



**Homeland
Security**

October 23, 2019

Dear Tribal Leader:

I am pleased to announce that the Department of Homeland Security's (DHS) Office of Partnership and Engagement (OPE) will facilitate an outreach and consultation period from now until March 31, 2020 to seek input from federally recognized Indian tribal governments and Alaska Native Corporations (ANCs) on proposed updates to the DHS Tribal Consultation Policy. The DHS Tribal Consultation Policy implements Executive Order (EO) 13175, "Consultation and Coordination with Indian Tribal Governments," and establishes an accountable process to ensure timely and meaningful consultation with Indian tribes. DHS is committed to meaningful review and revision of the policy as necessary or as requested by Indian Tribes or ANCs. This effort is also responsive to findings and recommendations of the Government Accountability Office's report, "TRIBAL CONSULTATION: Additional Federal Actions Needed for Infrastructure Projects," which were developed from input from Indian tribes and tribal organizations.

Our goal is to update the policy to reflect current authorities and current standards, while continuing to improve DHS's processes for ensuring meaningful consultation with tribal governments. Through revisions to the policy and implementation instruction, DHS seeks to: (a) outline how input from tribal consultations is considered and adjudicated; (b) clarify the statutory requirement to consult with ANCs on the same basis as Indian tribes; (c) improve consultation and coordination with the tribal governments of federally recognized Indian tribes with respect to oil spill prevention, preparedness, response, and natural resource damage assessment; (d) create an EO 13175 tribal working group through the Deputy Assistant Secretary of Intergovernmental Affairs; and (e) establish a sound training and education program for tribal affairs practitioners and other DHS staff who work with Indian tribes.

This consultation period will facilitate receipt of tribal leaders' feedback during the policy update process. We will engage tribal and ANC officials through face-to-face meetings, national and regional association meetings and conferences, teleconferences, and webinars to gather input on the Tribal Consultation Policy. Tribal officials' suggestions and comments will help inform and refine the policy and identify any other areas for improvement for the updated policy. Comments during the consultation period will be considered by DHS, and a summary of decisions will be made available on the DHS website and shared with specific commenters to the greatest extent possible.

Dr. David Munro, Director of Tribal Affairs in OPE's Office of Intergovernmental Affairs, will serve as the DHS Consultation Official for this effort and he may also appoint regional consultation representatives to be responsive to the needs and requests of the tribes and to facilitate increased engagement. Comments can be emailed to DHS.IGA@hq.dhs.gov, or be

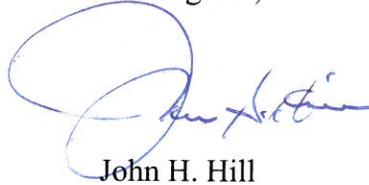
Tribal Consultation Policy Revision

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mailed to: Office of Partnership and Engagement, ATTN: Tribal Consultation MS-0385,
DHS/OPE, 2707 Martin Luther King, Jr. Ave., SE, Washington, DC 20528-0385.

Enclosed is a copy of the current DHS Tribal Consultation Policy. Your comments and recommendations will be key to ensuring that the revised policy continues to meet your tribe's needs. We look forward to receiving your valuable input. You, or your representative, can reach out to Dr. Munro at (202) 360-8998 or david.munro@hq.dhs.gov if you have any questions or input.

Best regards,



John H. Hill
Assistant Secretary

Enclosure

Planning Draft
DHS Tribal Affairs, Tribal Consultation Engagements
Last Updated 191023
Tentative and Working Consultation Availability

Confirmed Webinars	
<u>Agenda</u> <ol style="list-style-type: none"> 1. Overview of current DHS Tribal Consultation Policy 2. Snapshot of potential and required changes 3. Overview of consultation drafts and comments from participants 4. Discussion of engagement needs 	
Webinar Friday, November 8 3:00 ET https://share.dhs.gov/tribalaffairs/	Webinar Thursday, November 21 10:00 and 3:00 ET https://share.dhs.gov/tribalaffairs/
Webinar Monday, November 25 3:00 ET https://share.dhs.gov/tribalaffairs/	Webinar Tuesday, December 10 10:00 and 3:00 ET https://share.dhs.gov/tribalaffairs/
Webinar Wednesday, December 11 3:00 ET https://share.dhs.gov/tribalaffairs/	
More to be scheduled in January through March 2020	

Upcoming Direct Engagement Travel Focus Areas	
Week of December 2 and 9 West/Southwest	Week of December 16 Oklahoma

Future Direct Engagement Travel Focus Areas	
Alaska Northwest Plains Mountain Midwest	

To update its Tribal Consultation Policy, the Department of Homeland Security is creating a Directive and an implementing Instruction. The Directive is intended to be short and provide the policy, responsibilities, and requirements. The Instruction is intended to be more detailed and outline actions and activities to fulfill the Directive. The purpose of this is to inform the review of alignment of the current policy to the Directive and Instruction. This is not reflective of any changes that the Department is interested in consulting with Tribes.

Department of Homeland Security Tribal Consultation Policy

I. Introduction

A. The United States Government has a unique legal and political relationship with American Indian and Alaska Native Tribal Governments as set forth in the Constitution of the United States, treaties, statutes, court decisions, executive orders, and memoranda. The United States recognizes the right of Federally-recognized Indian Tribes (“Indian Tribes”) to self-government. Indian Tribes exercise inherent sovereign powers over their members and territories.

Policy statement will be included in the Directive

B. The Department of Homeland Security (DHS) is committed to strengthening the government-to-government relationship between the United States and Indian Tribes. DHS recognizes that agency policies, programs, and services may directly or indirectly impact Indian Tribes and is committed to regularly and meaningfully collaborating, communicating, and cooperating with Indian Tribes with regard to policies that have Tribal Implications.

D. Thus, in accordance with Presidential Memoranda issued in 1994, 2004, and 2009 and Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” (Nov. 9, 2000), 65 *Fed. Reg.* 67,249, DHS adopts this DHS Tribal Consultation Policy.

Authorities will be included in the Directive and Instruction

E. This DHS Tribal Consultation Policy outlines the guiding principles under which DHS is to engage with governments of Indian Tribes. The DHS Tribal Consultation Policy is intended to be continually updated and refined to reflect our ongoing engagement and collaboration with Tribal partners.

A revised purpose statement will be included in the Instruction.

II. Definitions

A. “Communication” refers to the verbal, electronic, or written exchange of information between DHS and Indian Tribes.

Definitions will be included in the DHS Instruction

B. “Consultation” involves the direct, timely, and interactive involvement of Indian Tribes regarding proposed Federal actions on matters that have Tribal Implications.

Definition of Alaska Native Corporation will be included.

C. “Exigent Situation” refers to an unforeseen combination of circumstances or the resulting state that calls for immediate action in order to enforce or uphold the law; to provide for the national defense; or to preserve life, health, national security, national resources, tribal resources, property, rights, or interests.

D. “Indian Tribe” refers to 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.

E. “Tribal Government” refers to the recognized body of an Indian Tribe, including any Alaska Native Village defined in or established pursuant to the *Alaska Native Claims Settlement Act* (85 Stat. 688).

F. A “Tribal Implication” exists when a DHS policy or action causes a substantial direct effect on 1) the self-government, trust interests, or other rights of an Indian Tribe; 2) the relationship between the Federal Government and Indian Tribes; or 3) the distribution of rights and responsibilities between the Federal Government and Indian Tribes.

III. Consultation with Tribal Governments

A. To the greatest extent practicable, subject to Exigent Situations and to the extent permitted by law, DHS will engage in Consultation with affected Tribal Governments prior to adopting policies or taking actions that are identified by DHS as having Tribal Implications.

B. As part of the Consultation process, DHS will take the following affirmative steps:

(i) Solicit input from Tribal Governments of Indian Tribes for which DHS has identified a Tribal Implication, taking into account the scope of the policy in question, the timeline for final decision-making, and any other relevant criteria.

(ii) Notify appropriate Tribal Governments of DHS’s desire to engage in Consultation. Notice should be given as early in DHS’s decision-making process as reasonably possible, preferably in writing, and with sufficient detail about the proposed actions or policies that have Tribal Implications.

(iii) Incorporate the input received from the Tribal Governments into DHS’s decision-making process.

(iv) Communicate DHS decisions to the Tribal Governments engaged in the Consultation.

The steps listed above provide general principles to guide engagement; the specific manner in which DHS and the Indian Tribes engage in Consultation will be flexible in recognition of the uniqueness of each Indian Tribe and the wide range of Federal actions that may warrant Consultation. In many cases, Consultation will most appropriately occur between officials of Tribal Governments and DHS personnel at the local level. In some cases, particularly with regard to policies or actions of national scope, Consultation may warrant national meetings, special work groups, or other mechanisms as determined by DHS and the impacted Tribal Governments in order to best foster productive communication.

C. The Office of Intergovernmental Affairs will coordinate and support implementation of the DHS Tribal Consultation Policy across the Department. Each DHS operating component shares in the Department-wide responsibility to fully engage in Consultation over Tribal Implications of DHS policies and actions. While much of the contact between Indian Tribes and DHS will occur at the

Definitions to be included in Instruction.

To be included in Directive

To be expanded, and detailed and included in Instruction.

To be updated and policy included in Directive and actions included in Instruction.

local level, the DHS Office of Intergovernmental Affairs serves as the central point of contact at DHS for engagement with Indian Tribes. Each DHS component must have a designated tribal liaison as required by the DHS Memo, *Designation of Component Tribal Liaisons*, dated November 3, 2009.

Same as above.

D. As appropriate, DHS will take steps to implement and streamline processes by which Tribal Governments may apply for waivers of statutory and regulatory requirements.

Policy statements to be included in Directive.

E. Consultation can be initiated by either DHS or by a Tribal Government.

IV. Applicability of the Federal Advisory Committee Act

The provisions of the *Federal Advisory Committee Act* (5 U.S.C. App.) (FACA) do not apply to Consultations undertaken pursuant to this DHS Tribal Consultation Policy with Tribal Governments. In accordance with section 204(b) of the *Unfunded Mandates Reform Act of 1995* (Pub.L. 104-4, approved March 22, 1995), FACA is not applicable to Consultations between the Federal Government and elected officers of Tribal Governments (or their designated employees with authority to act on their behalf).

FACA statement to be included in Directive.

V. General Provisions

A. DHS will periodically consult with Tribal Governments to review the effectiveness of this DHS Tribal Consultation Policy and make revisions as necessary.

General provisions will be included in Directive.

B. This document has been adopted for the purpose of strengthening government-to-government relationships, communications, and mutual cooperation between DHS and Tribal Governments. This document is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other persons. This document is effective on the date it is signed.

C. DHS adopts this DHS Tribal Consultation Policy pursuant to Executive Order 13175. This DHS Tribal Consultation Policy does not replace or change any existing Co-obligations of DHS under the *National Environmental Policy Act*, the *National Historic Preservation Act*, Section 102 of the *Illegal Immigration Reform and Immigrant Responsibility Act*, or any other statute.

This Consultation Draft of a potentially new Directive is provided as a draft for tribal consultation related to the updated of the Department of Homeland Security's Tribal Consultation Policy and creation of a new implementing instruction. POC is David Munro at 202-360-8998 or david.munro@hq.dhs.gov

CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS

I. Purpose

This Directive creates an accountable policy for the implementation of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," and Section 706, "Improved Coordination with Tribal Governments" of the "Coast Guard Authorization Act of 2010." This Directive establishes the Department of Homeland Security's (DHS or Department) policy, outlines responsibilities, and establishes requirements regarding consultation and coordination with tribal governments on matters that may have tribal implications. This Directive is intended to provide flexibility to each DHS component to address whole community mission requirements without requiring each component to establish a separate supporting tribal consultation policy. This Directive reinforces a foundation for honoring tribal sovereignty, accompanied by productive and long-lasting collaborative communications, consideration, and engagement with tribal governments and tribal organizations.

The United States Government has a unique legal and political relationship with American Indian and Alaska Native Tribal Governments as set forth in the Constitution of the United States, treaties, statutes, court decisions, executive orders, and memoranda. The United States recognizes the right of federally-recognized Indian Tribes ("Indian Tribes") to self-government. Indian tribes exercise inherent sovereign powers over their members and territories.

The Department of Homeland Security (DHS) is committed to strengthening the government-to-government relationship between the United States and Indian Tribes. DHS recognizes that agency policies, programs, and services may directly or indirectly impact Indian Tribes and is committed to regularly and meaningfully collaborating, communicating, and cooperating with Indian tribes with regard to policies that have Tribal Implications.

II. Scope

This Directive applies throughout DHS. DHS Tribal Consultation Policy of May 11, 2011 is hereby superseded.

III. Authorities

- A. Public Law 111-281, "Coast Guard Authorization Act of 2010"
- B. Public Law 108-199, "Consolidated Appropriations Act, 2004"
- C. Public Law 108-447, "Consolidated Appropriations Act, 2005"
- D. Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments"
- E. DHS Delegation Number 24000, Delegation to the Assistant Secretary for Intergovernmental Affairs

IV. Responsibilities

- A. The **Deputy Assistant Secretary, Office of Intergovernmental Affairs**, oversees the administration and direction of the Tribal Affairs program to ensure compliance in consultation and collaboration with Indian Tribal Governments and Alaska Native Corporations.
 - 1. Ensures proper staffing and resource allocations within IGA to carry out the functions and activities in this Directive and the Instruction.
- B. The **Director of Tribal Affairs** administers the Department's tribal affairs program.
 - 2. Maintains situational awareness of homeland security issues of interests of Indian tribes and ANCs. Provides expertise, direct support, and recommendations to DHS component and office tribal affairs practitioners
 - 3. Supports the Deputy Assistant Secretary for Intergovernmental Affairs in managing and implements this Directive and accompanying Instruction.
 - 4. Develops and delivers training, workshops, webinars, symposiums, strategic planning, collaboration activities; etc.
 - 5. Supports components and offices in carrying out their responsibilities outlined in this Directive and Instruction.
- C. **Component Heads** support Department-wide implementation of and compliance with this Directive and accompanying Instruction.

V. Policy and Requirements

A. Policy Statements:

1. The Department respects the nation-to-nation relationship between the federally recognized Indian tribes and the United States. The Department is committed to upholding the federal trust responsibility to Indian tribes and adhering to the various treaties and agreements made between the governments.
2. The Department also recognizes that, although it may not be able to provide direct services, nor have a nation-to-nation relationship with previously recognized, state-recognized, or otherwise acknowledged tribes that working collaboratively with these non-recognized tribes contributes to the homeland security mission considerations in working across all sectors.
3. DHS is committed to early collaboration and meaningful consultation with Indian tribes across all component programs in matters that may have Tribal Implications.
4. The Office of Intergovernmental Affairs will coordinate and support the implementation of the DHS Tribal Consultation Policy across the Department. Each DHS component and office shares in the Department-wide responsibility to fully engage in consultation over Tribal Implications of DHS policies and actions. While much of the contact between Indian Tribes and DHS will occur at the local level, the DHS Office of Intergovernmental Affairs serves as the central point of contact at DHS for engagement with Indian Tribes. Each DHS component must have a designated tribal liaison as required by the DHS Memo, Designation of Component Tribal Liaisons, dated November 3, 2009.

B. Consultation in General:

1. To the greatest extent practicable, subject to Exigent Situations and to the extent permitted by law, DHS will engage in Consultation with affected Tribal Governments prior to adopting policies or taking actions that are identified by DHS as having Tribal Implications.
2. As appropriate, DHS will take steps to implement and streamline processes by which Tribal Governments may apply for waivers of statutory and regulatory requirements.
3. Consultation can be initiated by either DHS or by a Tribal

Government.

C. **Requirements:**

1. All components and offices will appoint a primary tribal government liaison that will work with other tribal affairs practitioners across the Department to facilitate a coordinated approach to working with Indian tribes and conduct of consultations.
2. All components and offices will initiate early collaboration with Indian tribes on potential or proposed actions, including legislative recommendations and rulemaking that may have tribal implications or have the potential to create an unfunded mandate, including for the voluntary participation in federal programs, to evaluate the need for formal consultation.
3. All formal consultations with federally recognized tribes on matters that have been identified as potentially having tribal implications will be conducted under advisement of the DHS Tribal Consultation Official.

B. **General Provisions:**

1. DHS will periodically consult with Tribal Governments to review the effectiveness of this DHS Tribal Consultation Policy and make revisions as necessary.
2. This document has been adopted for the purpose of strengthening government-to-government relationships, communications, and mutual cooperation between DHS and Tribal Governments. This document is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other persons. This document is effective on the date it is signed.
3. DHS adopts this DHS Tribal Consultation Policy pursuant to Executive Order 13175. This DHS Tribal Consultation Policy does not replace or change any existing Co-obligations of DHS under the National Environmental Policy Act, the National Historic Preservation Act, Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act, or any other statute.
4. The provisions of the Federal Advisory Committee Act (5 U.S.C. App.) (FACA) do not apply to Consultations undertaken pursuant to this DHS Tribal Consultation Policy with Tribal Governments. In accordance

with section 204(b) of the Unfunded Mandates Reform Act of 1995 (Pub.L. 104-4, approved March 22, 1995), FACA is not applicable to Consultations between the Federal Government and elected officers of Tribal Governments (or their designated employees with authority to act on their behalf).

VI. Questions

Address any questions or concerns regarding this Directive to the Director of Tribal Affairs, Office of Partnership and Engagement, Office of Intergovernmental Affairs.

Consultation Draft

This consultation draft is prepared for utilization in discussion with Indian tribe and ANCs in the Department's update to its Tribal Consultation Policy. This is intended to be a primary internal management document utilized by DHS staff to fulfill the requirements of EO 13175.

Issue Date: MM/DD/YYYY

IMPLEMENTING CONSULTATION AND COORDINATION WITH TRIBAL GOVERNMENTS

I. Purpose

This Instruction implements the Department of Homeland Security (DHS or Department) Directive (insert MD #), "Consultation and Coordination with Tribal Governments." It describes the responsibilities, requirements, and procedures for consulting with tribal governments and Alaska Native Corporations created under the Alaska Native Claims Settlement Act, on matters that may have tribal implications. The Instruction serves as a foundation for collaboration and consultation in meeting the requirements of Executive Order 13175, "Consultation and Coordination With Indian Tribal Governments."

II. Scope

This Instruction applies across the Department. Each component and major office shall appoint at least one tribal affairs practitioner as its primary point of contact in tribal affairs matters to serve to enhance nation-to-nation relations between Indian tribes and the Department. This component or office tribal affairs practitioner will serve as the primary coordinator of inter-organizational and -agency efforts and work to support a unified approach to tribal affairs.

This Instruction replaces and supersedes the Deputy Secretary Lute, November 3, 2009, memorandum outlining requirements for tribal affairs points of contact across the Department.

III. References

- A. DHS Delegation 24000, "Delegation to the Assistant Secretary for Intergovernmental Affairs."
- B. DHS Directive ___-___, "Consultation and Coordination with Tribal Governments."

IV. Definitions

- A. **Accountable Process:** An accountable process is one by which the component or office is able to track and report on the efforts on any given

consultation, from initial outreach and consultation activities to how the results of the consultation were used to inform decision making.

B. **Alaska Native Corporation:** Created under the Alaska Native Claims Settlement Act, these organizations manage lands and resources for Alaska Natives. While not federally recognized tribes, consultation is required with these organizations in some instances as if they were tribes. Their shareholders are generally members of federally recognized tribes in Alaska. This category generally includes both regional and village corporations established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. § 1601 et seq.].

C. **Collaboration:** Occurs when two or more people or organizations work together in an intersection of common goals by sharing knowledge, learning and building consensus. Collaboration is the mutual development of perspectives or actions that are of mutual interest, as in a tribe and a DHS component working together on a policy that benefits both the component or office and the tribe.

D. **Communication:** Refers to the verbal, electronic, or written exchange of information between DHS and Indian tribes.

E. **Consultation:** Tribal consultation is the timely, meaningful, and substantive dialogue between DHS officials who have delegated authority to consult, and the tribal government representatives of federally recognized Indian tribes, appropriate and appointed leadership of Alaska Native Corporations, or their designated representative(s), pertaining to actions that may have tribal implications. It is important to distinguish between formal consultation and other more common collaboration and coordination actions. For instance, the distribution of information from a Component or Office to one or more tribes is not consultation. Neither are day-to-day communications or outreach activities, however important or influential, between staff without leadership involvement. While notification, technical communications, and outreach are all essential and are often used as part of consultation, they alone do not constitute formal government-to-government consultation.

F. **Coordination:** Is the communication of planned or potential activities of various entities.

G. **DHS Tribal Consultation Official:** Is the official responsible for carrying out a specific consultation effort. Consultation may only be conducted by employees who have delegated authority for consultation.

H. **Exigent Situation:** refers to an unforeseen combination of circumstances or the resulting state that calls for immediate action in order to enforce or uphold the law; to provide for the national defense; or to preserve life, health, national security, national resources, tribal resources, property, rights, or interests.

I. **Federally Recognized Indian Tribe or Indian Tribe:** refers to an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges existing as an Indian Tribe pursuant to the “Federally Recognized Indian Tribe List Act of 1994”, 25 U.S.C. 479a.

J. **Listening Session:** is a mode of communication. A listening session is utilized to gather input from tribal leaders on a subject or interest of the Department to help frame potential recommendations and processes for improvement.

K. **Tribal Government:** refers to the recognized body of an Indian Tribe, including any Alaska Native Village defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688).

L. **Tribal Implication:** exists when a DHS policy, legislative recommendation, or planned action causes, or is likely to cause, a substantial direct effect on 1) the self-government, trust interests, or other rights of an Indian tribe; 2) the relationship between the Federal Government and Indian tribes; or 3) the distribution of rights and responsibilities between the Federal Government and Indian tribes.

M. **Tribe:** Tribe is shorthand for “Indian tribe” as used in Executive Order 13175, which means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

V. Responsibilities

A. The Deputy Assistant Secretary for Intergovernmental Affairs is the DHS official responsible for the implementation of E.O. 13175, and manages the execution of this Instruction and enabling Directive.

B. The Director of Tribal Affairs, Office of Intergovernmental Affairs carries out the activities of the Tribal Affairs Program and supports the Deputy Assistant Secretary for Intergovernmental Affairs in the management and execution of this Instruction and:

1. Serves as the designated lead for tribal relations and consultation and the main point of contact between the Department and tribal leaders.
2. Provides oversight of DHS programs and policy that may affect tribal governments, encouraging and supporting supportive nation-to-nation relationships that strengthen external and internal coordination and communication about tribal concerns and the DHS mission.
3. Develops and supports workshops, education, and training for DHS

employees to help them work more effectively with tribal government and other partners.

4. Chairs and coordinates the internal DHS Tribal Consultation Policy Working Group and ad-hoc groups and efforts necessary for intra-departmental coordination.

5. Supporting component and office tribal affairs practitioners in efforts related to this Instruction and enabling Directive.

C. DHS Component and Office Heads will appoint at least one headquarters senior level official to represent component and office leadership in tribal affairs matters. Components and offices may develop or modify existing policies to meet the minimum standards and practices as established in this Instruction.

D. Each component or office appointed tribal affairs practitioner serves as the component principal tribal affairs practitioner. Duties are established by the component or office based on operational needs and mission space. Duties and practices include, but are not limited to:

1. Working in a collaborative and consultative manner with tribal government and association partners in areas of responsibility.

2. Serving as an advocate for tribal government interests during policymaking processes, and considering and incorporating communicated tribal government perspectives into programs and initiatives as warranted appropriate.

3. Monitoring component or office outreach to, and coordination with, federally recognized Indian tribes, including implementing and maintaining culturally responsive and appropriate engagement programs to explain DHS programs and initiatives.

4. Developing and assisting in the drafting of guidance, establishment of training requirements and programs, providing input for strategic planning and other correspondence, and addressing tribal issues.

5. Serving as the primary point of contact for meetings and information requests from tribal government leaders, their staff representatives, and tribal organizations.

6. Coordinates and communicates tribal affairs matters.

7. Contributes to DHS efforts in carrying out Executive Order 13175, including participation in the DHS Tribal Consultation Policy Working Group by actively participating in related activities.

VI. Content and Procedures

A. **Policy:**

1. This Instruction adheres to the policy statements of the consultation process outlined in the DHS Tribal Consultation Policy. Each DHS operating component shares in the DHS responsibility to fully engage in consultation with tribal governments on matters that may have tribal implications.

2. DHS is committed to strengthening the nation-to-nation relationship between the United States and Indian tribes and DHS supports meaningful and significant collaboration and consultation with Indian tribes across all component programs.

3. Meaningful consultation with Indian tribes ensures that tribal leaders have enough information to gauge their interests in consultation with appropriate time to provide input to the subject of the consultation.

B. EO 13175 Implementation

1. There is created

2. Body

3.

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

1. Actions commonly confused with consultation. It is also important to distinguish between consultation and other actions. Notification in the form of distribution of information from a DHS component or office to one or more tribes is not consultation. Neither are technical communications or outreach activities, however important or influential, between staff without leadership involvement. While notification, technical communications, and outreach are all essential and are often used as part of consultation, they alone do not constitute government-to-government consultation.

2. Consultation Record. A record of tribal consultation must be produced and maintained by the consulting DHS component or office. At a minimum, the consultation record must include major milestones and activities of the consultation and a record adjudication of consultation considerations. This record will be maintained in accordance with component or office records management requirements.

3. Principle of Mutual Concurrence. As a general principle,

consultation only occurs when the DHS component or office and tribal officials mutually agree that consultation is taking place. The DHS component or office consultation officials and their staff should be clear in identifying, in collaboration with the relevant tribal officials when an action or set of actions constitutes government-to-government consultation.

4. Principle of Component or Office Executive Authority. The consultation does not require the Department to do anything a tribal or ANC representative requests, but rather requires DHS to take those views, information, rights, and interests into serious, deliberative consideration. Consultation should be part of an effort to cooperate and collaborate in good faith with tribal and ANC representatives. Consultation and collaboration with tribes and ANCs helps the Department better serve tribal communities.

D. **Consultation Officials:**

1. For DHS, consultation may only be conducted by employees who have delegated authority for consultation. This delegation may exist in a formal delegation of authority or may also come appropriate DHS component and office leadership and should be written. This delegation most often will be seen in a notice in the federal register or notification of intent to engage in consultation through a “Dear Tribal Leader” letter. The level of authority of the consultation official should be based on the nature of the regulation, policy, program or planning decision and how it may affect the consulting tribes. The consultation official should be considered in parity with the tribal officials or representatives consulting with the Department.

2. For the tribes, consultation is conducted by elected tribal representatives, tribal members with authority to speak on behalf of the tribe, or tribal employees or designees who have delegated authority from their tribal government for consultation. This delegation is determined by the Tribes themselves, as sovereign governments. The consulting official must be designated by the tribe, and DHS components and offices should seek, with respect to tribal customs and traditions, written confirmation from the Tribe that any official participating in consultation have authority from their Tribal government.

E. **Consultation and Tribal Implications:** A tribe, DHS, or another party may take action that could initiate consultation, or at least an evaluation of whether consultation is required or desired. Under EO 13175 the term “policies with tribal implications” includes “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.”

If there is any potential for an effect, consultation may be required, depending on the extent (significance) of the effect. If the DHS component or office does not know the significance of the effect, or even whether there will be an effect, the DHS component or office should inquire of potentially affected tribes whether the tribes think there would be an effect, how significant such an effect may be, and whether they would like to consult.

The list below is based on the EO 13175; EO 13175 serves as the baseline for tribal consultation and it provides examples of other considerations for initiating consultation. The list is meant to serve as a guide to some of the actions that might trigger consultation, and should not be considered exhaustive, only illustrative:

1. Tribal Initiated
 - a) Request for Federal Assistance or Intervention
 - b) Request from Tribal Leader or ANC
 - c) Waiver Request from Tribe or ANC
 - d) Request from Intertribal organization representing Federally Recognized Tribes
2. DHS Office or Component Initiated from any program activities that may directly affect one or more Indian Tribes; to the extent practicable and permitted by law or policies that have Tribal implications
 - a) Component or Office Change in Role in Program Delivery
 - b) Formulation and Implementation of Policies
 - c) Implementation of Statute
 - d) Rulemaking
 - e) Application Processes
 - f) Creation of Forms
 - g) Legislative Proposals or Positions
 - h) Development of Policies or Implementing Instructions

F. **Consultation Timelines:**

1. For national-level actions that may affect Indian tribes from across the country or Alaska Native Corporations, the entities being consulted should have a realistic, meaningful opportunity to review the issue and associated materials, discuss fully with component or office consulting officials, and have concerns and suggestions received by the responsible official in time to be incorporated into the decision being made.

Notification to Indian tribes of the opportunity to consult does not itself constitute consultation.

2. **Minimum Consultation Period.** Widely applicable national issues must provide a consultation period of at least 120 days from the date the Tribe or ANC received the information on which they are being invited to consult. This will require providing the notice of opportunities to consult

prior to the beginning of the consultation period.

Other actions (such as consultation on national issues that may affect only one or a few Indian tribes or ANCs, or on regional or more local decisions) may require less time for consultation. Also, in emergencies, shorter periods may be necessary.

G. **Tribal Consultation Processes:** The form of tribal consultation follows the context in which it is conducted. Some consultations occur at the national level, others occur at regional levels. Some require years of planning and execution; others occur in the process of a conversation. Others are somewhere in the middle. In general, however, most tribal consultation will follow a common progression. Throughout all these types and modes of consultation only occurs when the DHS consultation official of a DHS component or office and tribal officials mutually agree that consultation is taking place. DHS consultation officials and their staff should be clear in identifying, in collaboration with the relevant tribal officials, when an action or set of actions constitutes government-to-government consultation.

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

- a) Single event. Sometimes a single meeting between the consulting officials will suffice;
- b) Multiple events as part of a process. Some policies, programs, or planning decisions may require multiple consultation meetings. For instance, consultation may need to be conducted across the country in multiple locations or both prior to publication of a proposed rule as well as prior to publishing the final rule; and
- c) Ongoing as part of a relationship. Often, DHS component and office tribal affairs practitioners and staff have regularly scheduled meetings, as well as interactions on an “as needed” basis, with tribal and ANC officials.

2. Modes of Consultation. There are many ways, or modes, for conducting meaningful consultation of these, real-time, in-person dialogue is the preferred method; however, the parties to the consultation may agree to carry out consultation by other modes. Sometimes there is a need to be creative about how to conduct a consultation, regardless of whether it is a single session, multiple interactions, or part of an ongoing relationship. Consultation is based on dialogue, and dialogue can occur in many forms. We often think of consultation as taking place between

governments in the form of a face-to-face meeting, but it may also occur via telephone or video conference. Budget constraints of both parties must be taken into consideration when planning consultation sessions. Postal mail, email, or other forms of communications media are generally utilized to ensure that all parties have relevant documents, maps and so forth, before the start of the consultation. Consultation by written correspondence (paper or electronic) is possible, although face-to-face consultation is always preferred. In such circumstances, all consulting parties should agree that consultation is indeed taking place in such an exchange, and it should be documented as such. Modes of consultation are not mutually exclusive and may include one or more of these:

a) Meetings: DHS components and offices may convene one or more meetings with affected, or potentially affected, tribes to discuss all pertinent issues in a national, regional, or local forum, as appropriate, to the extent practicable and permitted by law, within allowable and available funding, when a proposed plan, policy or program may significantly affect one or more tribes.

1) Tribes may request to meet one-on-one with a DHS component or office head, or their designated representative, to consult on issues specific to that Indian Tribe. DHS components and offices should attempt to meet these requests when practicable and offer other means of engagement and collaboration to be responsive to requests. Other types of meetings and conferences occur, which may not be considered consultation sessions, but these non-consultation meetings may provide an opportunity to share information, conduct workshops, and provide technical assistance to tribes.

2) Regional Tribal Consultation: DHS components and offices have held consultations with a regional approach in the past. DHS will strive to continue holding regionally-based tribal consultation events, as appropriate and necessary. When funding constraints make execution of such events impossible, DHS will nonetheless endeavor to provide meaningful consultation venues. Regular collaboration and engagements will continue to solicit tribal insights, priorities, and unmet needs in the homeland security mission space. These sessions will provide an opportunity for tribes to articulate their comments and concerns on budgets, regulations, legislation, and DHS policy matters. When conducted, regional in-person or telephonic venues may be preceded by informational sessions conducted primarily through electronic means.

- 3) Regional elements of DHS components and offices will work collaboratively with the tribes in their respective areas of operation or regions on the development of consultation meetings, roundtables, and annual sessions. Regional elements should develop protocols for consultation with the tribes in their respective areas of operation and responsibility and should establish regular, collaboration and coordination relationships.
 - 4) Regional elements of DHS components and offices will work with tribes to identify tribal organizations that may assist in working with tribes in planning tribal consultation sessions.
 - 5) DHS components and offices will work collaboratively to facilitate tribal and state relations regarding DHS programs and services as they affect tribes and ANCs.
- b) Paper Correspondence. A series of correspondence between consultation officials may serve as a consultation. Written communications should clearly provide affected, or potentially affected, Tribes with information regarding the potential tribal implication and consultation topic.
 - c) Electronic Correspondence. Similarly, emails or electronic documents shared between consultation officials may serve as a consultation.
 - d) Tribal Resolution or Formal Letter of Position. Communications from tribes may come in the form of a formal resolution or letter depending on the governance of the Tribe. These resolutions or letters may be the most formal declaration of a tribe's position on or requesting formal consultation. Once a DHS component or office receives a tribal resolution or letter indicating a position, the component or office should respond appropriately. An appropriate response may include continued consultation using other modes.
3. Leveraging Intertribal Meetings. Several national and regional Intertribal organizations hold one or several conferences each year. Tribal leaders, including many who may have delegated authority to consult with DHS, attend these sessions. It can be worthwhile to inquire whether an Intertribal organization would be interested in scheduling consultation sessions with DHS officials during their meetings. This has the potential to leverage the attendance of multiple tribal leaders in a setting that is conducive to this type of discourse. Keep in mind, however, that such arrangements require consent of the Intertribal organization and planning

far in advance. DHS officials should avoid “taking over” an intertribal organization’s meeting and be sensitive to the organization’s needs. DHS officials should also keep in mind that consultation in these settings occurs between DHS component or office officials and delegated tribal officials, not with the sponsoring intertribal organization or individual tribal members.

4. Consultation Steps. The degree and extent of consultation will depend on the identified potential tribal implication. While this Instruction does not provide specific guidelines for every potential scenario, DHS components and offices shall utilize the following criteria to ensure that the requirements of this policy are satisfied.

- a) Identify the tribal implication (funding, policy, programs) and its context: complexity, implications, time constraints, issues.
 - 1) The need to develop a policy may be identified from within the DHS components and offices, or may be identified by tribes. This need may result from external forces such as Executive, Judicial, or Legislative Branch directives.
 - 2) Once the need to develop a policy or take an action is identified, a consultation planning process should begin. The DHS component or office may request technical assistance from the DHS Tribal Affairs Program in OPE/IGA for planning or conducting the tribal consultation process.
- b) Identify the affected/potentially affected tribes
- c) Identify the level and mode of consultation to be offered
- d) Coordinate the Schedule for Consultation. DHS Components and Offices should establish and adhere to a formal schedule of meetings to consult with tribal governments and representatives.
 - 1) DHS components and offices are encouraged to establish additional forums for tribal consultation and participation, and for information sharing with tribal leadership. Consultation schedules should be forwarded to DHS Tribal Affairs for wide distribution through GovConnect.
 - 2) Work sessions may be held to solicit official tribal comments and recommendations on policy and budget matters affecting tribes. These sessions at roundtables, forums, and meetings will

provide the opportunity for meaningful dialogue and effective participation by tribes.

e) Provide Notice. Upon the determination of the level of consultation necessary, proper notice of the level of consultation utilized shall be communicated to affected and potentially affected tribes inviting their participation. Notice shall be made using all appropriate methods including mailing, broadcast e-mail, Federal Register, and other outlets. Notices shall include clear and explicit instructions for the submission of comments. Notice is not, by itself, consultation, but rather the communication of the opportunity for consultation. DHS components and offices must provide reasonable and timely notice of consultation events initiated by the DHS components and offices. The minimum standard notice period should be 30 business days, but in some instances involving complex policies or multiple policies, the notice period may extend for up to 120 days. Shorter periods may be necessary during exigent situations.

5. Incorporate Results of the Consultation Effort as Appropriate. For instance, if rulemaking is the subject of consultation, the preamble to the regulation must contain a discussion of the consultation effort, the comments received and how the DHS component or office addressed the comments received during consultation. How results of the consultation are incorporated will depend on the nature of the tribal implication.

H. Dialogue, Coordination, and Collaboration with Other Groups

1. In cases where a government-to-government relationship does not exist, consultation is encouraged to the extent practicable and permitted by law. Some aspects of these kinds of consultation are set out in statute and administrative policy.

2. The Department is able to interact with organizations and/or groups that do not represent federally recognized tribal governments. However, if the Tribe or Department wants to include organizations that do not represent specific federally-recognized tribal governments on advisory committees or workgroups, then FACA requirements must be followed. The intergovernmental committee exemption to FACA is found in the Unfunded Mandates Reform Act (2 U.S.C. 1534).

3. The DHS components and offices will work to identify those instances when other Native American organizations and groups may be negatively affected if excluded from the consultation process. Tribal organizations and groups include urban Indian organizations, non-

federally recognized tribal groups, governing bodies of tribes with federal or state reservations, state-recognized tribes, other Indian organizations, Native Hawaiians, Native American Pacific Islanders (including American Samoan Natives), and other Native American groups that, by the nature of their business, serve American Indians, Alaska Natives or Native Americans.

4. Although consultation may be allowed with these organizations and groups, non-federally recognized tribes and organizations and groups that do not represent federally recognized tribes do not fall under the intergovernmental committee exemption to FACA found in 2 U.S.C. 1534. As a result, the Component or Office may be required to adhere to FACA when such organizations are made a part of an advisory committee or workgroup. DHS Tribal Affairs and Components and Offices will work to facilitate any required consultation forums, the level of consultation required, recording of meetings, evaluate the results, determine whether additional consultation on policy items may be needed, and report to the affected Native American groups and organizations.

5. Involving States. In some instances, the authority and appropriations for DHS programs, grants in aid, and services that affect tribes flow through the states for the benefit of tribes, based on statute, regulation or DHS policy. It is important that DHS facilitate collaboration and communication between states and tribes under appropriate circumstances as determined by all parties involved to ensure these activities are understood and carried out by the states. In these instances it is important to consider whether the requirement for consultation or collaboration has also been devolved to a state.

I. **Training, Education, and Workshops:** Training and workshop attendance will be mandatory for all DHS employees with tribal affairs responsibilities upon the following “Tier” groupings:

1. Tier 1 includes senior staff and management of DHS and its Components and Offices. This category is comprised of primarily political appointees or Senior Executive Service career employees.

2. Tier 2 includes DHS Component and Office senior management and staff designated to conduct tribal Consultations. This group includes high-level managers and leaders of other types of programs where those individuals would personally be involved in the consultation and collaboration processes.

3. Tier 3 includes all DHS employees.

4. Tier 1 and Tier 2 training and workshops should be conducted with a team comprised of professional non-governmental tribal consultation trainers and expert DHS staff. The inclusion of tribal governments as active participants in both the development and implementation of training programs is suggested.

5. Tier 1 and Tier 2 are competence and sensitivity level training respectively. Sessions will explain the history of the legal relationship between Tribes and the U.S. Government; the definition of Tribal sovereignty; the definition of trust responsibility; and the ramifications of the DHS Tribal Consultation per the President's agenda. Tier 1 and Tier 2 will involve components of legal issues as well as cultural competency training.

6. Tier 3 training is awareness level training and will be offered from the Office of Personnel Management (OPM) Go-Learn program, "Working Effectively with Tribal Governments" that can be accessed via the Internet.

VII. Questions

Address any questions or concerns regarding this Instruction to the Director of Tribal Affairs.

Consultation Draft for Discussion