

**U.S. Department of Justice Consultation on the Strengthening Nation-to-Nation Relationship
with Tribes and Consultation-related Policy
March 2021**

Framing Paper

The U.S. Department of Justice (DOJ) welcomes President Biden's directive¹ to strengthen our nation-to-nation relationship with Tribal governments and, as part of that effort, to review our consultation policy. DOJ remains committed to partnering with Tribes on a government-to-government basis, to meet our treaty and trust obligations, and to promoting Tribal sovereignty. In response to the directive from the President we would appreciate your feedback on the DOJ Consultation Policy² (attached) as well as the DOJ Statement of Principles for Working with Tribes (also attached). Both documents are intended to establish a framework to guide all of DOJ's interactions with Tribal representatives, but we are always interested in improving their utility.

The DOJ Consultation Policy, signed in 2013, is used by offices across DOJ to plan and implement formal consultation with Tribes. The Statement of Principles, signed in 2015, is an aspirational document that has helped DOJ remain committed to improving the ways we provide services to and partner with Tribal governments.

There are four guiding principles that shape DOJ's policy:

Consultation will involve timely, adequate notice to the appropriate parties. Adequate notice has two components: first, giving Tribes enough time to arrange for attendance; second, providing a full description of the topics to be discussed and any relevant documents in advance of this discussion.

Consultation will be accessible and convenient to Tribal participants. DOJ's policy allows for a variety of formats, including in-person and virtual, to ensure broad access to participation. DOJ's policy also specifies that written comments must be accepted to ensure Tribes that are not able to participate in live discussions still have an opportunity to provide perspective and feedback.

Consultation will be a meaningful process involving appropriate participants. DOJ's policy mandates that consultation must take place *before* the Department has arrived at a decision. DOJ's policy also states that, wherever possible, participants should have decision-making authority. DOJ

¹ Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, January 26, 2021: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>

² The DOJ Consultation Policy was established as directed in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, November 6, 2000.

representatives are required to ensure that agency leadership is substantively involved even if they are not able to attend.

Consultation will be conducted through a transparent and accountable process. After consultation, DOJ must prepare a summary that includes a synopsis of Tribal feedback and a description of DOJ's consideration of those issues and concerns. This summary must be made available to participants of the consultation.

Following are some specific questions for consideration in advance of our consultation sessions. These questions are not intended to limit feedback; although President Biden's Memorandum focuses on consultation, DOJ welcomes input on any aspect of our current Consultation Policy, the Statement of Principles, or broader feedback about strengthening the government-to-government nature of DOJ's work in support of Tribal communities.

- Is the current DOJ policy regarding initiating consultation sufficient?
 - The current policy requires formal consultation before adopting policies that have Tribal implications. The term "policies" includes: (1) regulations or regulatory policies; (2) proposed legislation; (3) decisions regarding whether to establish Federal standards; and (4) other policies for which the Department determines consultation is appropriate and practicable.
- Under the current guidance, "policies" does not include matters that are the subject of investigation, anticipated or active litigation, or settlement negotiations. Nor does it include individual grants or contracts.
- Is DOJ's description of when consultation should be utilized clear? Is it broad enough?
- Does the current DOJ Consultation Policy establish an appropriate timeline for notification and response?
- Does posting an agency response to Tribal feedback online provide sufficient insight into agency decision-making on issues raised during consultation?
- Are DOJ's efforts to communicate about upcoming consultations (email notification and announcement on agency website) effective?

- Have formal consultations with DOJ been useful to your Tribe? Do you feel your input during formal consultation had an impact on the final agency decisions or actions?
- DOJ regularly holds listening sessions and small-group meetings to facilitate communication on subjects that do not require formal consultation under E.O. 13175.
 - Have these been valuable to your Tribe?
 - Should the DOJ consultation policy describe in greater detail these other forms of outreach and communication, to clarify the difference between these types of communication and formal consultation?
- What interactions with DOJ have the greatest impact on your communities?
- Do you have specific examples of DOJ could improve our partnership with Tribes under as part of our government-to-government relationship that you would like to share?

DOJ strongly encourages submission of feedback in advance on scheduled discussion. Submission of feedback prior to our discussions will help ensure DOJ representatives are able to address specific concerns and, where possible, ensure the right agency representatives are in attendance to address specific feedback. Tribes are welcome to submit multiple times, before and after consultation discussions. Please submit advance feedback via email to OTJ@usdoj.gov.

DEPARTMENT OF JUSTICE POLICY ON TRIBAL CONSULTATION

I. Introduction

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

Coordination between Tribes and the Department of Justice encompasses a variety of forms of communication that include formal consultation, listening sessions, meetings with individual Tribes, and informal discussions with Tribal leaders. Executive Order 13175 and this Policy focus on the more formal aspects of consultation. However, communication between Tribes and the Department of Justice is not limited to formal consultation. To this end, the Department of Justice will engage in ongoing communication with Tribes beyond formal consultation.

II. Initiating Consultation

The Department of Justice will consult with federally recognized Tribes before adopting policies that have Tribal implications. The term "policies" includes: (1) regulations or regulatory policies; (2) proposed legislation; (3) decisions regarding whether to establish Federal standards; and (4) other policies for which the Department determines consultation is appropriate and practicable. The term "policies" does not include matters that are the subject of investigation, anticipated or active litigation, or settlement negotiations. Nor does it include individual grants or contracts. Executive Order 13175 explains that policies have Tribal implications if they "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." The requirements of Executive Order 13175 and this policy statement generally will be construed liberally in favor of consultation on any given policy with Tribal implications. All decisions regarding whether and how to conduct a consultation, or whether a given policy or topic has Tribal implications, will be coordinated with the Department's Office of Tribal Justice.

In addition, the Office of Tribal Justice-in conjunction with affected Department components-will consider requests from Tribes to engage in consultation on any new policy initiated by the Department of Justice, even if the Department has not previously identified that policy as having Tribal implications. Tribes may contact the Office of Tribal Justice to request a consultation. The affected component, in coordination with the Office of Tribal Justice, will prepare and send to the requesting Tribe or Tribes a written response to the request.

III. Consultation Guiding Principles

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

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

A. Adequate Notice

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

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

Adequate notice of a consultation should include sufficient detail about the topic to be discussed to allow Tribal leaders an opportunity to engage meaningfully in the consultation. The Department's experience has been that providing Tribes with specific information about the issues and questions the Department deems most relevant to the topics of a particular consultation benefits both Tribal participants and the Department by helping ensure that Tribal comments are focused enough to be useful in the Department's decision-making process. This does not mean that the affected Department component has reached a preliminary decision on the issue that is the topic of the consultation. However, the Department should provide a brief

discussion of the issues, a timeline of the process, potential outcomes, and, if possible, an overview of any specific questions on which the Department would like Tribal input.

B. Accessibility

Consultations should be accessible to the relevant Tribal audience. Depending on the circumstances, consultation may be conducted in person, via video conferencing, conference calls, interactive Web technology, or similar means. Written comments will also be accepted. If an issue that is the subject of the consultation primarily affects an individual reservation or region, the consulting component within the Department should ensure that the consultation will be accessible to the tribes that will be primarily affected. This will sometimes mean holding multiple consultation sessions. If the consultation involves joint action with other Federal agencies, the consulting component should attempt to hold a joint consultation with the other agencies.

C. Meaningful Process

Whenever possible, a consultation should involve individuals who have decision-making authority on the issue that is the subject of the consultation. This will generally mean that the component should make every effort to ensure that elected Tribal leaders or their designees will be substantively involved in the consultation. Also, the component should ensure that political leadership or other relevant decision-makers for the Department of Justice are substantively involved in the consultation even if they are not personally able to attend. If the ultimate decision-makers are not present for the consultation, the Department representatives should ensure that those decision-makers are aware of the relevant issues in advance of the consultation and are apprised of Tribal input after the consultation and before relevant decisions are made. A meaningful process includes providing a full description of the topics to be discussed, and in most cases it will include written materials in advance of the event.

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

D. Accountability

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

DEPARTMENT OF JUSTICE**Office of the Attorney General
[AG Order No. 3481–2014]****Attorney General Guidelines Stating Principles for Working With Federally Recognized Indian Tribes**

DATES: This notice is effective December 3, 2014.

SUPPLEMENTARY INFORMATION: The Attorney General Guidelines state the following principles for working with federally recognized Indian tribes:

Overarching Principles

- The Department of Justice honors and strives to act in accordance with the general trust relationship between the United States and tribes.
- The Department of Justice is committed to furthering the government-to-government relationship with each tribe, which forms the heart of our federal Indian policy.
- The Department of Justice respects and supports tribes' authority to exercise their inherent sovereign powers, including powers over both their citizens and their territory.
- The Department of Justice promotes and pursues the objectives of the United Nations Declaration on the Rights of Indigenous Peoples.
- The Department of Justice is committed to tribal self-determination, tribal autonomy, tribal nation-building, and the long-term goal of maximizing tribal control over governmental institutions in tribal communities, because tribal problems generally are best addressed by tribal solutions, including solutions informed by tribal traditions and custom.

Consultation and Communication with Tribes

- The Department of Justice recognizes that its commitment to tribal self-determination requires regular, meaningful, and informed consultation with American Indian and Alaska Native tribal officials when developing new or amended policies, regulations, and legislative actions initiated by the Department that may affect tribes, as detailed in the Department's Policy Statement on Tribal Consultation.
- The Department of Justice recognizes that—in addition to, but not in lieu of, formal consultation—there can be great benefit in timely, detailed, informal communications with tribal officials and other community leaders.
- The Department of Justice supports the Attorney General's Tribal Nations Leadership Council and other task forces and advisory groups that allow elected tribal representatives to provide direct

input to the Department's leaders and components.

Culture and Mutual Respect

- The Department of Justice recognizes that each tribe's history and contemporary culture are unique, and that solutions that work for one tribe may not be suitable for others.
- The Department of Justice works to respectfully consider traditional tribal cultural practices and values, and is sensitive to the need for effective cross-cultural communication.
- The Department of Justice seeks to foster an internal Departmental culture, from top to bottom, that will encourage its officers and employees to identify and be responsive to the needs of tribes routinely, not merely as an afterthought.

Law Enforcement and Litigation

- The Department of Justice is committed to helping protect all Native Americans from violence, takes seriously its role in enforcing federal criminal laws that apply in Indian country, and recognizes that, absent the Department's action, some serious crimes might go unaddressed.
- The Department of Justice prioritizes helping protect Native American women and children from violence and exposure to violence, and works with tribes to hold perpetrators accountable, to protect victims, and to reduce the incidence of domestic violence, sexual assault, and child abuse and neglect in tribal communities.
- The Department of Justice is committed to protecting tribal treaty rights, tribal lands and natural resources, and tribal jurisdiction through litigation, where appropriate, and to handling litigation involving tribes in a manner that is mindful of the government-to-government relationship.
- The Department of Justice promotes the proper application of the Indian Child Welfare Act of 1978 (ICWA), and seeks to protect tribes and Native American families from unwarranted removal of their children.
- The Department of Justice works to safeguard the civil rights of Native Americans by prosecuting hate crimes, protecting the right to vote, and otherwise helping ensure that Native Americans are free from illegal discrimination.

Nation-Building and Tribal Justice Systems

- The Department of Justice believes that stable funding at sufficient levels for essential tribal justice functions is critical to the long-term growth of tribal institutions.
- The Department of Justice seeks to increase tribes' flexibility to administer grant programs and thus design solutions appropriate to their communities, while ensuring strict accountability.
- The Department of Justice believes that pilot and demonstration projects that are available to state or local governments should be available to similarly situated tribal governments, and endeavors, where appropriate and practicable, to give serious consideration to locating projects in tribal communities.
- The Department of Justice is committed to fully implementing the Indian Civil Rights Act of 1968 (ICRA), the Tribal Law and Order Act of 2010 (TLOA), and the Violence Against Women Reauthorization Act of 2013 (VAWA), and believes that working with tribes to strengthen their

justice systems, including indigent defense services, is critical to fulfilling the promise of these statutes.

- The Department of Justice supports tribes' efforts to build innovative approaches to law enforcement, public safety, and victim services, and, where appropriate, to evaluate those approaches by collecting empirical evidence and conducting scientific and statistical research.

Coordination and Outreach

- The Department of Justice, when working with other federal agencies on issues involving tribes, advocates respecting tribal self-determination, tribal autonomy, tribal nation-building, and the government-to-government relationship.
- The Department of Justice works to facilitate communication and build relationships among the federal agencies engaged with tribal governments and to promote the sharing of federal resources and expertise.
- The Department of Justice works to facilitate communication and build relationships between tribes and state, local, and private partners in law enforcement, public safety, victim services, and civil rights, to promote prosperous and resilient tribal communities, and to use dispute resolution techniques such as mediation to resolve community conflicts and tensions.
- The Department of Justice recognizes the link between healthy, prospering families and public safety, and the need to coordinate law enforcement efforts with educational, housing, environmental-protection, and public-health services.

Sustainability

- The Department of Justice will continue taking steps to institutionalize its commitment to tribal justice and to make its officers and employees aware of these Attorney General Guidelines stating principles for working with federally recognized Indian tribes, so that progress in areas important to tribes continues regardless of changes in Department personnel.

These guidelines and principles are intended to improve the internal management of the Department of Justice. They are not intended to and do not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party in any matter, civil or criminal, against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person, nor do these guidelines or principles place any limitations on otherwise lawful litigation prerogatives of the Department of Justice. Please contact the Department's Office of Tribal Justice (OTJ) with any questions about these guidelines and principles.

Dated: December 3, 2014.

Eric H. Holder, Jr., *Attorney General*.