees, these communications can meet the requirements of government-to-government consultation under E.O. 13175.

To provide meaningful consultation and coordination, NOAA recommends that line offices and regions establish consultation protocols with tribal governments consistent with this Handbook as necessary. Consultation agreements, which provide both the product (clarifying how consultations will be conducted in a manner meaningful for the tribe, and can identify more explicitly what constitutes actions that are "of interest" to the tribe, tailored to that specific collaboration), as well as a process by which relationships of trust and respect can be forged and fostered.

NOAA's tribal liaison ensures the approach is consistent with this Handbook and ensures that summary information on tribal consultation and engagement is collected throughout the year in a database. Also see section VII (DOC and OMB Reporting).

C. Interagency communication

NOAA staff should also be aware that numerous other federal agencies engage with tribes on related issues and, therefore, NOAA staff should participate in the larger network of agencies, institutions and organizations that are committed to enhancing cooperation, coordination and collaboration to strengthen and sustain the federal trust relationship with tribes.

NOAA recognizes that many federal policies and programs involve multiple agencies, which may place a burden on tribes as they attempt to consult. NOAA strives to maintain communication, coordination and cooperation among interested federal agencies to ensure the most efficient and expeditious manner of consultation with tribes on a particular matter.

To provide meaningful consultation and coordination in situations with multiple agencies, NOAA recommends, when appropriate, that the lead agency invite other federal agencies to join in a single tribal consultation. NOAA should discuss this possible approach first with relevant federal agencies and then the relevant tribe(s) prior to determining if a joint consultation is appropriate. This will help reduce the burden for the tribe(s) of multiple consultations on the same action.

VI. Preparing for the Consultation Process

There is no one correct way for the consultation process to operate. There are over 570 federally recognized tribes, with distinct cultures, languages, values, traditions and processes. Based on the tribal differences, a process that works well for one tribe may not work for another. For the consultation process to be effective, agency representatives need to be flexible and develop a solid grasp of the tribe's history, culture, and leadership. While books and other documents may serve as useful secondary references for understanding the political and cultural history of an indigenous people, agency staff should remember that the tribal members themselves are the best source of knowledge about their particular tribe. This entails the following:

A. Understanding the history of the tribe and its current and historical relationship to the federal government

Books, tribal newspapers, websites and other documents can provide information on the tribe's historical relationship with the federal government. It is important to know about any relevant conflicts, wars, treaties, statutes, executive orders and case law, how these have evolved over the years and how these historical events affect the federal/tribal relationship. It is also important to become familiar with relevant treaties and other sources of reserved and similar rights in relevant geographic areas. Tools such as the Oklahoma State Tribal Treaty Database tool can assist in such inquiries (<https://treaties.okstate.edu>).

B. Understanding the tribe's culture

“Culture” comprises how a group’s worldview influences their behavior. This includes a tribe’s government structure, food preferences, religion, burial traditions, natural resource values, wealth, family structure, education system, etc. It is also important to consider subsistence schedules and preparation times before consultation begins so that, to the extent possible, meetings do not coincide or conflict with important tribal harvest seasons.

C. Understanding what is and what is not appropriate within tribal culture

Observation, reading and discussions with tribal designated officials can provide pertinent information about the tribal culture and help minimize cultural missteps. Accepting invitations to visit tribal lands can be an opportunity to learn tribal protocols and ways to appropriately engage with tribal members.

D. Understanding the tribal perceptions of time and allow enough time to form an ongoing relationship

Perceptions of time vary across cultures. The NOAA perception of time is typically based on western culture (e.g., “deadline driven”), which may differ from a tribe’s time perception (e.g., rooted in a perspective of “time immemorial”). Agency staff should be aware of differences and exercise patience when time horizons seem to be out of sync. Timelines should reflect that tribal members often have competing, conflicting and overriding obligations associated with sustaining tribal communities. Likewise, agency staff should be clear with tribal contacts about any urgent circumstances or other timing constraints driving the agency’s timing for action.

E. Understanding the tribal structure and its history

The U.S. Congress passed the Indian Reorganization Act in 1934, which has had a long-term effect on the traditional form of tribal organization and leadership. It authorized Congress to appropriate funds annually to formalize tribal governments on reservations and for tribal land acquisitions. Although the Indian Reorganization Act led to creation of a federal government-style bureaucracy within many tribal governments, a number of tribes have also maintained a parallel leadership structure based on culture and traditions.

F. Identifying the tribal leadership

As indicated above, there may be a parallel leadership structure operating in which the formal structure has elected officials and cabinet positions, but a tribal social structure may produce leaders based on tradition, family lineage, age, spiritual authority, political status, skillset or other tribal considerations. It is important to understand that greater influence may come from informal leadership positions. However, it should be noted that the formal governmental relationship is between the United States and the duly elected tribal governments. To the extent possible, staff should also be aware of contested leadership and factions within a tribe.

G. Understanding the tribe's decision-making process

Not all tribes use the same process to make decisions. Some use a system in which everyone in the tribe must vote in favor of a measure or action to be approved, in which case one dissenting vote can stop a proposed action. Other tribes may require a simple majority for approval, while others have representatives who vote on measures. Still others require only the tribal leader to give approval to a proposed action.

H. Adapting current information based on new information from tribes

Tribal members and affiliates may present new information to NOAA. When they do so, the NOAA representative should explain to the tribe if and how that new information may be used within the agency, such as for agency decision-making. In addition, the NOAA agency representative should seek to clarify any conflicting information with the governing body of the tribe.

VII. Consultation Process

NOAA offers government-to-government consultation at the earliest practicable time it can reasonably anticipate that a proposed policy may have tribal implications. The tenets of tribal consultation require early notification, early opportunities for technical briefings/discussions and an opportunity for formal input in the federal process to the extent practicable and consistent with federal law. Consultation should occur early enough in the decision-making process to allow for flexibility and modification of NOAA actions while meeting required timelines. Although consultation need not occur at every step of the federal decision-making process, it should always occur at the earliest time practicable, well before a final policy or regulatory decision with tribal implications is made. NOAA staff should be knowledgeable and respectful of the decision-making practices of the tribe. This may require a departure from highly-structured agendas and timeframes.

A. Initiating consultation

An invitation to consult on a proposed policy that may have tribal implications should be sent in writing to the appropriate representative of the governing body of the tribe, usually the tribal chair. The letter should clearly explain, in plain language, the policy or action that NOAA is proposing, and offer a summary of any information NOAA has on potential effects on tribal treaty rights, reserved rights, similar rights, resources or interests. If relevant, the letter should note where tribes can access more information about the proposed policy or action and whether there will be other opportunities for public participation or comment (such as public comment periods on proposed rulemakings or draft environmental impact statements, or public participation at fishery management council meetings).

The letter may be sent by email or mail, or delivered in person to key tribal staff, unless consultation protocols specify otherwise. The consultation protocols of the office issuing the invitation determine the preferred form of correspondence. The correspondence should clearly indicate "Request to Initiate Government-to-Government Consultation." NOAA should

request a written response from tribes who wish to consult within a certain timeframe, at least 30 days, and NOAA should explain what NOAA will do if the tribes do not respond within that set timeframe. If there are time constraints such that 30 days' notice of consultation is not possible (e.g., for an action addressing an emergency situation), the notice of consultation should include information as to why the standard notice or written comment period cannot be provided. In some cases, it may be useful to follow up with a phone call to ensure contact within a timely manner. NOAA keeps up-to-date lists that may include mailing and email addresses or other tribal contact information for initiating consultation. NOAA staff should discuss questions related to current contact information with their headquarters tribal liaison.

In the case of national policies or rulemakings that may have tribal implications from multiple federally recognized Indian tribes, NOAA staff should work with their Line Office Tribal Liaison(s) to help facilitate a successful consultation. While working with tribes individually is the preferred mechanism for government-to-government consultations, sometimes policies or rulemakings can affect a large number of tribes, which may necessitate alternate consultation approaches. National announcements are made at a Government-to-Government level using BIA's list that is updated annually. Line Office Liaisons may then use their personal emails to update other connections as needed (see note at end of section). If an inter-tribe or regional/national consultation is held, opportunities to collect written comments and accepting individual consultations or engagement requests from tribes are best practices.

When a tribe accepts NOAA's invitation to consult, NOAA designates a point of contact to make arrangements for the consultation. This exchange of correspondence opens the record of consultation. Frequently, NOAA requests information or technical staff meetings to help determine whether a policy is likely to have tribal implications.

A notice of consultation or engagement, should include sufficient information on the topic to be discussed, and additional information could include:

- the date, time, and location of the consultation, as requested by the agency or as developed in consultation with the Tribe or Tribes;
- if consulting virtually or by telephone, links to join or register in advance;
- an explanation of any time constraints known to the agency at that time, such as statutory deadlines;
- deadlines for any written comments on the topic; and
- names and contact information for agency staff who can provide more information.

Examples of policies where consultation with tribes is appropriate include but are not limited to:

- A policy or action that will have effects within a reservation or Alaska Native village.
- A policy or action that may impact tribal trust resources or the rights of a federally recognized tribe.
- A policy or action affecting a tribal entity, or facility, land, or resources owned or operated by a tribal government, or held in trust for a federally recognized tribe.

- A policy or action that affects tribes, tribal governments or a tribe's traditional way of life.
- A policy or action that affects tribes traditional and cultural properties or traditional use areas.
- Developing a process for communication during emergencies (e.g., marine mammal stranding events).

If the scope of action changes, that change should be addressed as part of the ongoing consultation.

Note: Employee email lists are based on relationships with tribes and should not be shared or used by anyone except the employee that received that permission. A tribe may request an employee contact a specific tribal member on specific issues. That permission is specific to that issue and that employee.

Consideration of tribal treaty rights, reserved rights and similar rights

To help determine if tribal treaty rights, reserved rights or similar rights may be implicated by a policy or action, always ask the three threshold questions:

- Do treaties, reserved rights, or other similar rights exist within a specific geographic area implicated by proposed agency action?
- What treaty rights, reserved rights or other similar rights exist in, or what treaty-protected resources rely upon, the specific geographic area affected by the proposed action?
- How are treaty rights, reserved rights or other similar rights potentially affected by the proposed action?

For the purpose of determining/identifying tribes that may have treaty rights, reserved rights or other similar rights implicated by a proposed agency action, invite tribes with historical or cultural connections to the project area regardless of the tribe's current location.

B. Responding to requests for consultation from tribes

A tribe may request consultation with NOAA on a policy, proposed regulation or other action for which NOAA has not initiated consultation. In these instances, NOAA takes into consideration the nature of the issue or activity of concern to a tribe, past consultation efforts, available resources, availability of pertinent information, timing, change in tribal government or any other relevant factors when responding. If the tribe demonstrates that the proposed action may have tribal implications, NOAA proceeds with consultation consistent with this Handbook. Even if NOAA determines that an issue of interest to a tribe likely does not have tribal implications, NOAA makes reasonable efforts to meet or engage with tribal staff or representatives about the issue, and may, as appropriate, elect to engage in consultation based upon the considerations outlined above. The NOAA Tribal Team can assist in coordinating across line offices as needed. As noted earlier, meetings on issues that do not have tribal

implications are not subject to the consultation requirements of E.O. 13175 or the process described in this Handbook.

C. When a tribe or NOAA decline to consult

If NOAA receives a written response from the tribe that they choose not to engage in government-to-government consultation, the tribe's decision is noted in the administrative record or file as appropriate. NOAA should remain available to consult at any time in the decision-making or policymaking process to the extent practicable. If NOAA receives a request from a tribe to consult and declines, the designated point of contact for the action must document the reason and provide a letter to the tribe explaining the NOAA decision. NOAA may only decline a consultation if it is determined that an issue of interest does not have tribal implications.

D. When a tribe does not respond to an invitation to consult

When an invitation to consult has been delivered to the appropriate tribal governing body and any known points of contact and no response is received within the time period requested, NOAA notes the lack of response in the administrative record. If NOAA believes its action will have substantial direct effects on that tribe, NOAA staff will follow the written invitation with a phone call, site visit and/or an email/fax (assuming those forms of communication are available to the tribal points of contact). It may be that the tribe has pressing matters to attend to within their community or is participating in subsistence fishing, hunting and gathering seasons. This underscores the importance for NOAA to reach out to tribes regularly and well before any deadlines to include tribal input in policy decisions. Those efforts should be noted in the administrative record.

E. Tribal organizations

Tribal organizations, including inter-tribal, regional and national organizations and nonprofits can provide helpful means to communicate and exchange information on a variety of NOAA actions, projects and initiatives that may have regional or inter-tribal implications. Such organizations can be valuable partners in scoping issues, initiating dialogue, understanding tribal perspectives, sharing traditional knowledge and reaching tribal members, and NOAA recognizes the value of national, regional and inter-tribal organizations that play an important role in subject matter analysis. Discussing such plans, activities and initiatives at the inter-tribal organization or national or regional level can facilitate future discussions with individual tribal programs or governments.

Although dialogue and work conducted with tribal organizations does not generally constitute consultation, a tribe may expressly authorize such an organization to represent it or conduct consultation on its behalf with NOAA. If a tribe wants to authorize a tribal organization to represent it or conduct consultation on its behalf, NOAA should confirm that in writing with the appropriate tribal officials and with the tribal organization. NOAA should also confirm in writing the scope of that representation (e.g., which tribes are represented by the tribal organization) and the role that the tribal organization will fulfill during the consultation process. For example, representation could mean that the tribal organization helps coordinate setting up the

consultation and sharing of materials, or could entail a more expansive representation where the tribal organization represents the tribe during the consultation meetings. If a tribal organization is involved in the consultation process, NOAA should be cognizant that the issues and interests of the organization may vary from the tribe or tribes, and NOAA should ensure the individuals, tribes or other organizations participating in the consultation have an opportunity to provide input.

F. Determining a consultation structure

Determining the structure and logistics of a government-to-government consultation is a critical function shared by the designated NOAA official and tribal points of contact. The important elements for conducting meaningful consultation are: 1) Identify the issues and factors leading to the need for the consultation; 2) identify the appropriate NOAA and tribal participants; 3) determine the location and timing of the consultation; 4) determine the need for an exchange of information prior to consultation; and 5) agree on the method of recordkeeping and documentation of the consultation in keeping with guidance from Office of Management and Budget (OMB), DOC, and this Handbook. Each element is described in more detail below.

1. Identify the issues and concerns

Whether the consultation is initiated by NOAA or the tribe(s), the points of contact for the tribe(s) and for NOAA should work together early in the process to clarify issues of concern to each of the parties. The articulation of the issues is an important factor in identifying the appropriate participants, support staff and information needed for the consultation. The points of contact should agree on the issues and concerns to be addressed. This will help both parties as they prepare for the consultation and take the next steps in structuring the consultation. It is also important to determine whether the consultation is expected to result in a decision by either party and whether decision-makers will be present at the consultation or, alternatively, whether the consultation participants will be reporting to decision-makers after consultation meetings are held.

If it becomes clear that NOAA and the tribe have divergent views about the issues and topics appropriate for the consultation, effort should be made by both parties to agree upon a single statement of the issues. If the parties cannot reach an agreement, the record of the consultation should reflect the different views.

2. Identify participants in the consultation

Tribes have the authority to choose their consultation participants. Those participants can range from a technical or policy staff level to the leadership level. The participants or leads chosen by the tribe informs NOAA's choice of the appropriate level of NOAA participation. Generally, if the tribe designates its leader or members of the tribal council as representatives in the consultation, it is important that a NOAA official with decision-making authority participate in the consultation. If tribal staff are identified as

representatives in the consultation, a commensurate level of NOAA staff may represent NOAA at the consultation. In all cases, NOAA staff with expertise in the topics under consultation attend the consultation, unless otherwise requested by the tribal representative. Often, a NOAA tribal liaison or point of contact with familiarity with the tribe and its structure can help NOAA designate appropriate personnel for the consultation.

Because NOAA's designation of consultation participants depends to some extent on the tribe's designated participants, NOAA works with the tribal point of contact early to determine the leadership level of tribal participation in the consultation. If the tribe has not identified its participants at the point when NOAA must select its participants, NOAA should identify and prepare consultation participants who are able to fully address the concerns and issues articulated for discussion through government-to-government consultation.

3. Determine the location and timing of the consultation

The best possible forum for a successful consultation is a face-to-face meeting among the designated participants in the tribe's home territory or a location preferred by the tribe. Unfortunately, face-to-face meetings are not always feasible due to budgetary, public safety or other factors, and alternatives must be developed to accommodate technology needs and time available for the participants. The regional tribal liaison may be able to help determine the best venue and technology for the nature of the consultation and the concerns of the tribe.

4. Exchange information to assist the consultation

Information important to a full discussion of the issues and concerns of the parties should be exchanged as early in the process as possible. NOAA should notify tribes in advance of the information disclosure requirements that may apply to information shared by tribes with the federal government (examples include FOIA and litigation discovery). Although NOAA will endeavor to comply with a tribe's request that information be kept confidential, there may be applicable requirements that compel its release. If a tribe submits information that it considers confidential business information, it should be listed as such on the document. In addition, many tribes have internal rules restricting the discussion of information for religious, traditional or ceremonial reasons. Additional guidance on exchange of sensitive information is provided in the "NOAA Guidance and Best Practices for Engaging and Incorporating Indigenous Knowledge in Decision-Making." Efforts should be made by the points of contact to ensure that information available for exchange is provided as far in advance of the consultation meeting as possible.

5. Agree on the method of recordkeeping

The NOAA and the tribal points of contact should discuss and reach agreement on the most practical way of keeping a record of the consultation. In many circumstances, simply identifying a note taker and circulating the notes of the consultation for review, comment and approval by each party is sufficient. Rarely will it be necessary to arrange for a

transcript of the consultation discussion, but if there are many statements or issues to discuss, development of a transcript, by machine or other methods, may be the most accurate way of recording the proceedings. Tribes must be notified of any recordings and permission given prior to any meeting recordings or the development of a transcript takes place. The parties should agree on a method for keeping sufficiently detailed notes and records to allow NOAA to develop a thorough summary of the consultation, including the issues identified, the nature of the discussions and resolutions considered and/or adopted. NOAA and tribes should not create or share recorded information, such as summaries, transcripts or recordings, without first discussing the government's obligations under applicable law, including the Federal Records Act, FOIA and the Privacy Act, as well as in response to litigation obligations or as required by court order. This discussion should occur prior to beginning consultation.

G. Completing the government-to-government consultation: **Closeout and Recording**

Before concluding the government-to-government consultation, the agency should provide the tribe(s) with a 30-day period to submit any additional written comments on the subject of the consultation. If it is not possible to provide a 30-day comment period (e.g., for an action addressing an emergency situation), the agency should notify the tribe(s) why the standard notice or written comment period cannot be provided.

Government-to-government consultation is closed through a formal, written communication from the lead NOAA official to the most senior tribal official. The written communication should recount the agreed-upon issues for the consultation or NOAA's understanding of the tribe's concerns and explain how NOAA will (or has) addressed the tribe's concerns in its final decision or action or, alternatively, the reasons why NOAA will not or cannot address the concern(s) raised by the tribe. As a best practice, NOAA should share a draft of the closing record for review and comment with the tribe before it is finalized. When appropriate, use terms or words that are representative of the tribe's language.

The agency should document internally how it reached a decision about whether a policy or action requires consultation and what the decision was. NOAA should also include a statement in any public record of decision that the government-to-government consultation occurred. The consultation should also be noted in any required *Federal Register* notices as part of the background information made available to the public.

H. Dispute Resolution

Although implementation of the procedures described in this Handbook does not create enforceable rights or a cause of action under law, in the event of unresolved complaints regarding the sufficiency, timing and compliance with this Policy, disputes may be addressed by elevation to the next level official within the Department or operating unit. In the event elevation is unsuccessful in resolving the dispute, NOAA and the relevant tribal government may agree to employ an alternative dispute resolution process.

VIII. Reporting to OMB and DOC

To ensure compliance with E.O. 13175, on January 26, 2021, the President instructed the head of each agency to submit to the Director of OMB, within 90 days, a detailed plan of actions the agency will take to implement the policies and directives of E.O. 13175. Thereafter, the head of each agency is directed to submit to the Director of OMB, within 270 days and annually thereafter, a progress report on the status of each action included in the agency's plan together with any proposed updates to its plan. The Director of OMB then is directed to submit to the President a report on the implementation of E.O. 13175 across the executive branch based on the review of agency plans and progress reports. Recommendations for improving the plans and making the tribal consultation process more effective, if any, should be included in this report.

NOAA's information related to compliance with E.O. 13175 is included with the plan and progress reports prepared by DOC. The NOAA point of contact to provide this content to DOC is:

Becky Cruz Lizama

NOAA Senior Tribal Liaison

NOAA Office of Legislative and Intergovernmental Affairs

OLIA.Tribal@noaa.gov; (202) 482-0809

IX. Related Topics

A. Working with tribes/indigenous groups without federal recognition status

E.O. 13175 and this Handbook apply only to federally recognized tribes. However, NOAA works with many non-federally recognized indigenous groups who are important partners in carrying out its mission and who have interests regarding NOAA's activities. Although NOAA recognizes the value of such partnerships, these communications and relationships do not constitute or require government-to-government consultation. NOAA should, however, endeavor to engage such non-federally recognized indigenous communities to ensure their timely and meaningful participation in the public process for actions having implications to those communities.

B. Culturally sensitive information

Some types of tribal information may be culturally privileged or otherwise controlled or regulated, often by gender, age or cultural norms. Hence, sharing knowledge with non-tribal members may be contrary to tribal interests. While this Handbook does not address NOAA's consultations conducted under the National Historic Preservation Act, 54 U.S.C. § 300101 et seq., the National Register of Historic Places' definition of "culture" illustrates the types of information that may be culturally sensitive. It defines, "culture" to mean the traditions, beliefs, practices, lifeways, arts, crafts and social institutions of any community. See National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*. The sharing of these types of information may be restricted to within the tribe. Tribal culture, in general terms, is uniquely and inextricably tied to place; any of the items listed above may also

imbue a place with special meaning. Traditional Cultural Properties are those properties eligible for listing on the National Register of Historic Properties based on its associations with the cultural practices, traditions, beliefs, lifeways, arts, crafts or social institutions of a living community, and constitute perhaps the most common situation where NOAA's consultation with tribes may involve culturally sensitive information. The traditional cultural significance of a historic property is derived from the role the property plays in a community's historically rooted beliefs, customs and practices. Examples of such locations include:

- A location associated with the traditional beliefs of a Native American group about its origins or cultural history, or the nature of the world.
- A location where Native American religious practitioners have historically gathered, and are known or thought to go today, to perform ceremonial activities in accordance with traditional cultural rules of practice.
- A location where a community has traditionally carried out economic, artistic or other cultural practices important in maintaining its historic identity.

Indigenous Knowledge (IK) may be similarly privileged or otherwise controlled or regulated by gender, age and other cultural constraints within a tribe and, more recently, may be protected under intellectual property rights. The western definition of IK is "a cumulative body of knowledge, practice and belief evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment."¹ Indigenous ways of knowing about the environment differ fundamentally from those of most western or industrialized societies. The western paradigm places humans at the top of a hierarchy of nature, implying that humans are separate from the environment. This leads to the treatment of other living things as resources to be used to meet human needs, wants and desires. Often, the indigenous paradigm posits humans as an inseparable part of the environment, with responsibility to steward the environment for future generations.

Each tribe is unique, influenced by its local environment, as is its IK. NOAA's scientific and resource management responsibilities can be greatly enriched through the incorporation of IK. It may take NOAA scientists years to validate through western science what local indigenous peoples already know about their environment. IK can be shared through the consultation process, as well as through less formal collaboration. These interactions can help NOAA staff identify tribal individuals who hold IK, as well as the opportunities to ask whether and how IK may be shared.

Culturally sensitive information may sometimes be publicly available. However, respect for the nature of this information must be demonstrated when consulting with tribes. It will not always be possible to know in advance what type of information is culturally sensitive, and tribes will not necessarily be willing or able to speak of such information to NOAA representatives. While

¹ U.S. Forest Service. 2011. *Traditional Ecological Knowledge: Sustaining Our Lives and the Natural World*. Newtown Square, PA. <http://na.fs.fed.us/stewardship/pubs/biodiversity/sustaining-lives-natural-world.pdf>

this poses challenges, awareness that there is likely to be culturally sensitive information, and respect for the sensitive nature of this information, will help foster trust and a productive relationship with tribes. NOAA representatives, however, must be cognizant of information disclosure requirements that may apply to culturally sensitive information shared by tribes with the federal government. NOAA representatives should inform tribes before the sharing of such information that, although NOAA will endeavor to comply with a tribe's request that information be kept confidential, there may be applicable requirements that compel its release (examples include FOIA and litigation discovery).

NOTE: For more information see "NOAA Guidance and Best Practices for Engaging and Including Indigenous Knowledge in Decision-Making"

C. Section 106 of the National Historic Preservation Act

Tribal consultation procedures outlined in this Handbook are meant to be compatible with the regulations for section 106 consultation of the National Historic Preservation Act.

The government-to-government consultation outlined in this Handbook may be conducted alongside, and can be an integral part of, the section 106 consultation process required by the National Historic Preservation Act (NHPA, 54 U.S.C. § 306108). Government-to-government consultation and NHPA consultation for "federal undertakings" are distinct functions. A federal undertaking is defined as a project, activity or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out by or on behalf of a federal agency; those carried out with federal financial assistance; and those requiring a federal permit, license or approval (see also 36 CFR Part 800.16(y)). NOAA conducts section 106 consultations with State Historic Preservation Officers and/or Tribal Historic Preservation Officers, as appropriate. The regulations for section 106 consultations are available at [36 CFR Part 800, Protection of Historic Properties](#). NOAA staff should also contact NOAA's Federal Preservation Officer for additional guidance on compliance with section 106 of the NHPA, while undertaking procedures described in this Handbook.

D. Alaska Native entities

There is a unique system of Native governance in Alaska, and a variety of entities represent the interests of Alaska Native communities, including Alaska tribes and governments, Alaska Native corporations, Alaska Native non-profits, and Alaska Native organizations. The purpose and structure of some of these entities is dictated in part by federal law, such as the Alaska Native Claims Settlement Act (ANCSA)² and the Marine Mammal Protection Act (MMPA). Moreover, the status of land ownership in Alaska is similarly defined in part by federal law, including ANCSA. Pursuant to ANCSA, Alaska Native corporations hold title to land in Alaska; as such, ANCSA lands are not held in trust by the United States and do not qualify as Indian country. There is one reservation located in Alaska, the Annette Islands Reserve of the Metlakatla Indian Community.³ However, the lands and reservation defined under federal law may not represent the traditional homelands of Alaska Native tribes.

² 43 U.S.C. §§ 1601-1629h; see also <https://ancsaregional.com/about-ancsa/>.

³ 25 CFR Part 241.

In 2004, through two consolidated appropriations acts, Congress required federal agencies to consult with Alaska Native corporations on the same basis as federally recognized Indian tribes under E.O. 13175 (Public Law (P.L.) 108-199, 118 Stat. 452, as amended by P.L. 108-447, 118 Stat. 3267). NOAA interprets the term “Alaska Native corporations” in this requirement to mean “Native corporation[s]” as that term is defined under the Alaska Native Claims Settlement Act (ANCSA) of 1971 (43 U.S.C. § 1602). A “Native corporation” is any regional, village, urban or group corporation defined in, or established pursuant to, the ANCSA. These corporations manage the lands, property, funds and other assets of Alaska Natives. Most Alaska Native corporation shareholders also are members of a federally recognized tribe in Alaska. However, the Alaska Native corporations were established to operate as for-profit or non-profit enterprises, and may not necessarily represent the same perspective or interests as the tribes and adjacent native communities.

NOAA implements the requirement to consult with Alaska Native corporations in a manner as close as possible to the requirement to consult with federally recognized Indian tribes in Alaska, while recognizing the important differences between the federal trust responsibility to the sovereign governments of federally recognized Indian tribes and the corporate entities created by ANCSA. Consultation with Alaska Native corporations follows the process described in this Handbook for consultation with federally recognized Indian tribes. Consultations with Alaska Native corporations occur on a “government-to-corporation” basis, rather than “government-to-government” basis to reflect the distinction between sovereign governments and corporate entities. To the extent that concerns expressed by Alaska Native peoples and tribes and Alaska Native corporations substantively differ, NOAA gives due consideration to the sovereignty and self-governance of federally recognized Alaska Native tribes.

Alaska Native entities are organized, and may be categorized, in a variety of different ways:

- Federally recognized tribes include Alaska Native tribal entities formally recognized as having a government-to-government relationship with the United States.
- Tribal governments are organized according to the customs and traditions of a particular native community. This category includes both individual tribal governments and regional tribes, which encompass multiple communities.
- ANCSA Alaska Native Corporations: Regional Corporations are the 13 Alaska Native Regional Corporations established under ANCSA, 12 of which represent distinct geographic regions across Alaska and one of which represents Alaska Natives living outside of Alaska. Regional Corporations are for-profit entities. Village, Group and Urban Corporations are for-profit or non-profit organizations established to hold, invest, manage or distribute lands, property, funds and other rights and assets for the native village, native group or urban community of natives. Consultations with Regional Corporations, as well as Village, Group or Urban Corporations, occur on a “government-to-corporation” basis.
- Native Regional Non-Profit Organizations are organized in each of the 12 ANCSA regions to provide social, education and health services for Alaska Natives within each geographic region under ANCSA. Coordination and dialogue with Alaska Native Regional Non-Profit Organizations would not constitute government-to-government consultation; however, a

tribe may expressly authorize such an organization to represent it or conduct consultation on its behalf on a specific matter subject to consultation with NOAA (see section VI – Consultation Process, subsection E – Tribal Organizations).

- Additional Alaska Native groups, nonprofits, tribal consortia and inter-tribal agencies represent Alaska Natives and tribes to address a range of issues involving science and research, health and wellness, native arts and heritage, economics, subsistence and resource management, governance and public policy. Coordination and dialogue with such organizations would not constitute government-to-government consultation; however, a tribe may expressly authorize an organization to represent it or conduct consultation on its behalf on a specific matter subject to consultation with NOAA (see section VI – Consultation Process, subsection E – Tribal Organizations).
- Alaska Native organizations are groups designated by law or formally chartered to enter into cooperative agreements with NOAA Fisheries to conserve marine mammals and co-manage subsistence use by Alaska Natives pursuant to section 119 of the Marine Mammal Protection Act (16 U.S.C. § 1388(a)). These organizations have written agreements with NOAA Fisheries. Each co-management agreement sets forth the conditions and requirements for coordination between NOAA Fisheries and the applicable Alaska Native organization. While this coordination and dialogue with an Alaska Native organization on issues involving co-management of marine mammals would not constitute government-to-government consultation, a tribe may expressly authorize such an organization to represent it or conduct consultation on its behalf for issues involving co-management of marine mammals (see section VI – Consultation Process, subsection E – Tribal Organizations).

If an Alaska Native tribe authorizes another organization to represent the tribe during consultation or conduct consultation on its behalf, NOAA is cognizant that the issues and interests of that organization may vary from Alaska Native tribes and members.

E. Hawaii and U.S. Affiliated Pacific Islands

This document pertains to consultation with tribal governments recognized as having government-to-government relationships with the United States by the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a. There are different authorities for the political relationships between the United States and the indigenous communities in the Pacific Islands Region, which includes the State of Hawaii, the unincorporated organized Territory of Guam, the Commonwealth of the Northern Mariana Islands, and unincorporated, unorganized territories, including American Samoa. The federal consultation structure within this region varies according to applicable federal laws and policies governing specific relationships between the United States and the peoples of the Pacific Islands. For example, through certain laws, including the National Historic Preservation Act and the Native American Graves Protection and Repatriation Act, Congress established a special relationship between the United States and the Native Hawaiian community, and requires consultation with Native Hawaiian Organizations, as defined under these Acts. Consultations required by these Acts may contain many of the hallmarks of the government-to-government consultation procedures described in this document, however, NOAA staff should consult the specific Act and any

implementing regulations for the applicable consultation requirements under these authorities (see 36 CFR Part 800.2; 43 CFR Part 10.5). Some additional information can be found here:

- www.doi.gov/hawaiian
- www.doi.gov/oia

F. Regional Fishery Management Councils

Regional Fishery Management Council meetings are a critical part of the fishery management planning process and are the first and earliest point of development of fishery management policy. It is most beneficial to tribes, Councils, and NOAA if there is early and active participation in these fora, and Councils should discuss and work with tribes as appropriate depending on applicable Tribal Trust Resources and interests at an early stage in order to address their concerns while developing fishery conservation and management measures under the Magnuson-Stevens Fishery Conservation and Management Act. In particular, Councils should work with NOAA to ensure that there are constructive and effective avenues for tribal participation in the Council process.

Active participation by tribes in the Regional Fishery Management Councils is crucial to the development of fishery management policy. However, interaction with the tribes during the council process is not a substitute for, nor does it constitute, government-to-government consultation. NOAA ultimately has a responsibility to consult with federally recognized tribes consistent with E.O. 13175, and NOAA intends to continue working to ensure that the consultation occurs in a timely fashion given the Council-led fishery management planning process. NOAA and the tribes should continue to work together to develop specific, proactive, and effective processes and procedures to better integrate the outcomes from tribal consultation between NOAA Fisheries and tribes with the appropriate Council process(es), with the goal that consultation outcomes would be shared with the appropriate Council before the Council takes action. Consultation should always occur at the earliest time practicable, well before a final policy or regulatory decision with tribal implications is made.

G. Secretarial Order 3206 – American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act

In 1997, this Order was issued by the Secretary of the Interior and the Secretary of Commerce to clarify the responsibilities of the two departments' component agencies, bureaus and offices when taking actions under authority of the Endangered Species Act of 1973 (ESA) and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources or the exercise of American Indian tribal rights, as defined in the Order. The Order acknowledges the trust responsibility and treaty obligations of the United States toward Indian tribes and tribal members and its government-to-government relationship in dealing with tribes. The Order directs the departments to carry out their ESA responsibilities in a manner that harmonizes the federal trust responsibility to tribes, tribal sovereignty and statutory missions of the departments, and to strive to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation. The Order does not apply to Alaska Native corporations or tribes, in

recognition of the distinct provisions that govern the taking of ESA- listed species by Alaska natives for subsistence purposes. The procedures in this Handbook supplement the procedures of Secretarial Order 3206 and are not intended to substitute for (or alter) Secretarial Order 3206.

X. Appendices

APPENDIX A: Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments (November 6, 2000)

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian Tribes; it is hereby ordered as follows:

Section 1. Definitions.

For purposes of this order:

- a. "Policies that have tribal implications" refers to 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.
- b. "Indian Tribe" 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.
- c. "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).
- d. "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles.

In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

- a. The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian Tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian Tribes.
- b. Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian Tribes to self-government. As domestic dependent nations, Indian Tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian Tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

- c. The United States recognizes the right of Indian Tribes to self- government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria.

In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

- a. Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.
- b. With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.
- c. When undertaking to formulate and implement policies that have tribal implications, agencies shall:
 - 1. Encourage Indian Tribes to develop their own policies to achieve program objectives;
 - 2. Where possible, defer to Indian Tribes to establish standards; and
 - 3. In determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian Tribes.

Sec. 4. Special Requirements for Legislative Proposals.

Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. Consultation.

- a. Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.
- b. To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:
 - 1. Funds necessary to pay the direct costs incurred by the Indian tribal government or the Tribe in complying with the regulation are provided by the Federal Government; or
 - 2. The agency, prior to the formal promulgation of the regulation,
- c. Consulted with tribal officials early in the process of developing the proposed regulation;

- d. In a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and
- e. Makes available to the Director of OMB any written communications submitted to the agency by tribal officials.
- f. To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,
 - 1. Consulted with tribal officials early in the process of developing the proposed regulation;
 - 2. In a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and
 - 3. Makes available to the Director of OMB any written communications submitted to the agency by tribal officials.
- g. On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. Increasing Flexibility for Indian Tribal Waivers.

- a. Agencies shall review the processes under which Indian Tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.
- b. Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian Tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.
- c. Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefore.
- d. This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. Accountability.

- a. In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.
- b. In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.
- c. Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. Independent Agencies.

Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. General Provisions.

- a. This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on government-to-government Relations with Native American Tribal Governments.
- b. This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).
- c. Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.
- d. This order shall be effective 60 days after the date of this order.

Sec. 10. Judicial Review.

This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

William J. Clinton
The White House, November 6, 2000.

APPENDIX B: Presidential Memorandum on Tribal Consultation

November 05, 2009

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Tribal Consultation

The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies (agencies) are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.

History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.

My 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. Accordingly, I hereby direct each agency head to submit to the Director of the Office of Management and Budget (OMB), within 90 days after the date of this memorandum, a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175. This plan shall be developed after consultation by the agency with Indian tribes and tribal officials as defined in Executive Order 13175. I also direct each agency head to submit to the Director of the OMB, within 270 days after the date of this memorandum, and annually thereafter, a progress report on the status of each action included in its plan together with any proposed updates to its plan.

Each agency's plan and subsequent reports shall designate an appropriate official to coordinate implementation of the plan and preparation of progress reports required by this memorandum. The Assistant to the President for Domestic Policy and the Director of the OMB shall review agency plans and subsequent reports for consistency with the policies and directives of Executive Order 13175.

In addition, the Director of the OMB, in coordination with the Assistant to the President for Domestic Policy, shall submit to me, within 1 year from the date of this memorandum, a report on more (OVER) 2 the implementation of Executive Order 13175 across the executive branch based on the review of agency plans and progress reports. Recommendations for improving the plans and making the tribal consultation process more effective, if any, should be included in this report.

The terms "Indian tribe," "tribal officials," and "policies that have tribal implications" as used in this memorandum are as defined in Executive Order 13175.

The Director of the OMB is hereby authorized and directed to publish this memorandum in the Federal Register.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Executive departments and agencies shall carry out the provisions of this memorandum to the extent permitted by law and consistent with their statutory and regulatory authorities and their enforcement mechanisms.

BARACK OBAMA



APPENDIX C: Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships

JANUARY 26, 2021

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Tribal Consultation and Strengthening Nation-to-Nation Relationships

American Indian and Alaska Native Tribal Nations are sovereign governments recognized under the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. 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. The United States has made solemn promises to Tribal Nations for more than two centuries. Honoring those commitments is particularly vital now, as our Nation faces crises related to health, the economy, racial justice, and climate change — all of which disproportionately harm Native Americans. History demonstrates that we best serve Native American people when Tribal governments are empowered to lead their communities, and when Federal officials speak with and listen to Tribal leaders in formulating Federal policy that affects Tribal Nations.

To this end, Executive Order 13175 of November 6, 2000 (Consultation and Coordination With Indian Tribal Governments), charges all executive departments and agencies with engaging in regular, meaningful, and robust consultation with Tribal officials in the development of Federal policies that have Tribal implications. Tribal consultation under this order strengthens the Nation-to-Nation relationship between the United States and Tribal Nations. The Presidential Memorandum of November 5, 2009 (Tribal Consultation), requires each agency to prepare and periodically update a detailed plan of action to implement the policies and directives of Executive Order 13175. This memorandum reaffirms the policy announced in that memorandum.

Section 1. Consultation. My Administration is committed to honoring Tribal sovereignty and including Tribal voices in policy deliberation that affects Tribal communities. The Federal Government has much to learn from Tribal Nations and strong communication is fundamental to a constructive relationship. Accordingly, I hereby direct as follows:

(a) The head of each agency shall submit to the Director of the Office of Management and Budget (OMB), within 90 days of the date of this memorandum, a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175. The plan shall be developed after consultation by the agency with Tribal Nations and Tribal officials as defined in Executive Order 13175.

(b) Each agency's plan and subsequent reports shall designate an appropriate agency official to coordinate implementation of the plan and preparation of progress reports required by this memorandum. These officials shall submit reports to the Assistant to the President for Domestic Policy (APDP) and the Director of OMB, who will review agency plans and subsequent reports for consistency with the policies and directives of Executive Order 13175.

(c) The head of each agency shall submit to the Director of OMB, within 270 days of the date of this memorandum, and annually thereafter, a progress report on the status of each action included in the agency's plan, together with any proposed updates to its plan.

(d) The Director of OMB, in coordination with the APDP, shall submit to the President, within 1 year from the date of this memorandum, a report on the implementation of Executive Order 13175 across the executive branch based on the review of agency plans and progress reports. Recommendations for improving the plans and making the Tribal consultation process more effective, if any, should be included in this report.

Sec. 2. Definitions. The terms “Tribal officials,” “policies that have Tribal implications,” and “agency” as used in this memorandum are as defined in Executive Order 13175.

Sec. 3. General Provisions.

(a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 4. Publication. The Director of OMB is authorized and directed to publish this memorandum in the Federal Register.

JOSEPH R. BIDEN JR.

APPENDIX D: Department of Commerce Administrative Order 218-8

CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS

Number: DAO 218-8

Effective Date: 2012-04-26

SECTION 1. PURPOSE.

.01 This Order implements Executive Order (E.O.) No. 13175, “Consultation and Coordination with Indian Tribal Governments” (November 6, 2000), Presidential Memorandum, “Tribal Consultation,” 2009 Daily Comp. Pres. Docs. 887 (November 5, 2009), and the Office of Management and Budget Memorandum, “Guidance for Implementing E.O. 13175, ‘Consultation and Coordination with Indian Tribal Governments.’”

.02 This Order describes the actions to be followed by all Department of Commerce (the Department) operating units in their implementation of E.O. No. 13175 and outlines the

principles governing Department interactions with Indian tribal governments (Tribal governments) relating to the development of Department policies that have tribal implications.

.03 The Department works with Tribes on a government-to-government basis to address issues concerning tribal self-government, tribal trust resources, tribal treaty, and other rights. The Department seeks to enhance the government-to-government relationship between the Federal government and Tribal governments and support Tribes in the development of strong and stable economies able to participate in today's national and global marketplace.

.04 The Department recognizes that the Tribal right of self-government flows from the unique legal relationship between the Federal government and Tribal governments.

SECTION 2. AUTHORITY AND SCOPE.

.01 This Order is issued under the authority of 5 U.S.C. § 301.

.02 This Order applies to all Department operating units and describes the baseline responsibilities necessary to meet the objectives of E.O. No. 13175, including guidance for Department personnel on tribal consultation and related policies.

.03 This Order is for internal management only and shall not be construed to grant to or vest any right in any party with respect to federal actions not otherwise granted or vested by existing law or regulations.

.04 Additional guidance for compliance with E.O. No. 13175 can be found in the "Tribal Consultation and Coordination Policy of the U.S. Department of Commerce" (Tribal Consultation Policy). For purposes of policy and guidance, the Tribal Consultation Policy should be considered an extension of this Order and carry the same force and effect as this Department Administrative Order (DAO).

SECTION 3. DEFINITIONS.

.01 Consultation refers to an accountable process ensuring meaningful and timely input from tribal officials on Department policies that have tribal implications.

.02 Indian tribe (or tribe) 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.

.03 Operating units are organizational entities outside the Office of the Secretary charged with carrying out specified substantive functions (i.e., programs) for the Department. The operating units are the components of the Department through which most of its substantive functions are carried out.

.04 Policies that have tribal implications refers to 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.

.05 Tribal Consultation Official means the designee of the Secretary of Commerce (the Secretary) with principal responsibility for the implementation of this Order.

.06 Tribal officials means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

SECTION 4. DELEGATION OF AUTHORITY.

.01 Pursuant to the authority vested in the Secretary by law and subject to such policy and directives as may be prescribed, the Director of the Office of Legislative and Intergovernmental Affairs (OLIA) within the Office of the Secretary is hereby delegated the following authorities of the Secretary insofar as they apply to performing the functions assigned in this Order:

- a. The authority under section 5(a) of E.O. No. 13175 to designate an official with principal responsibility for the Department's implementation of the E.O.
- b. Other authorities of the Secretary pertinent to such functions.

.02 The Director of OLIA may delegate the authorities in Section 4.01 of this Order to any employee of the Department subject to such conditions in the exercise of such authority as may be prescribed by the Secretary.

SECTION 5. ROLES AND RESPONSIBILITIES.

.01 The Director of OLIA will designate a Tribal Consultation Official within the Office of the Secretary.

- a. Pursuant to Section 5(a) of E.O. No. 13175, the Tribal Consultation Official is designated as the official with principal responsibility for the Department's implementation of the E.O.

- b. The Tribal Consultation Official has principal responsibility for the implementation of this Order and the Tribal Consultation Policy.
- c. The Tribal Consultation Official has the authority to act as a liaison between the Secretary and Tribal officials. The Tribal Consultation Official may delegate this authority to heads of operating units.
- d. The Tribal Consultation Official will make online training and other resources available for Department personnel assisting with tribal consultations.

.02 Heads of operating units, as applicable, will:

- a. Implement all provisions of this Order as well as the Tribal Consultation Policy within their respective organizations and throughout all facilities within their organizations.
- b. Designate appropriate official(s) to ensure implementation of the Tribal Consultation Policy at the operating unit level.
- c. Ensure meaningful and timely consultation with affected Tribes on policies that have tribal implications, and work with the Tribal Consultation Official to ensure that an accountable consultation process is in place.
- d. Operating units may develop, issue, and implement tribal consultation guidance (including guidelines, handbooks, and procedures) specific to the operating unit, so long as the Department's Tribal Consultation Official reviews the guidance and it complies with the Tribal Consultation Policy. Consultation may take a variety of forms and is described in greater detail in the Tribal Consultation Policy and operating unit guidance, as appropriate.
- e. Whenever a consultation occurs between the Department or its operating units and Tribal officials, provide the Tribal officials with a formal, written communication that summarizes the consultation process, and responds to the issues and concerns, if any, identified during consultation. Operating units will maintain documentation addressing the consultation process, tribal concerns, and recommendations in conformance with applicable records retention schedules.
- f. Operating units will ensure that personnel assisting with tribal consultations have appropriate training.

Signed: Secretary of Commerce

Office of Primary Interest: Office of Legislative and Intergovernmental Affairs

APPENDIX E: Tribal Consultation and Coordination Policy of the U.S. Department of Commerce

Section 1. Introduction.

1. This “Tribal Consultation and Coordination Policy of the U.S. Department of Commerce” (“Tribal Consultation Policy” or “Policy”) establishes the manner in which the Department of Commerce (“Department”) works with Indian tribes on a government-to-government basis to build a durable relationship and address issues concerning tribal self-government, tribal trust resources, and tribal treaty and other rights, as well as support tribes in developing strong and stable economies able to participate in the national and global marketplace. The Department recognizes Indian tribal self-government and supports tribal sovereignty and self-determination.
2. The Department recognizes the Federal Government’s unique legal relationship, as established in the Constitution, statutes, treaties and federal court decisions, between Tribal governments and the Federal Government.
3. The Department and operating units will seek and promote cooperation within the Department and with other agencies that have related responsibilities. The Department’s mission encompasses many complex issues where cooperation and mutual consideration among governments (federal, state, tribal, and local) are essential. The Department and operating units will promote intradepartmental and interagency coordination and cooperation to assist Tribal governments in resolving issues requiring mutual effort.
4. Executive Order (E.O.) No. 13175, “Consultation and Coordination with Indian Tribal Governments,” requires federal agencies to have an accountable process to ensure meaningful and timely input by tribal officials in developing policies that have tribal implications. This Policy provides uniform standards and methodology outlining consultation procedures for all Department personnel working with Tribal governments regarding policies that have tribal implications. This Policy is to be construed consistent with Federal statutes, regulations, Presidential memoranda, Executive Orders, and other relevant Federal legal authorities.

Section 2. Background.

1. This Policy builds upon and expands the principles expressed in the “American Indian and Alaska Native Policy of the Department of Commerce,” promulgated by the Department on March 30, 1995. The Tribal Consultation Policy incorporates the requirements of E.O. No. 13175; Presidential Memorandum, “Tribal Consultation,” 2009 Daily Comp. Pres. Docs. 887 (November 5, 2009); the Office of Management and Budget Memorandum, “Guidance for Implementing E.O. 13175, ‘Consultation and Coordination with Indian Tribal Governments;’” and the Consolidated Appropriations Act, 2004, P.L. 108-199, div. H § 161, 118 stat. 3, 452 (2004), as amended by Consolidated Appropriations Act, 2005, P.L. 108-447, div. H., title V § 518, 118 stat. 2809, 3267, relating to consultation with Alaska native corporations.

2. This Policy is for internal management only and shall not be construed to grant or vest any right to any party not otherwise granted or vested by existing law or regulations.

Section 3. Authority.

1. This Tribal Consultation Policy is issued pursuant to the authority of 5 U.S.C. § 301 and Department Administrative Order (DAO) 218-8, "Consultation and Coordination with Indian Tribal Governments." This Policy shall have the same force and effect as a DAO. Amendments (substantive changes) or revisions (corrections or updates) to this Policy may be developed and issued by the Department of Commerce Tribal Consultation Official or the Secretary's designee in consultation with Tribal governments.

Section 4. Definitions.

1. "Consultation," as defined in Section 5 of E.O. No. 13175, refers to an accountable process ensuring meaningful and timely input from tribal officials on Department policies that have tribal implications.
2. "Indian tribe (or Tribe)," as defined in Section 1(b) of E.O. No. 13175, 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.
3. "Operating units," as defined in Section 3.c.1 of Department Organization Order 1-1, are organizational entities outside the Office of the Secretary charged with carrying out specified substantive functions (i.e., programs) of the Department. The operating units are the components of the Department through which most of its substantive functions are carried out. "Operating units" includes all Department bureaus and agencies.
4. "Policies that have tribal implications," as defined in Section 1(a) of E.O. No. 13175, refers to 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.
5. "Tribal Consultation Official," as defined in Section 5(a) of E.O. No. 13175, means the designee of the Secretary with principal responsibility for the implementation of this Policy.
6. "Tribal officials," as defined in Section 1(d) of E.O. No. 13175, means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.
7. "Alaska Native Corporation," pursuant to 43 U.S.C. § 1602 *et seq.*, any Regional Corporation, any Village Corporation, any Urban Corporation, and any Group Corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act.

Section 5. Roles and Responsibilities for Consultations.

1. Department of Commerce Tribal Consultation Official
 - a. The Tribal Consultation Official is an individual in the Office of Legislative and Intergovernmental Affairs (OLIA) within the Office of the Secretary who is duly appointed to act as a liaison between the Secretary of Commerce and Tribal officials.

The Tribal Consultation Official may delegate authority, as necessary, to the head of each operating unit. The Tribal Consultation Official has primary responsibility for ensuring compliance with DAO 218-8, this Policy, and E.O. 13175, and is responsible for tribal consultations and coordination for the Office of the Secretary programs.

- b. The Tribal Consultation Official has responsibility for coordinating the implementation of this Policy and DAO 218-8 within the Department and all operating units.
- c. The Tribal Consultation Official will engage tribal officials in periodic dialogue to discuss the Department's implementation of this Policy. The dialogue will provide an opportunity for tribal officials to assess policy implementation, program delivery, and discuss outreach and communication efforts, and other issues.
- d. The Tribal Consultation Official is responsible for submitting an annual report to OMB pursuant section 7(a) of E.O. No. 13175.

2. Head of operating unit Responsibilities

- a. The head of each operating unit will designate an official in the headquarters office who has primary responsibility for ensuring compliance with this Policy within the operating unit. Each operating unit's designated official will work with the Department Tribal Consultation Official to ensure coordination of tribal consultations, as necessary. The designated official is responsible for the development, maintenance and internal distribution of any guidance produced by the operating unit in compliance with the requirements of this Policy.
- b. The head of each operating unit or the designated official may delegate authority to appropriate individuals within the operating unit.
- c. The head of each operating unit will consult with Tribes and prepare tribal summary impact statements when promulgating any regulations that have tribal implications, that impose substantial direct compliance costs on Indian tribal governments, and that are not required by statute; and when promulgating any regulations that have tribal implications and that preempt tribal law.

Section 6. Training and Guidance.

1. The Tribal Consultation Official and the head of each operating unit will ensure that personnel assisting with tribal consultations have appropriate training.
2. Each operating unit may develop and issue tribal consultation guidance to assist staff in preparing, reviewing and managing the consultation process within their respective operating units, so long as:
 - a. The guidance is consistent with DAO 218-8, and
 - b. The Department's Tribal Consultation Official reviews the guidance.

Section 7. Consultation.

1. The Consultation Process. Consultation may take a variety of forms. Implementing this Policy may require a range of formal and informal planning activities. The Department and operating units' consultation processes may include one or more of the following: meetings, letters, conference calls, webinars, on-site visits, or participation in regional and national events. The Tribal Consultation Official or the head of each operating unit, as

applicable, will make a reasonable effort to accommodate a tribal request for consultation. Ultimately, the consultation process is to entail an informed discussion of the proposed federal policy and associated tribal concerns between the designated Tribal Consultation Official and tribal officials.

2. Elements of the Consultation Process.

- a. Ongoing communication shall be a regular part of the government-to-government relationship with tribal governments. The Department and operating units will engage in meaningful dialogue with Tribes regarding all policies that have tribal implications.
- b. Exchange of Information. The Department and operating units will make a reasonable effort to identify and provide timely and accurate information for consultation.
- c. Notification. The Department and operating units will notify Tribes of policies that have tribal implications. Follow-up may be necessary to ensure the appropriate tribal official has received the consultation notification and accompanying documents. These notifications do not replace or supersede any notifications that are required by statute or E.O. regarding tribal consultations.
- d. Consultation Planning. The Department or operating units will coordinate with tribal officials to plan logistical considerations for the consultation. The Department or operating units will, when practical, allow Tribes a reasonable amount of time to prepare for consultation and submit their views on policies that have tribal implications. The Tribal Consultation Official or the head of each operating unit, as applicable, will treat a request for consultation from a tribal official in an expedited fashion and provide a written response confirming receipt of the request.
- e. Written Communication and Record-Keeping. When a consultation occurs between the Department or its operating units and Tribal officials, the Department or operating unit will provide the Tribal officials with a formal, written communication that summarizes the consultation, and responds to the issues and concerns, if any, identified during consultation. The Tribal Consultation Official or head of each operating unit conducting a consultation will maintain documentation addressing the consultation, tribal concerns, and recommendations in conformance with applicable records retention schedules.

Section 8. Consultation with Alaska Native Corporations.

1. In 2004, through two consolidated appropriations acts, Congress required federal agencies to consult with Alaska Native Corporations on the same basis as Federally-recognized Indian Tribes under E.O. 13175 (Public Law 108-199, 118 Stat. 452, as amended by Pub.L. 108-447, 118 Stat. 3267).
2. The Department interprets the term “Alaska Native Corporations” in this requirement to mean “Native Corporations” as that term is defined under the Alaska Native Claims Settlement Act (ANCSA) of 1971. Congress created regional, village, and urban corporations to manage the lands, funds, and other assets conveyed to Alaska Natives by ANCSA. There are 13 regional corporations and over 200 village corporations in Alaska. The village corporations generally represent shareholders in villages associated with the 229 federally recognized tribes in Alaska. Most Alaska Native Corporation shareholders also are members of a Federally-recognized tribe in Alaska.

3. The Department will implement the requirement to consult with Alaska Native Corporations in a manner as close as possible to consultations with federally recognized tribes in Alaska, while recognizing the important differences between sovereign tribal governments and the federal trust responsibility to those tribal governments and corporations obligated to maximize financial returns to shareholders. Alaska Native Corporations were established to operate as for-profit enterprises, and may not necessarily represent the same perspective or interests as the tribes. Consultation and coordination with the corporations will follow the same process as described in this Policy for tribes, with the following exceptions:
 - a. Consultations with Alaska Native Corporations will occur on a “government-to-corporation” basis, rather than “government-to-government” basis to reflect the distinction between sovereign governments and corporate entities.
 - b. Government-to-corporations consultations will occur with appropriate adjustments given the unique status, structure, and interests of Alaska Native Corporations.

Section 9. Implementation.

1. The Tribal Consultation Official, located in OLIA within the Office of the Secretary, is responsible for ensuring implementation of this Policy. This responsibility may be delegated as appropriate. This Policy does not alter or affect any existing duty or authority of any individual operating unit.
2. This Policy is not intended to, and does not, grant, expand, create or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this Policy be construed to alter, amend, repeal, interpret, or modify tribal sovereignty, any treaty rights of any Indian tribes, or to preempt, modify, or limit the exercise of any such rights.
3. This Policy is intended to improve the Department’s management of its relations and cooperative activities with Indian tribes. The Department and operating units have no obligation to engage in any consultation activities under this policy unless they are practicable and permitted by law. Nothing in this policy requires any budgetary obligation or creates a right of action against the Department for failure to comply with this policy nor creates any right, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.
4. This Policy shall be updated as necessary.

Section 10. Effective Date.

1. This Policy is effective beginning with the date of this memorandum and will remain in effect until it is amended, superseded by a Departmental Administrative Order, or revoked.

APPENDIX F: NOAA Policy on Government-to-Government Consultations with Federally Recognized Indian Tribes and Alaska Native Corporations

NOAA FORM 58-5 (4-04)

	National Oceanic and Atmospheric Administration	NOAA Administrative Order 218-8A	
	NOAA ADMINISTRATIVE ORDER SERIES	DATE OF ISSUANCE March 10, 2023	EFFECTIVE DATE June 27, 2023
SUBJECT: The National Oceanic and Atmospheric Administration (NOAA) Policy on Government-to-Government Consultation with Federally Recognized Indian Tribal Governments			

SECTION 1. PURPOSE.

This Order establishes The National Oceanic and Atmospheric Administration (NOAA) Policy on Government- to-Government Consultation with Federally Recognized Indian Tribal Governments.

SECTION 2. SCOPE.

The purpose of this Order: strengthens the government-to-government relationship between NOAA and Indian Tribal governments; acknowledges that Indian tribes exercise inherent sovereign powers over their members and territory; and establishes a policy of regular and meaningful consultation and collaboration with tribal officials to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

SECTION 3. DEFINITIONS.

Federally recognized Indian Tribe ("Indian Tribe" or "Tribe"): As defined in Section I(b) of E.O. 13175, is 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. § 5131.

Consultation: As defined in Section 5 of E.O. 13175, refers to an accountable process ensuring meaningful and timely input from tribal officials on NOAA policies that have tribal implications.

Consultation protocol: An agreement between NOAA and a Federally recognized Indian Tribe describing the elements and procedures for implementing government-to-government consultation and E.O. 13175.
Policies that have tribal implications: All regulations, legislative comments, 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 Tribes, or on the distribution of power and responsibilities between the Federal government and tribes.

Tribal officials: An elected or duly appointed official of Indian tribal governments or authorized intertribal organizations.

SECTION 4. POLICY.

This Order follows the guidelines established in the Department of Commerce (DOC) Administrative Order (DAO) 218-8 requiring the heads of operating units to implement all provisions of the DOC Tribal Consultation Policy, designate an appropriate official to ensure implementation of the DOC Tribal Consultation Policy at the operating unit level, and work with the DOC Tribal Consultation Official to ensure that an accountable process for meaningful and timely consultation on policies with tribal implications is in place.

NOAA will further strengthen its consultation and collaboration with Indian tribes through the policies contained in Executive Order (E.O.) 13175, Consultation and Coordination with Indian Tribal Governments, dated November 6, 2000; Presidential Memorandum, Tribal Consultation, 74 FR 57881, dated November 5, 2009; Office of Management and Budget Memorandum, Guidance for Implementing E.O. 13175, dated July 30, 2010; Tribal Consultation and Coordination Policy for the U.S. Department of Commerce, 78 FR 33331, dated June 4, 2013; and the 2021 White House Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Appendix C), which reaffirmed the policy and requirements of the 2009 Presidential Memorandum. In November 2021, DOC and 16 other federal agencies entered into the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights.

To the extent required by P.L. 108-199 and P.L. 108-447, NOAA will also provide procedures for consultation with Alaska Native Corporations.

This policy is intended only for NOAA internal management purposes and does not create any right or benefit, substantive or procedural, enforceable against the United States, its agencies, entities, or instrumentalities, its officers or employees or any other person.

SECTION 5. RESPONSIBILITIES.

Each NOAA Line/Staff Office and Regional Office is responsible for implementing procedures and best practices consistent with the NOAA Handbook titled NOAA Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribes and Alaska Native Corporations, and other procedures or guidance established by the NOAA Tribal Liaison. The NOAA Handbook will be updated as necessary.

The NOAA Administrator will appoint and maintain a "NOAA Tribal Liaison" position in the Office of Legislative and Intergovernmental Affairs (OLIA) to whose functions will include:

1. Developing, adopting, and publishing to the public, guidance and procedures for government-to-government consultation with Federally-recognized Indian Tribes and Alaska Native Corporations (including handbooks, guidances, and procedures);
2. Ensuring the availability of on-line training and other resources for NOAA personnel assisting with tribal consultations;
3. Maintaining documentation of tribal consultation conducted by NOAA and its Line/Staff Offices and Regional Offices as well as those conducted by NOAA headquarters offices; and
4. Meeting reporting requirements established by the Department of Commerce Tribal Liaison and the President's Office of Management and Budget.

To further these policies, NOAA Line/Staff Offices and Regional Offices will establish such internal procedures as necessary to implement E.O. 13175, DAO 218-8, and the DOC Tribal Consultation and Coordination Policy consistent with the guidance, handbook(s) and procedures developed by the NOAA and DOC Tribal Liaisons. Responsible officials include NOAA Assistant Administrators and NOAA Regional Administrators.

SECTION 6. REFERENCES.

Existing documents referenced in this Order are as follows:

1. E.O. 13175, Consultation and Coordination with Indian Tribal Governments, 65 FR 67249, 2000.
2. Presidential Memorandum, Tribal Consultation, 74 FR 57881, 2009.
3. Office of Management and Budget Memorandum, Guidance for Implementing E.O. 13175, 2010.
4. Department of Commerce Administrative Order 218-8, Consultation and Coordination with Indian Tribal Governments, 2012.
5. Tribal Consultation and Coordination Policy for the U.S. Department of Commerce, 78 FR 33331, 2013.
6. White House Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, January 2021
7. Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights, November 2021

SECTION 7. EFFECT ON OTHER ISSUANCES.

This Order supersedes NOAA Administrative Order (NAO) issued on June 30, 2014, in its entirety.

The Under Secretary of Commerce for Oceans and Atmosphere signs because there is no delegation of authority for this NAO. An electronic copy of this Order will be posted on the NOAA Office of the Chief Administrative Officer website under the NOAA Administrative Issuances Section.

An electronic copy of this Order will be posted in accordance with Chapter 100 of the NOAA Records Control Schedule on the NOAA Office of the Chief Administrative Officer website under the Administrative Programs' NOAA Administrative Issuances Section. <https://www.noaa.gov/organization/administration/noaa-administrative-orders>



Under Secretary of Commerce for Oceans and Atmosphere

Offices of Primary Interest:

1. Office of the Under Secretary of Commerce for Oceans and Atmosphere
2. NOAA General Counsel
3. NOAA Office of Legislative and Intergovernmental Affairs