



Approved On: November 30, 2022

DOJ POLICY STATEMENT

TRIBAL CONSULTATION

PURPOSE: This policy implements the requirements of Executive Order 13175 of November 6, 2000 (Consultation and Coordination With Indian Tribal Governments), the Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, signed on January 26, 2021, and the Memorandum on Uniform Standards for Tribal Consultation, signed on November 30, 2022, and provides the Department of Justice (“Department” or “DOJ”) guidance on the formal process through which the Department seeks Tribal input regarding the development of new or amended policies, regulations, and legislative actions initiated by the Department.

SCOPE: All Department components

ORIGINATOR: Office of Tribal Justice

CATEGORY: (I) Administrative, (II) Governmental and Public Relations

AUTHORITY: Executive Order 13175 (Nov. 6, 2000); Presidential Memorandum on Tribal Consultation (Nov. 5, 2009); Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021); Presidential Memorandum on Uniform Standards for Tribal Consultation (Nov. 30, 2022).

CANCELLATION: None

DISTRIBUTION: Electronically distributed to those referenced in the “SCOPE” section and posted on the DOJ directives electronic repository (SharePoint) at <https://doj365.sharepoint.us/sites/jmd-dm/dm/SitePages/Home.aspx>

APPROVED BY: Merrick B. Garland
Attorney General



ACTION LOG

Issuing Component must review its DOJ directives, at a minimum, every 5 years and make revisions as necessary. The action log records dates of approval, recertification, and cancellation, as well as major and minor revisions to this directive, and provides a brief summary of all revisions. In the event this directive is canceled, superseded, or supersedes another directive, that will also be noted in the action log.

Action	Authorized by	Date	Summary
Initial Approval	Attorney General	8/29/2013	This Policy implements the requirements of Executive Order 13175 and provides guidance on the formal process through which the Department seeks Tribal input regarding the development of new or amended policies, regulations, and legislative actions initiated by the Department.
Revised	Attorney General 	11/30/2022	Changes reflect input received during June 2021 Consultations with Tribal leaders. Included in the changes are clarifications regarding processes and the scope and application of the policy.

TABLE OF CONTENTS

I. Introduction	4
II. Initiating Consultation	4
III. Consultation Guiding Principles.....	5
A. Adequate Notice.....	5
B. Accessibility	6
C. Meaningful Process.....	6
D. Accountability	6
IV. Development of Supplemental Consultation Guidance.....	7
V. Interagency Consultation	7
VI. Judicial Review.....	8

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 United States 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), Presidential Memorandum on Tribal Consultation (Nov. 5, 2009), President Biden’s Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, signed on January 26, 2021, and President Biden’s Memorandum on Uniform Standards for Tribal Consultation, signed on November 30, 2022. 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 includes formal Consultation, listening sessions, meetings with individual Tribes, and informal discussions with Tribal leaders. Executive Order 13175 and this Policy Statement 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 formulating or implementing policies that have Tribal implications. The term “policies” includes: (1) regulations or regulatory policies; (2) proposed legislation; (3) decisions regarding the establishment of 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. It also does not 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 as defined above with Tribal implications. Consultations may be organized in a variety of ways, from a single group discussion to a more iterative process involving a series of discussions. 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 within a reasonable amount of time.

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 to and convenient for Tribal participants.
- Consultation will be a meaningful part of the Department's decision-making process and involve 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 communicated in at least two ways. First, the invitations will be published on the Office of Tribal Justice and the Tribal Safety and Justice Web sites. Second, they will be sent by e-mail to appropriate individual Tribal leaders using an up-to-date Tribal leader 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 process of Consultation. Notice of Consultation should include the date, time, and location of the consultation; and where appropriate,

links to join or register in advance.

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. The Department will provide a relevant discussion of the issues, a timeline of any applicable process, potential outcomes, and, if possible, an overview of any specific questions on which the Department would like Tribal input. The Department will generally include these materials as part of the invitation to consult, but if materials must be sent separately, the Department will ensure informational materials are provided with sufficient time to review before the scheduled discussion or discussions.

The Department recognizes that discussions about complex or technical issues will be most productive if participants are able to substantively consider background materials and potential implications. The Department components engaging with Tribes on complex or technical issues should therefore consider making use of informal listening sessions in advance of formal Consultation.

B. Accessibility

Consultations should be accessible to the relevant Tribal audience. If the subject of a Consultation primarily affects an individual reservation or region, the Department should consider steps to promote access and participation by the affected Tribe or Tribes. Depending on the circumstances, Consultation may be conducted in person or via video conferencing, conference calls, interactive Web technology, or similar means. Written comments will also be accepted, and absent exceptional circumstance, the written comment period should be open for at least 30 days following the Consultation. 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 or duly appointed Tribal leaders or their designees will be substantively involved in the Consultation. Tribal leaders may wish to designate an alternative representative or representatives. If so, they should notify the Department of Justice point of contact identified in the invitation prior to the Consultation to ensure that the Departmental representatives can appropriately recognize Tribal representation.

As noted earlier, Consultations need not be limited to a single event; a series of discussions may be necessary to ensure substantive involvement by Tribal representation. Department of Justice

components should ensure that political leadership or other relevant Department of Justice decision-makers 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 discussion or discussions, the Department's representation 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 process and before relevant decisions are made. A meaningful process requires the Department to provide a full description of the topics to be discussed, and in most cases, will require the Department to provide 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, Department components need to be aware as early as possible of their duty to consult with Tribes and factor Consultation into their deliberative process.

Throughout Consultation, Department of Justice components shall recognize and respect Tribal self-government and sovereignty; honor Tribal treaty rights; reserved rights, and other rights; respect and consider indigenous knowledge; and strive to meet the responsibilities that arise from the unique legal relationship between the federal government and Tribal governments.

D. Accountability

At the conclusion of a Consultation, 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 Department component's consideration of these concerns and issues. Consultation synopses provide a summarized account of the proceedings as well as insight into Departmental decisions resulting from the discussion. To the extent permitted by applicable law, the Department shall ensure that information designated as sensitive by a Tribal government is not disclosed. After input from the Office of Tribal Justice, the component will timely post this synopsis to the Tribal Justice and Safety website and maintain a record of the Consultation.

IV. Development of Supplemental Consultation Guidance

The Department of Justice is made up of nearly 40 components. Some of these components have frequent and substantive contact with Tribal governments, while others have limited interaction with Tribes. The Office of Tribal Justice is available to assist other Department components with implementing this Policy for their Tribal Consultation process. Components with frequent and substantive contact with Tribes may wish to supplement this Policy with more specific Consultation guidance. Those components are encouraged to develop such guidance. Supplemental guidance shall be reviewed by the Office of Tribal Justice to ensure consistency and compatibility with Executive Order 13175, President Biden's Memorandum on Uniform Standards for Tribal

Consultation, signed November 30, 2022, and this Department-wide Policy.

V. Interagency Consultation

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

VI. Judicial Review

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

Please contact the Office of Tribal Justice for further information on any of the processes established in this Policy Statement.