

NATIONAL CONGRESS OF AMERICAN INDIANS

November 24, 2009



The Honorable Ken Salazar
Secretary of Interior
1849 C Street, NW
Washington, DC 20240

Dear Secretary Salazar:

On November 5, 2009, you joined with President Obama in an historic meeting with tribal government leaders from across the United States. It was a proud day for our country as President Obama promised to improve the partnership between the federal government and tribal nations. As an initial step toward fulfilling his promise, the President issued an Executive Memorandum that directs all federal agencies to develop a plan within 90 days for consultation and coordination with tribal governments under President Clinton's Executive Order 13175.

The National Congress of American Indians is the largest national organization representing the broad interests of American Indian and Alaska Native tribal governments. I am writing to extend our assistance in meeting the President's charge, and have attached a short briefing paper for your consideration on ways to increase dialogue and cooperation with tribal governments. February 3, 2010 is fast approaching, and we want to make it as easy as possible for the Department of Interior to engage with tribal leaders in developing a plan.

Our fundamental request is that the federal government will go beyond dialogue and truly take action to meet its responsibilities in Indian Country. Tribal governments have a unique status in our federal system under the U.S. Constitution and numerous federal laws, treaties, and federal court decisions. Indian tribes have the power and responsibility to enact civil and criminal laws, and provide a broad range of governmental services to our citizens including law enforcement, education, health care, and management of lands the size of seven states.

As Secretary of Interior, we particularly hope that you will move forward on land reform measures to address the serious delays in land to trust, leasing and title reports that hamstring tribal development initiatives. Tribal leaders are also requesting swift action to address significant law enforcement concerns in Indian country, particularly to increase police presence through recruitment, training and retention reforms, and to address the delays in providing Special Law Enforcement Commissions.

Please feel free to contact me at any time if we can be of assistance, or ask one of your staff to contact Jacqueline Pat or John Dossett at jpata@ncai.org or jdossett@ncai.org.

Sincerely,

Jefferson Keel

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Background and Recommendations on Tribal Consultation and Government-to-Government Coordination

This background paper is intended to assist federal agencies in preparing to execute President Obama's November 5th Executive Memorandum, which requires each federal agency to develop a plan to implement Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments. E.O. 13175 was issued by President Clinton on November 9, 2000. The Executive Order was required by the Unfunded Mandates Reform Act of 1995, and is the companion to E.O. 13132 – Federalism – which applies to state governments. Although E.O. 13175 was created during the Clinton Administration, it is rooted in the longstanding relationship found in the U.S. Constitution, the Indian treaties, and the federal trust relationship.

In general, tribal leaders have strongly supported E.O. 13175, but have significant concerns about the way it has been implemented. Tribal concerns boil down to two points: 1) The Executive Order is viewed by federal agencies as merely a procedural requirement with no focus on the substantive goals of tribal self-government and fulfillment of the federal trust responsibility. Tribal leaders spend a great deal of time and resources engaging with a federal agency only to receive little response directed toward tribal recommendations. 2) Sometimes federal agencies ignore or refuse to carry out their responsibilities under the Executive Order, and there are no mechanisms for accountability.

Although these are serious concerns about the consultation process, tribal leaders acknowledge that the E.O. is a useful tool for improving the federal-tribal relationship, and that some consultation processes have worked well and generated positive and substantive results.

Recommendation #1 – Refocus on Substantive Goals while Respecting Tribal Sovereignty and the Federal Trust Responsibility

To address the first concern, federal agencies should focus on the substantive requirements of Executive Order 13175. Too often, federal agency officials fulfill the procedural requirements of “consultation,” but fail to reflect tribal concerns in final federal policies and regulations. Interpreting the Executive Order as only a procedural requirement—another hoop to jump through—undermines the effectiveness of the Order.

Section 3 of the Executive Order contains substantive “Policymaking Criteria” that lie at the heart of the federal-tribal relationship: “Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.” Section 3 specifically supports tribal self-government, directing federal agencies to “defer to Indian tribes to establish standards,” and “preserve the prerogatives and authority of Indian tribes.”

The purpose of the Executive Order is to improve the governmental services and programs on Indian reservations within a framework of tribal self-determination. Refocusing on action components provides a context for tribal consultation as a tool that is used to implement larger policy goals and not as an end in itself. In a nation-to-nation relationship, tribal consultation should be defined as a process of decision-making that works in a cooperative manner toward reaching a consensus before a decision is made or action is taken. The goal of consultation is to

reach mutually agreeable understandings and decisions that acknowledge the interests of both the federal and tribal governments.

Agency plans should also acknowledge the fundamental purpose of tribal self-determination and the federal trust responsibility. These are longstanding federal policies intended to assure that Indian tribes will maintain their cultures and viability as distinct groups of people. An understanding of the values of tribal cultures is needed in order to instill meaning into what are otherwise abstract principles.

Recommendation #2 – Develop Accountability and Tracking Provisions

NCAI strongly urges the federal agencies to develop accountability and tracking provisions under the Executive Order. Section 7 of the Executive Order contains provisions on accountability to be carried out by the Office of Management and Budget (OMB), but these have not been effective. It has been too easy for federal officials to ignore both the substantive and the procedural aspects of the Executive Order. On substantive issues such as law enforcement, land management, health care, and education federal reports demonstrate that tribal leaders have raised similar issues for decades and most often have received little response. In addition, some agencies have intentionally bypassed tribal consultation in order to avoid certain tribal opposition. (For example, in 2006 the Department of Justice submitted Adam Walsh Act amendments to Congress that seriously undermine tribal sovereignty. Tribal leaders support the goals of the Adam Walsh Act, but oppose the provisions that shift jurisdiction to states.)

NCAI encourages federal agencies to develop a tracking system to ensure that the agency responds and takes action to address the issues that are raised through tribal consultation. Tribes understand that the federal agencies are bound by legal, fiscal, and policy restraints, but within those boundaries, the federal government has a responsibility to respond to legitimate tribal concerns and to engage in real dialogue and negotiation to find solutions. A tracking and oversight system is needed to ensure that such a response take place.

In addition, OMB has the primary responsibility under the Executive Order for oversight. Our view is that OMB is not organized to effectively review tribal government issues. This lack of focus on tribal government issues also exists with regard to OMB's primary role in developing the federal budget. NCAI has recommended to the Obama Transition Team that the President create an OMB Assistant Director for Tribal Government Programs. Currently, tribal programs are organized under natural resources programs and budgets. We strongly urge a reorganization of OMB to appropriately prioritize Indian programs and ensure that meaningful consultation occurs with tribal governments.

Recommendation #3 – Focus on Solutions, Bring Decisionmakers to Tribal Consultation and Engage in Real Dialogue

As noted above, too often tribal consultation has become little more than a “listening session” without dialogue or efforts to find solutions. Unfortunately this has become an ingrained habit with both federal agencies and tribes, and it will require some effort to change. NCAI's experience is that tribal consultation works best when it is focused on a particular subject, and

when the agency is forthcoming about the factors that affect its decision making process. For example, a federal agency may have budget constraints or external political pressures that prevent it from fully adopting a tribal solution. Too often federal agencies are silent on the internal issues they face, and then get frustrated when tribal leaders do not propose workable solutions. Tribes are effective at negotiating solutions when they have an opportunity to fully understand the federal agency's perspective on the issues. This type of dialogue can only occur when the federal agency is represented by decision makers who are empowered to discuss issues in detail.

Recommendation #4 – InterAgency Cooperation

NCAI strongly recommends the development of interagency task forces to address issues that are the responsibility of more than one federal agency. For example, law enforcement on Indian reservations is managed by a range of federal agencies, but primarily the Bureau of Indian Affairs, Federal Bureau of Investigation, and U.S. Attorneys offices, and the Department of Justice. Too often these agencies have had very little coordination to ensure effective law enforcement policies. High level direction is needed to ensure that the federal agencies work together to resolve common issues.

Recommendation #5 – Create Opportunities for both Formal Consultation on Developed Proposals and Early Informal Scoping on Tribal Issues

With any effort by the federal government to consult with outside entities, including tribal governments, a dilemma looms. The problem is that most of the opportunities for sharing information happen early in the decision-making process, long before any specific proposal has been committed to paper. But it is difficult to hold a consultation on a proposal that does not yet exist. Conversely, once a large bureaucracy like the federal government has formulated written proposals, it is easy to hold a consultation meeting, but by then, decisions have already been made on the fundamental questions regarding the need for action and the scope of issues to be considered. In sum, it becomes more and more difficult to influence federal policy decisions if you wait until they are ready for a formal consultation.

There will always be a need for formal consultation with tribal governments on major federal regulatory proposals. At the same time, the consultation requirement should not become a barrier to the regular communications that enable federal officials to learn about tribal issues. NCAI actually heard this comment recently from a federal official: "I wanted to talk to the tribes about this issue, but I hadn't taken the training, and we didn't have time for a consultation." The purpose of consultation should not be lost in the formalities.

Federal officials should be encouraged to pick up the phone and engage in informal discussions with tribal leaders so that both sides understand the basic parameters of the issues. Without early discussions, the federal agency will develop proposals based on an incomplete and anecdotal understanding of the issues that surround a particular matter. Such proposals often create severe unintended consequences for tribal governments. Issues in Indian Country are often more complex than they first seem, in part because of the great diversity among tribes. An open process in the initial stages creates better and more efficient consultation. For example,

early discussions may provide the basis for the federal agency determining that no action is necessary. More broadly, pre-draft consultation helps insure that real problems are identified at the beginning and properly studied; that issues that are of no concern do not consume time and effort; that subsequent drafts are balanced and thorough; and that the delays and costs occasioned by redoing an inadequate draft are avoided.

Conclusion – This paper is intended to provide background information and recommendations for federal agencies to consider in developing their implementation plans for tribal consultation. We expect that many more ideas will come forward in the process of discussions with tribal leaders. If you have any questions or comments on this issue, please contact Jacqueline Johnson Pata, NCAI Executive Director at jpata@ncai.org, or John Dossett, NCAI General Counsel at jdossett@ncai.org.

Presidential Documents

Title 3—

Memorandum of November 5, 2009

The President

Tribal Consultation

Memorandum for the Heads of Executive Departments And Agencies

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

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

My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175. Accordingly, I hereby direct each agency head to submit to the Director of the Office of Management and Budget (OMB), within 90 days after the date of this memorandum, a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175. This plan shall be developed after consultation by the agency with Indian tribes and tribal officials as defined in Executive Order 13175. I also direct each agency head to submit to the Director of the OMB, within 270 days after the date of this memorandum, and annually thereafter, a progress report on the status of each action included in its plan together with any proposed updates to its plan.

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

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

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

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

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

A handwritten signature in black ink, appearing to be Barack Obama's signature, consisting of a large 'B' followed by a circle and a vertical line through it, and a horizontal line extending to the right.

THE WHITE HOUSE,
Washington, November 5, 2009.

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Presidential Documents

Title 3—**Executive Order 13175 of November 6, 2000****The President****Consultation and Coordination With Indian Tribal Governments**

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

Section 1. Definitions. For purposes of this order:

(a) “Policies that have tribal implications” refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

(b) “Indian tribe” means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(c) “Agency” means any authority of the United States that is an “agency” under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) “Tribal officials” means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

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

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. *Special Requirements for Legislative Proposals.* Agencies shall not submit to the Congress legislation that would be inconsistent with the policy-making criteria in Section 3.

Sec. 5. *Consultation.* (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the

need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. *Increasing Flexibility for Indian Tribal Waivers.*

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. *Accountability.*

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. *Independent Agencies.* Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. *General Provisions.* (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

Sec. 10. *Judicial Review.* This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.



THE WHITE HOUSE,
November 6, 2000.

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