

(December 18, 2000) DISCUSSION DRAFT

U.S. DEPARTMENT OF AGRICULTURE POLICY ON CONSULTATION WITH AMERICAN INDIAN AND ALASKA NATIVE TRIBES

I. Purpose

The purpose of this consultation policy is to improve communication and coordination between the Department of Agriculture and American Indian and Alaska Native tribes and to ensure effective consultation with tribes on policies of the Department of Agriculture that may have tribal implications.

II. Introduction

Federally recognized Tribes have a special unique legal and political relationship with the United States government as set forth in the United States Constitution, treaties, statutes, court decisions, and executive orders and memoranda. Under this relationship, the U.S. Department of Agriculture and its agencies (“USDA”) have a duty to consult Indian tribes on matters affecting tribes. USDA will follow the consultation process prescribed herein with Indian tribal governments in fulfillment of the obligations under Executive Order 13175.

III. Background

On April 29, 1994, a Presidential Memorandum was issued reaffirming the federal government’s commitment to operate within a government-to-government relationship with federally recognized American Indian and Alaska Native tribes, and to advance self-government for such tribes. The Memorandum directed each executive department and agency, to the greatest extent practicable and to the extent permitted by law, to consult with tribal governments prior to taking actions that affect federally recognized tribal governments. The Memorandum further required that all such consultations be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.

On May 14, 1998, the President issued Executive Order 13084, “Consultation and Coordination with Indian Tribal Governments.” EO 13084 set forth guidelines for all federal agencies to: (1) establish regular and meaningful consultation and collaboration with Indian tribal

governments in the development of regulatory practices on federal matters that significantly or uniquely affect their communities; (2) to reduce the imposition of unfunded mandates upon Indian tribal governments; and (3) to streamline the application process for and increase the availability of waivers to Indian tribal governments.” On November 6, 2000, President Clinton signed Executive Order (EO) 13175, Consultation and Coordination with Indian Tribal Governments, replacing EO 13084.

IV. Definitions:

“Consultation” means a process of government-to-government dialogue between USDA and an Indian tribe(s) regarding proposed Federal actions that have tribal implications in a manner intended to secure meaningful and timely tribal input. Consultation requires that Indian tribes are:

1. to receive timely notification of the formulated or proposed Federal action;
2. to be notified of the potential impact on Indian tribes of the formulated or proposed Federal action;
3. to be notified of those Federal officials who may make the final decisions with respect to the Federal action;
4. to have the input and recommendations of Indian tribes on such proposed action be fully considered by those officials responsible for the final decision; and
5. to be notified of the rejection of tribal recommendations on such action from those Federal officials making such decisions and the basis for such rejections.

Consultation does not mean merely the right of tribal officials, as members of the general public, to be consulted, or to provide comments, under the Administrative Procedures Act or other Federal law of general applicability. Rather, it is the collaborative involvement of tribes as sovereign nations in the development of regulatory policies on matters that have a significant impact on Indian country.

“Policies that have Tribal Implications” means regulations, legislative comments or proposed legislation, and other policy statements or actions having 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.

“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.

“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).

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

“Action” means the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof. 5 U.S.C. §551(13).

V. Principles

In formulating and implementing policies affecting Indian tribal governments, USDA will be guided by the following principles:

A. USDA acknowledges the unique relationship between the Federal Government and Tribes.

B. USDA recognizes the ongoing right of Indian tribes to self-government and supports tribal sovereignty and self-determination and continues to work with Indian tribes on a government-to-government basis concerning Indian tribal self-government, trust resources and Indian tribal treaty and other rights.

C. USDA shall take appropriate steps to remove legal and program impediments to working directly and effectively with tribes.

D. USDA shall encourage states and local governments to work with and cooperate with tribes to resolve problems of mutual concern.

F. USDA shall work with other federal departments and agencies to more effectively coordinate activities, programs and policies to assist tribes to accomplish their goals.

VI. General Departmental Consultation Requirements

Consultation between USDA and Indian tribes shall conform to the following basic principles:

A. Ensure affected Indian tribes are provided early and adequate notice of those proposed policies that may have tribal implications and a meaningful opportunity to comment on those policies.

B. Consult with tribal officials whenever a proposed policy may have substantial direct effects on one or more Indian tribes, in order to determine whether the tribe considers that a proposed policy has a substantial direct effect. Tribes at any time may exercise their right to request consultation with USDA.

C. Consider including tribal representatives in the development of proposed policies, especially technical representatives, where appropriate.

D. Provide tribes with an official point of contact at an appropriate level in recognition of protocol with a sovereign nation.

E. Document in writing the process and actions taken to consult with Indian tribes, the results of those actions, and how the Department's final action, decision, or policy was communicated to affected tribes.

F. Comply with applicable laws and regulations requiring or providing for public involvement (which includes Indian tribal governments), including, but not limited to, the National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), the National Forest Management Act (NFMA), EO 13007 (Sacred Sites), agency appeals processes, and land management planning regulations.

very good

had to be at highest level

VII. Agency Compliance

In addition to the general requirements set forth above, agencies within USDA who routinely administer programs and formulate policies that have tribal implications will provide to the Secretary no later than 180 days from the effective date of this policy a detailed consultation process appropriate to the agency, as long as the supplemental processes do not diminish or conflict with the Department-wide process.

VIII. Compliance With Executive Order 13175 Provisions

The terms of EO 13175 setting forth the manner of consultation and coordination with Indian tribes are hereby incorporated into this consultation process by reference.

IX. Monitoring and Evaluation

The Department of Agriculture will review and monitor periodically its compliance with this consultation process. This process shall include designation of a Department official who shall be responsible for reporting to the Department on the status of consultation efforts with tribes and, where appropriate, designation of agency officials to perform this task at the agency level. This review and monitoring process shall include discussions with tribal officials and representatives to obtain feedback on the effectiveness of the consultation process and adherence to the process by Department personnel. This review and monitoring process may occur at the agency level as well. Periodic written reports summarizing the review process shall be compiled and made available to the public.

X. Additional Considerations

A. Supplemental Agency Guidance: Agencies within the Department of Agriculture may develop supplemental consultation processes that are specific to those agencies' programs, as long as the supplemental processes do not diminish or conflict with the Department-wide process.

B. Other Consultation and Public Involvement Requirements: This process does not supersede or in any way diminish agency requirements to consult and provide for public involvement under law or regulation. Legal

requirements providing for tribal involvement in agency actions and decision-making include, but are not limited to NEPA, NHPA, NFMA, agency appeals processes, and land management planning regulations.

→ (incorporate DOI II & program access equitable funding)

C. Communication Methods: The methods used to consult with Indian tribes under this process may vary, depending on a number of factors. Methods of communication may include, but are not limited to, in-person contact, whether formally or informally, mail correspondence, electronic mail communication, phone calls, and facsimiles.

D. Emergencies and Exigent Circumstances: Nothing in this process precludes the Department or agencies in the Department from taking such actions as may be necessary in an emergency or under exigent circumstances. The Department shall consult with Indian tribes at the earliest opportunity in those situations in which emergency actions taken by the Department may have substantial direct effects on tribes and consultation prior to the Department's actions was not feasible.

E. This policy shall become effective immediately.