

Secretary

U.S. Department of Homeland Security  
Washington, DC 20528



**Homeland  
Security**

November 25, 2009

Dear Tribal Leader:

At the recent White House Tribal Nations Conference on November 5, 2009, President Obama reaffirmed the Federal Government's commitment to meaningful consultation with Indian tribes and directed each Federal agency to develop a detailed plan of action to implement Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." I share the President's commitment to tribal sovereignty and self-determination and I am eager to hear from you how the Department of Homeland Security (DHS) can strengthen the relationship between the United States and tribal governments.

In my first months in office, I released a draft tribal consultation policy and solicited your views. We have heard from many of you and are on track to finalize this policy early next year. I am writing to you now to solicit any remaining comments you may have on the enclosed draft policy. Pursuant to the President's November 5, 2009 memorandum to all Federal agencies, I am also requesting your formal written recommendations for inclusions in the DHS "plan of action" we are developing to implement this policy. In order for us to meet the 90-day deadline set by the President, please submit all written comments to DHS no later than January 8, 2010.

In addition to submitting written comments, DHS will conduct two national conference calls with tribal leaders, and I hope that you will participate in one of these calls. I have enclosed details for the submission of written comments and participation in the conference calls.

Your support is crucial to our shared success. I look forward to receiving your perspective on these topics and working with you to meet our shared objective of keeping our communities safe. If you have any questions, please contact Stephanie Tennyson, Deputy Assistant Secretary for Intergovernmental Affairs, at (202) 282-9310.

Yours very truly,

A handwritten signature in black ink, appearing to read "Janet Napolitano", with a long horizontal flourish extending to the right.

Janet Napolitano

Enclosures



## **DHS Tribal Participation**

### **About the Department**

The Department of Homeland Security has a vital mission: to secure the Nation from the many threats we face. This requires the dedication of more than 225,000 employees in roles that range from transportation and border security to emergency response, from cybersecurity to chemical facility inspection. Our duties are wide-ranging, but our goal is clear—keeping America safe.

### **Formal Written Comments**

Please provide written comments no later than January 8, 2010, by e-mail or postal service.

E-mail Address: DHS.IGA@hq.dhs.gov

Mailing Address: Office of Intergovernmental Affairs  
ATTN: DA/S Stephanie Tennyson  
MS 3350  
U.S. Department of Homeland Security  
Washington, D.C. 20528

### **National Conference Calls:**

The two national tribal leaders' conference calls will be held on the following dates and time. We respectfully request that you dial in 15 minutes to prevent backlog. Please join us for one of the following calls:

Date: December 15, 2009  
Time: 11:00 a.m. (EST)  
Call-in number: 1-866-843-0890 (Domestic)  
1-412-317-9250 (International)  
Pass code: 84848

***OR***

Date: December 16, 2009  
Time: 2:00 p.m. (EST)  
Call-in number: 1-866-843-0890 (Domestic)  
1-412-317-9250 (International)  
Pass code: 30196

### **Questions?**

Please contact DHS's Office of Intergovernmental Affairs at (202) 282-9310 or DHS.IGA@hq.dhs.gov.

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## Department of Homeland Security Draft Tribal Consultation Policy

### I. Introduction

- A. The U.S. Government has a unique relationship with American Indian 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 territory. The Department of Homeland Security (DHS) and the Indian Tribes believe open and continuous communication is the basis for successfully pursuing mutually agreeable objectives.
- B. Thus, in accordance with Presidential Memoranda issued in 1994 and 2004 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.

### II. Definitions

- A. “Consultation” means the direct and interactive involvement of Indian Tribes in the development of regulatory policies on matters that have tribal implications. Consultation is the active, affirmative process of: (1) identifying and seeking input from appropriate Indian Tribal governing bodies and, as appropriate, individuals; and (2) considering their interest as a necessary and integral part of DHS’s decision-making process.
- B. “Exigent Situation” means an unforeseen combination of circumstances or the resulting state that calls for immediate action in order to enforce the law; provide for the national defense; or to preserve life, health, national security, national resources, tribal resources, property, rights, interests, or Federal funding.
- C. “Indian Tribe” means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the *Federally Recognized Indian Tribe List Act of 1994*, 25 U.S.C. 479a.

### III. Tribal Government Consultation

- A. To the greatest extent practicable, subject to Exigent Situations, and to the extent permitted by law, DHS will engage in Consultation with affected Indian Tribal governments prior to finalizing any policies that are identified by DHS as having tribal implications, where a tribal implication is understood to mean a substantial direct effect on the self-government, trust interests, or other rights of a Federally recognized Indian Tribe. DHS’s tribal Consultation will include the following procedures, as appropriate:

## DRAFT

- (i) On DHS rulemaking actions that relate to tribal self-government, tribal trust resources, or treaty and other rights, DHS will explore and, where appropriate, use consensual mechanisms for developing regulations which may include negotiated rulemaking.
  - (ii) DHS will consider any opportunities for processes under which Indian Tribal governments may apply for waivers of statutory and regulatory requirements and take appropriate steps to implement and streamline those processes, if any.
- B. The Office of Intergovernmental Affairs will serve as the lead Departmental office for the implementation of this policy and is the principal point of contact for Consultation with Indian Tribes on all DHS policies. That being said, it is DHS's policy that every operating Component of DHS shares in the Department-wide responsibility to coordinate, communicate, and consult with Indian Tribes on issues that affect Indian Tribal governments.
  - C. Based on a government-to-government relationship, and in recognition of the uniqueness of each tribe, a primary focus for Consultation activities is with individual tribal governments. When proposed Federal government policies are determined by DHS as having tribal implications, DHS will notify the affected tribe(s) and take affirmative steps to consult tribe(s) or its (their) designee. Tribal governments at any time may exercise their right to request Consultation with DHS.
  - D. Internal DHS policies and procedures are not subject to this policy.

#### **IV. Applicability of the Federal Advisory Committee Act**

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

#### **V. General Provisions**

- A. This document has been adopted for the purpose of enhancing government-to-government relationships, communications, and mutual cooperation between the Department of Homeland Security and Federally recognized Indian Tribal governments and 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.

## DRAFT

- B. This Consultation policy sets out the policy for Consultations with Indian Tribal governments with respect to DHS policies likely to have significant tribal impacts under Executive Order 13175. This tribal Consultation policy does not replace or change any existing consultation 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.

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