NOAA NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
UNITED STATES DEPARTMENT OF COMMERCE

NOAA Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribes and Alaska Native Corporations

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Introduction

This Handbook is intended to provide for meaningful and timely input from Tribes into the Federal decision-making process on policy matters having substantial direct effects on them.

The relationship between Federally-recognized Indian Tribes and the Federal government is one of sovereign to sovereign and has been described at length by the federal judiciary and referred to in federal law promoting Tribal self-determination and self-governance. Many Presidential memoranda have recognized and this unique legal and political relationship between governments. President Bill Clinton signed a presidential memorandum and executive orders outlining the nature of the government-to-government relationship between Tribes and the United States. President Clinton's efforts to formalize that relationship culminated in Executive Order (E.O.) 13175, "Consultation and Coordination with Indian Tribal Governments" (November 6, 2000), which requires each Federal agency to establish procedures for meaningful consultation and coordination with tribal officials in the development of Federal policies that have tribal implications. Department of Commerce (DOC) Administrative Order (DAO) 218-8 and the "Tribal Consultation and Coordination Policy of the U.S. Department of Commerce" together constitute DOC's "Tribal Consultation Policy." This policy reconfirms DOC's recognition of the Federal government's trust responsibility, as established by Federal statutes, treaties, and the decisions of the Federal courts. This Handbook is NOAA's implementation of EO 13175 and the DOC Tribal Consultation Policy and is intended to improve NOAA's management of its relations and cooperative activities with Indian Tribes and their governments. Its implementation does not create enforceable rights or a cause of action under law.

The procedures outlined here provide further guidance to NOAA line offices to support a more consistent, effective and proactive approach to conducting government-to-government consultations with Federally recognized Indian Tribes under E.O. 13175 and the DOC's Tribal Consultation Policy. These procedures are intended to improve consistency across NOAA offices and provide a foundation on which the line offices may adopt mission-specific procedures tailored to regional or line office needs and based on the financial resources available to conduct consultations. These procedures supplement the procedures of Secretarial Order 3206 on American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act and are in no way intended to substitute for or alter the Secretarial Order.

I. Background

The U.S. government and the governments of Federally-recognized American Indian Tribes have a unique "government-to-government" relationship based on the U.S. Constitution, treaties, Federal statutes, Federal court decisions, and Executive Branch policies. Central to this relationship is the "trust responsibility" of the U.S. government that was originally established through treaties between the United States and Indian Tribes and developed by the Federal

courts and Congressional actions. The Federal trust responsibility is a legal obligation under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes (Seminole Nation v. United States, 1942). This obligation was first discussed by Chief Justice John Marshall in Cherokee Nation v. Georgia (1831). Over the years, the trust responsibility has been at the center of numerous U. S. Supreme Court cases, making it one of the most important principles in Federal Indian law.
The Federal trust responsibility is also a legally enforceable obligation on the part of the United States as a duty to carry out the mandates of Federal law with fiduciary consideration for the rights and interests of American Indian and Alaska Native tribes and villages.

In addition, the United States recognizes the political rights of Federally-recognized Indian Tribes to self-government and the exercise of sovereign power over their members and territory. The United States protects those rights by working with Indian Tribes on a government-to-government basis to address issues concerning Indian tribal trust resources, treaty rights, and the unique relationship between the Federal government and Indian tribal governments.

This Handbook provides procedures for formal government-to-government consultation as contemplated by E.O. 13175. These procedures are not a substitute for the routine communications, collaboration, coordination, and agency meetings that support, strengthen and enhance NOAA's relationships with Indian Tribes. The procedures in this Handbook describe the formalized process of government-to-government consultation for NOAA actions and policies that have substantial direct effects on an Indian Tribe or its relationship with NOAA. Ongoing coordination and communication is essential to support NOAA's efforts to fulfill its trust responsibility to Indian Tribes, and this Handbook offers processes that can be used by the Line Offices to work with Federally-recognized Indian Tribes on NOAA policies or actions that may have tribal implications.

Through government-to-government consultation and informal staff-to-staff collaboration, the United States acknowledges Federally-recognized tribal governments as separate sovereign governmental entities, under the protection of the United States whose unique political historical and religious characteristics are reflected in their governmental priorities, concerns, and needs. Consultation recognizes and distinguishes the views and policies of American Indian and Alaska Native tribal governments from those of the general public and considers those views in the context of the responsibilities of Federally-recognized Tribes to their people and tribal members.

What is a consultation process?
According to the DAO 218-8, "consultation refers to an accountable process ensuring meaningful and timely input from tribal officials on Department policies that have tribal implications." The DAO further states that "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." Consultation is an open and free exchange of information and opinions between governments that can lead to mutual understanding. Effective consultation requires Federal representatives to understand the historical circumstances of the Tribes in relationship to the U.S. government, including relevant treaties, agreements, or statutes, as well as any past conflicts between the Tribe and the Federal government.

A consultation process is a formal means of communication between NOAA and the government of a Federally-recognized Tribe, and is understood by both NOAA and that Tribe to be a government-to-government meeting. Consultation reflects the United States' recognition of the sovereignty of Federally-recognized Tribes and implements the government-to-government relationship between the sovereigns. Consultation is used to exchange information, deliberate, and address Federal policies that have tribal implications. Consultation is not a format for consensus decision-making; rather, it is a process for the Federal government to consider the sovereignty, rights, and resources of Indian Tribes during the development of Federal policies or actions.

While government-to-government consultation is a formally structured and planned meeting, other forms of communication among NOAA employees and tribal officials, employees, consultants, and representatives are important elements of NOAA's ongoing relationship with any Federally-recognized Tribe. These routine communications are the foundation of successful collaboration and cooperation and they generally include exchange of information about NOAA's proposals, plans, or upcoming decisions and seek tribal input. However, these informal communications are not the forum for the formal exchange of policy views among sovereigns and are not, taken by themselves, government-to-government consultation.

It is important to note that government-to-government consultation is a reflection of the responsibility of the U.S. Government to sovereign Federally-recognized American Indian Tribes. State governments are not a part of that relationship and NOAA should not work through state governments to implement government-to-government consultation obligations. Similarly, these procedures are not required to state-recognized Tribes, or to American Indian Tribes and Alaska Natives Villages that are not Federally-recognized.

Consultation at the Department of Commerce

On March 30, 1995, pursuant to the Presidential Memorandum "Government-to-Government Relations with Native American Governments," April 29, 1994, Secretary of Commerce Ron Brown signed DOC's first American Indian and Alaska Native Policy. That policy recognized tribal sovereignty and the unique legal and political status of Federally-recognized American Indian and Alaska Native tribal governments, and required all Department operating units to consult and work with tribal governments before making decisions affecting Tribes. The goal of the policy was to ensure that tribal rights and concerns were addressed before developing legislation, regulations, or policies that would affect tribal governments, their economic and social development activities, or their lands and resources.

On April 26, 2012, Secretary of Commerce John Bryson issued DAO 218-8 to implement the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (November 6, 2000), and the Presidential memorandum on Tribal Consultation (2009). On May 21, 2013, Acting Secretary Rebecca Blank issued a new Tribal Consultation Policy which builds upon and expands the principals expressed in the 1995 DOC Policy. The new policy establishes the manner in which the Department works with Federally-recognized Tribes on a government-to-government basis and outlines broad guidelines concerning consultation procedures for all Department operating units when developing policies that have tribal implications. Through this Handbook, and associated NOAA Administrative Order, NOAA is implementing Executive Order 13175 and the Department of Commerce Tribal Consultation Policy.

II. Definitions for the Purposes of this Handbook

Federally recognized Indian Tribe ("Indian Tribe" or "Tribe"): As defined in Section 1(b) of E.O. 13175, is 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.

Consultation: Based on the definition in Section 5 of E.O. 13175, refers to an accountable process ensuring meaningful and timely input from tribal officials on NOAA policies that have tribal implications.

Consultation protocol: An agreement between NOAA and a Federally-recognized Tribe describing the elements and procedures for implementing government-to-government consultation and E.O. 13175.

Policies that have tribal implications: All regulations, legislative comments, 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 Tribes, or on the distribution of power and responsibilities between the Federal government and Tribes.

Tribal official: An elected or duly appointed official of Indian tribal governments or authorized intertribal organizations.

III. Responsibilities within NOAA

A. Training

As financial resources allow, NOAA will ensure that all NOAA personnel directly involved with outreach, consultation, and operations with tribal governments receive appropriate training so that they can act consistently with the procedures and policies set forth in this Handbook. The training may include legal background, history of American Indians and Alaska Natives, cultural protocols, tribal issues, and tribal governmental structures. The extent of training provided

should be commensurate with the scope and quantity of tribal issues and concerns that regularly occur in a particular region.

B. Tribal Liaison

NOAA recommends each line office, or staff office, establish a position of "line office Tribal Liaison" (see Appendix A for list of current line office Liaisons). If a division or region within a line office deems necessary, they also may consider establishing a "division/regional Tribal Liaison". These Liaisons serves as a single point of contact having responsibility for determining the need for consultation, conducting consultations, and ensuring consultations are properly recorded and that the tribal governments are informed of the results of consultation. NOAA should consider establishing a cross-line-office workgroup for Tribal Liaisons in each region. The goal of this group would be to share information regarding tribal interactions with other line offices.

The NOAA line office or region proposing the policy or action should lead any consultation on that policy or action, with the assistance of the regional Tribal Liaison as appropriate. In some cases the regional Tribal Liaison may serve in either a lead or moderator capacity. The line/staff office Tribal Liaison, or their designee, is responsible for keeping a record of the consultation, including all letters, pertinent email, and meeting notes related to the consultation in accordance with NOAA policy and Federal record-keeping procedures and laws.

IV. Exchange of Information to Support the Consultation

A. Communication

Ongoing communication should be a regular part of the government-to-government relationship with Federally-recognized tribal governments. Methods of communication include formal letters, phone calls, fax transmissions, emails, webcasts, webinars, NOAA website postings, on-site visits, presentations at regional/national events, and notifications in the *Federal Register*. When planning to communicate with Tribes, it is important to gain tribal input on the best method to reach them and adequate timelines for responses.

Tribes need timely and accurate information to understand, plan, and make decisions. NOAA will provide available information and preparation time to the Tribe before consultation begins. In doing so, NOAA will encourage coordination and collaboration with Tribes for policy actions that may have tribal implications. Information received by NOAA from a tribal government should not be released to the public without permission from the tribal government unless required by applicable law or by the Freedom of Information Act (FOIA). Communications with tribal officials should be appropriate to the recipient and avoid the use of profession-specific jargon. NOAA staff should also be aware that numerous other Federal agencies engage with Tribes on related issues and therefore NOAA staff should participate in the larger network of agencies, institutions, and organizations that are committed to enhancing cooperation, coordination, and collaboration to strengthen and sustain the Federal trust relationship with

Tribes. Tribes may request relevant information without submitting a request under FOIA, subject to the confidentiality requirements of applicable Federal law.

NOAA will make every reasonable effort to provide adequate information about its actions and policies at the earliest practical time. Line offices are encouraged to develop routine methods of communication to keep Indian Tribes and NOAA informed of possible effects of NOAA actions and policies on Federally-recognized Indian Tribes and tribal resources.

Proposed NOAA policies or actions requiring meetings or other communication with tribal staff or officials may not rise to a level requiring the formal government-to-government procedures outlined in this Handbook. Line offices should develop, based on the nature of their interactions with Indian Tribes, regular communications and contacts for informal meetings and discussions with Indian Tribes to ensure that NOAA's mission is achieved while meeting the substance of NOAA's trust responsibility to Indian Tribes and the intent of the Executive Order 13175.

B. Consultation Protocols

Some of NOAA's regions and offices work with Federally-recognized Tribes frequently or on a continuing basis. As a result, it may be useful and expeditious for those Tribes and NOAA offices to develop protocols reflecting their mutually preferred timeline for and means of communication and exchange of information. Protocols can make communication more routine and predictable and can better incorporate tribal needs and views early in the policy or regulatory development process. There is no set template for such protocols, as long as they provide for a government-to-government consultation process consistent with the procedures outlined here. Similarly, some Tribes have developed their own policies on consultation with the Federal government, and thus may wish to craft protocols with NOAA to reflect those policies.

Protocols may reflect how and what type of communication may occur between technical staff at meetings, through phone contacts, via emails, and during onsite visits. They may address routine matters and create procedures for identifying matters best handled through informal meetings, phone calls, emails, and letters. Protocols may also include procedures for setting up formal meetings between NOAA personnel and tribal government staff or designees of tribal leadership. If a tribal government agrees, these communications can meet the requirements of government-to-government consultation under E.O. 13175.

To provide meaningful consultation and coordination, NOAA recommends that line offices and regions establish consultation protocols with tribal governments consistent with this Handbook as necessary. NOAA's Tribal Liaison will ensure the approach is consistent with this Handbook and ensure information is collected throughout the year in a database.

C. Interagency Communication

NOAA recognizes that many Federal policies and programs involve multiple agencies, which may place a burden on Tribes as they attempt to consult. NOAA will strive to maintain

communication, coordination, and cooperation among interested Federal agencies to ensure the most efficient and expeditious manner of consultation with Tribes on a particular matter.

V. Preparing for the Consultation Process

There is no one correct way for the consultation process to operate. There are over 560 Federally-recognized Tribes, and most have a distinct culture, language, values, traditions, and processes. Based on the tribal differences, a process that works well for one Tribe may not work for another. For the consultation process to be effective, agency representatives need to be flexible and receive training to develop a solid grasp of the Tribe's history, culture, and leadership. This entails the following:

A. Understanding the history of the Tribe and its current and historical relationship to the Federal government.

Books, tribal newspapers, websites, and other documents can provide information on the Tribe's historical relationship with the Federal government. It is important to know about any relevant conflicts, wars, treaties, executive orders, case law, and statutes, and how these have evolved over the years.

B. Understanding the Tribe's culture.

"Culture" comprises how a group's worldview influences their behavior. This includes a Tribe's government structure, food preferences, religion, burial traditions, natural resource values, wealth, family structure, education system, etc. It is also important to consider subsistence schedules and preparation times before consultation begins.

C. Understanding what is and what is not appropriate within tribal culture.

Observation, reading, and discussions with tribal designated officials can provide pertinent information about the tribal culture and help minimize cultural missteps.

D. Understanding the tribal perceptions of time and allow enough time to form an ongoing relationship.

Perceptions of time vary across cultures. The NOAA time rhythm is typically based on western culture (i.e., "time is money"), which may differ from a Tribe's time rhythm. Agency staff should be aware of differences and exercise patience when time horizons seem to be out of sync. Likewise, agency staff should be clear with tribal contacts about any exigent circumstances driving the agency's timing for action.

E. Understanding the tribal structure and its history.

The U.S. Congress created the Indian Reorganization Act (IRA) in 1934. The IRA has had a long-term effect on the traditional form of tribal organization and leadership. It authorized Congress to appropriate funds annually to formalize tribal governments on reservations and for tribal land acquisitions. Although the IRA led to creation of a Federal government-style bureaucracy

within tribal governments, many Tribes have maintained a parallel leadership structure based on culture and traditions.

F. Identifying the tribal leadership.

As indicated above, there may be a parallel leadership structure operating in which the formal structure has elected officials and cabinet positions (e.g., Secretary of Agriculture), but a tribal social structure may produce leaders based on tradition, family lineage, age, spiritual authority, political status, skillset, or other tribal considerations. It is important to understand that greater influence may come from informal leadership positions. However, it should be noted that the formal governmental relationship is between the United States and the duly elected tribal governments. To the extent possible, staff should also be aware of contested leadership and factions.

G. Understanding the Tribe's decision-making process.

Not all Tribes use the same process to make decisions. Some use a system in which everyone in the Tribe must vote in favor of a measure or action to be approved, in which case one dissenting vote can stop a proposed action. Other Tribes may require a simple majority for approval, while others have representatives who vote on measures. Still others require only the tribal leader to give approval to a proposed action.

H. Adapting current information in light of new information from Tribes.

The consultation process should be refined when tribal members and affiliates present information not typically used by NOAA in decision-making. When tribal members and affiliates present divergent information to NOAA, the NOAA agency representative should seek to clarify the divergent information with the governing body of the Tribe.

While books and other documents may serve as useful secondary references for understanding the political and cultural history of an indigenous people, agency staff should remember that the tribal members themselves are the best source of knowledge about their particular Tribe.

VI. Consultation Process

NOAA will offer government-to-government consultation at the earliest practicable time it can reasonably anticipate that a proposed policy or initiative may have tribal implications. The tenets of tribal consultation require early notification, early opportunities for technical briefings/discussions, and an opportunity for formal input in the Federal process to the extent practicable and consistent with Federal law. Consultation should occur early enough in the decision-making process to allow for flexibility and modification of NOAA actions while meeting required timelines. Although consultation need not occur at every step of the Federal decision-making process, it should always occur at the earliest time practicable, well before a final policy or regulatory decision with tribal implications is made.

A. Initiating Consultation

An invitation to consult on a proposed policy, regulation, or action that might have tribal implications should be sent in writing to the representative of the governing body of the Tribe, usually the tribal chair. The letter may be sent by email or mail, or delivered in person to key tribal staff unless consultation protocols specify otherwise. The consultation protocols of the division or region within a line office issuing the invitation will determine the preferred form of correspondence. The correspondence should clearly indicate "Initiation of Government-to-Government Consultation." NOAA should request a written response from Tribes who wish to consult within a certain timeframe, usually 30 days. NOAA will keep up-to-date lists that may include mailing and email addresses or other tribal contact information for initiating consultation.

When a Tribe accepts NOAA's invitation to consult, NOAA will designate a point of contact to make arrangements for the consultation. This exchange of correspondence will open the record of consultation. Frequently NOAA requests information or technical staff meetings to help determine whether an action or policy is likely to have tribal implications.

Examples of actions with the potential to require consultation with Tribes include but are not limited to:

- A policy or action that will have effects within a reservation or Alaska Native village.
- A policy or action that may impact tribal trust resources or the rights of a Federally-recognized Tribe.
- A policy or action affecting a facility or entity owned or operated by a tribal government.
- A policy or action that affects Tribes, tribal governments, or a Tribe's traditional way of life.
- A policy or action that affects Tribes Traditional and Cultural Properties or Traditional Use Areas

B. Responding to Requests for Consultation from Tribes

A Tribe may request consultation with NOAA on a policy, proposed regulation, or other action for which NOAA has not initiated consultation. In these instances, NOAA will take into consideration the nature of the issue or activity of concern to a Tribe, past consultation efforts, available resources, availability of pertinent information, timing, and any other relevant factors when responding. If the Tribe demonstrates that the proposed action may have tribal implications, NOAA will proceed with consultation consistent with this Handbook. Even if NOAA determines that an issue of interest to a Tribe likely does not have tribal implications, NOAA will make every reasonable effort to meet with tribal staff or representatives about the issue. As noted earlier, meetings on issues that do not have tribal implications are not subject to the consultation requirements of E.O. 13175 or the process described in this Handbook.

C. When a Tribe Declines to Consult

If NOAA receives a written response from the Tribe that they choose not to engage in government-to-government consultation, the Tribe's decision will be noted in the

administrative record or file as appropriate. NOAA should remain available to consult at any time in the decision-making or policymaking process to the extent practicable.

D. When a Tribe Does Not Respond to an Invitation to Consult

When an invitation to consult has been delivered to the appropriate tribal governing body and known points of contact and no response is received within the time period requested, NOAA will note the lack of response in the record. If NOAA believes its action will have substantial direct effects on that Tribe, it will follow the written invitation with a phone call and/or an email (assuming those forms of communication are available to the tribal points of contact). Those efforts will also be noted in the record.

E. Tribal Organizations

NOAA recognizes the value of key national and regional American Indian and Alaska Native organizations that play an important role in subject matter analysis. Intertribal organizations can also provide helpful means to communicate and exchange information on a variety of NOAA activities, projects, and initiatives that may have regional or multi-tribal implications. Discussing such plans, activities, and initiatives at the intertribal organization level can facilitate future discussions with individual tribal programs or governments. A Tribe consulting with NOAA may invite any other party to attend or participate in the consultation. However, dialogue and work conducted with intertribal organizations does not constitute consultation. A tribe may expressly authorize a tribal organization to represent it or conduct consultation on its behalf with NOAA.

F. Determining a Consultation Structure

Determining the structure and logistics of a government-to-government consultation is a critical function shared by the designated NOAA official and tribal points of contact. The important elements for conducting meaningful consultation are: 1) Identify the issues and factors leading to the need for the consultation; 2) identify the appropriate NOAA and tribal participants; 3) determine the location and timing of the consultation; 4) determine the need for an exchange of information prior to consultation; and 5) agree on the method of recordkeeping and documentation of the consultation in keeping with guidance from Office of Management and Budget (OMB), DOC, and this Handbook. Each element is described in more detail below.

1. Identify the issues and concerns.

Whether the consultation is initiated by NOAA's outreach to a Tribe or vice versa, the points of contact for the Tribe and for NOAA should work early in the process to clarify exactly what issues are of concern to each of the parties. The articulation of the issues is an important factor in identifying the appropriate participants, support staff, and information needed for the consultation. The points of contact should agree on the issues and concerns to be addressed. This will help both parties as they prepare for the consultation and take the next steps in structuring the consultation. It is also important to determine whether the consultation is expected to result in a decision by either party and whether decision-makers will be present at

the consultation or, alternatively, whether the consultation participants will be reporting to decision-makers after consultation meetings are held.

If it becomes clear that NOAA and the Tribe have divergent views about the issues and topics appropriate for the consultation, every effort should be made by both parties to agree upon a single statement of the issues. If the parties cannot reach an agreement, the record of the consultation should reflect the different views.

2. Identify participants in the consultation.

The participants or leads chosen by the Tribe will inform NOAA's choice of the appropriate level of NOAA participation. Typically the individuals chosen by the Tribe, and their respective positions within tribal government, will indicate how important the issues and consultation are to the Tribe. Generally, if the Tribe designates its leader or members of the tribal council as participants in the consultation, a NOAA official with decision-making authority should participate in the consultation. If tribal staff are identified as participants in the consultation, a commensurate level of NOAA staff may represent NOAA at the consultation. In all cases, NOAA staff with expertise in the topics under consultation will attend the consultation, unless otherwise requested by the tribal representative. Often, a NOAA regional Tribal Liaison or point of contact with familiarity with the Tribe and its structure can help NOAA designate appropriate personnel for the consultation.

Because NOAA's designation of consultation participants depends to some extent on the Tribe's designation of participants, NOAA will work with the tribal point of contact early to determine the leadership level of tribal participation in the consultation. If the Tribe has not identified its participants at the point when NOAA must select its participants, NOAA should identify and prepare consultation participants who are able to fully address the concerns and issues articulated for discussion through government-to-government consultation.

3. Determine the location and timing of the consultation.

The best possible forum for a successful consultation is a face-to-face meeting among the designated participants in the Tribe's home territory or a location preferred by the Tribe. Unfortunately, the resources for Federal travel are not always available, and alternatives must be developed in keeping with access to technology and time available for the participants. The regional Tribal Liaison may be able to help determine the best venue and technology for the nature of the consultation and the concerns of the Tribe. NOAA staff must be knowledgeable and respectful of the decision-making practices of the Tribe. This may require a departure from highly structured agendas and timeframes.

4. Exchange information to assist the consultation.

Information important to a full discussion of the articulated issues and concerns of the parties should be exchanged as early in the process as possible. Both parties should acknowledge and

discuss the limited capacity of NOAA to protect the confidentiality of information provided by the Tribe consistent with the requirements of the Freedom of Information Act (FOIA) or litigation. In addition, many Tribes have internal rules restricting the discussion of information for religious, traditional, or ceremonial reasons. Every effort should be made by the points of contact to ensure that information available for exchange is provided as far in advance of the consultation meeting as possible.

5. Agree on the method of recordkeeping.

The NOAA and the tribal points of contact should discuss the most practical way of keeping a record of the consultation. In many circumstances, simply identifying a note taker and circulating the notes of the consultation for review, comment, and approval by each party is sufficient. Rarely will it be necessary to arrange for a transcript of the consultation discussion, but if there are many statements or issues to discuss, development of a transcript, by machine or other methods, may be the most accurate way of recording the proceedings. The parties should agree on a method for keeping sufficiently detailed notes and records to allow NOAA to develop a thorough summary of the consultation, including the issues identified, the nature of the discussions, and resolutions considered and/or adopted.

G. Closing and recording the government-to-government consultation

Government-to-government consultation is closed through a formal, written communication from the lead NOAA official to the most senior tribal official. The written communication should recount the agreed-upon issues for the consultation or NOAA's understanding of the Tribe's concerns and explain how NOAA will (or has) addressed the Tribe's concerns in its final decision or action or, alternatively the reasons why NOAA will not or cannot address the Tribes' concerns to the extent the Tribe has sought.

In addition, NOAA will include a statement in any public record of decision that the government-to-government consultation occurred. The consultation should also be noted in any required *Federal Register* notices as part of the background information made available to the public.

VII. DOC and OMB Reporting

To ensure compliance with Executive Order 13175, President Obama instructed "each agency head to submit … a detailed plan of actions the agency will take to implement the policies and directives of [that] Executive Order." The President also instructed "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."

The NOAA point of contact to provide NOAA content for the DOC report is:

Linda D. Belton
NOAA Tribal Liaison and Senior Policy Advisor for Intergovernmental Affairs
NOAA Office of Legislative and Intergovernmental Affairs
linda.belton@noaa.gov; 202-482-5447

VIII. Related Topics

A. Working with Tribes without Federal Recognition Status

E.O. 13175 and this Handbook apply only to Federally-recognized Tribes. However, NOAA works with many non-recognized tribal groups, who are important partners in carrying out its mission and who have interests regarding NOAA's activities. Although NOAA recognizes the value of such partnerships, these communications and relationships do not constitute or require government-to-government consultation.

B. Hawaii and U.S. Affiliated Pacific Islands

This document pertains to consultation with tribal governments recognized as having government-to-government relationships with the United States by the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a. No such tribal governments are recognized in the Pacific Islands Region, which includes the State of Hawaii, the unincorporated organized Territory of Guam, the Commonwealth of the Northern Mariana Islands, and unincorporated, unorganized territories, including American Samoa. The Federal consultation structure within this region varies according to applicable Federal laws and policies governing specific relationships between the United States and the peoples of the Pacific Islands. Some additional information can be found here:

http://www.doi.gov/ohr/index.cfm
http://www.doi.gov/oia/index.cfm

B. Culturally Sensitive Information

Some types of tribal information may be culturally privileged or otherwise controlled or regulated, often by gender, age, or cultural norms. Hence sharing knowledge with non-tribal members may be contrary to tribal interests. While this Handbook does not address NOAA's consultations conducted under the National Historic Preservation Act, the articulation of the definition of "culture" illustrates the types of information that may be culturally sensitive. According to guidelines of the National Register of Historic Places, "culture" is understood to mean the traditions, beliefs, practices, lifeways, arts, crafts, and social institutions of any community. The sharing of knowledge of any of these types of information may be restricted to within the Tribe. Tribal culture, in general terms, is uniquely and inextricably tied to place; any of the items listed above may also imbue a place with special meaning. Traditional Cultural Properties are a National Register property type, and constitute perhaps the most common situation where NOAA's consultation with Tribes may involve culturally sensitive information. The traditional cultural significance of a historic property is derived from the role the property

plays in a community's historically rooted beliefs, customs, and practices. Examples of such locations include:

- A location associated with the traditional beliefs of a Native American group about its origins or cultural history, or the nature of the world.
- A location where Native American religious practitioners have historically gone, and are known or thought to go today, to perform ceremonial activities in accordance with traditional cultural rules of practice.
- A location where a community has traditionally carried out economic, artistic, or other cultural practices important in maintaining its historic identity.

Traditional Ecological Knowledge (TEK) may be similarly privileged or otherwise controlled or regulated by gender, age, and other cultural constraints within a Tribe and, more recently, may be protected under intellectual property rights. The western definition of TEK is "a cumulative body of knowledge, practice and belief evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment."[1] Indigenous ways of knowing about the environment differ fundamentally from those of most western or industrialized societies. The western paradigm places humans at the top of a hierarchy of nature, implying that humans are separate from the environment. This leads to the treatment of other living things as resources to be used to meet human needs, wants, and desires. Often the indigenous paradigm posits humans as an inseparable part of the environment, with responsibility to steward the environment for future generations.

Each Tribe is unique, influenced by its local environment, as is its TEK. NOAA's scientific and resource management responsibilities can be greatly enriched through the incorporation of TEK. It may take NOAA scientists years to validate what local indigenous peoples know about their environment. TEK can be shared through the consultation process, as well as through less formal collaboration. These interactions can help NOAA staff identify tribal individuals who hold TEK, as well as the opportunities to ask whether and how TEK may be shared.

Culturally sensitive information may sometimes be publicly available. However, respect for the nature of this information must be demonstrated when consulting with Tribes. It will not always be possible to know in advance what type of information is culturally sensitive, and Tribes will not necessarily be willing or able to speak of such information to NOAA representatives. While this poses challenges, awareness that there is likely to be culturally sensitive information, and respect for the privileged nature of this information, will help foster productive relationships with Tribes.

[1] U.S. Forest Service. 2011. *Traditional Ecological Knowledge: Sustaining Our Lives and the Natural World*. Newtown Square, PA. http://na.fs.fed.us/stewardship/pubs/biodiversity/sustaining-lives-natural-world.pdf

D. Section 106 of the National Historic Preservation Act

This Handbook is not intended to address consultations required under Section 106 of the National Historic Preservation Act (NHPA, *16 U.S.C. 470f*) for "Federal undertakings," which are defined as a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license, or approval (36 CFR 800.16(y)). For Federal undertakings, NOAA conducts Section 106 consultations with State Historic Preservation Officers (SHPOs) and/or Tribal Historic Preservation Officers (THPOs), as appropriate. The regulations for Section 106 consultations, are available at 36 CFR Part 800, *Protection of Historic Properties*. Readers should also contact NOAA's Federal Preservation Officer for additional guidance on compliance with Section 106 of the NHPA.

E. Consultation with Alaska Native Corporations

In 2004, through two consolidated appropriations acts, Congress required Federal agencies to consult with Alaska Native corporations on the same basis as Federally-recognized Indian Tribes under E.O. 13175 (Pub. L. 108-199, 118 Stat. 452, as amended by Pub. L. 108-447, 118 Stat. 3267).

NOAA interprets the term "Alaska Native corporations" in this requirement to mean "Native corporations" as that term is defined under the Alaska Native Claims Settlement Act (ANCSA) of 1971. Congress created regional, village, and urban corporations to manage the lands, funds, and other assets conveyed to Alaska Natives by ANCSA. There are 13 regional corporations and over 200 village corporations in Alaska. The village corporations generally represent shareholders in villages associated with the 229 Federally-recognized Tribes in Alaska. Most Alaska Native corporation shareholders also are members of a Federally-recognized Tribe in Alaska. However, the corporations were established to operate as for-profit enterprises, and may not necessarily represent the same perspective or interests as the Tribes.

NOAA recognizes the distinct and individual cultural traditions and values of Alaska Native peoples and the statutory relationship between Alaska Native Corporations and the Federal Government. To the extent that concerns expressed by Indian Tribes and ANCSA Corporations substantively differ, NOAA will give due consideration to the sovereignty and self-governance of Federally-recognized Indian Tribes.

NOAA will implement the requirement to consult with Alaska Native corporations in a manner as close as possible to consultations with Federally-recognized Indian Tribes in Alaska, while recognizing the important differences between the Federal trust responsibility to the sovereign governments of Federally-recognized Indian Tribes and the corporation entities created by ANCSA. Consultation and coordination with Alaska Native corporations will follow a process as similar as possible to that described in this Handbook for consultation with Federally-recognized Indian Tribes. Consultations with Alaska Native corporations will occur on a "government-to-corporation" basis, rather than "government-to-government" basis to reflect the distinction between sovereign governments and corporate entities.

F. Regional Fishery Management Councils

Regional Fishery Management Council meetings are a critical part of the fishery management planning process and are the first and earliest point of development of fishery management policy. It is most beneficial to Tribes, Councils, and NOAA if there is early and active participation in these fora, and NOAA strongly encourages Councils to discuss and work with Tribes to address their concerns while developing fishery conservation and management measures under the Magnuson-Stevens Fishery Conservation and Management Act. Thus, while it is NOAA's – and not the Councils' – responsibility to consult with Federally-recognized Tribes under Executive Order 13175, the Councils' early engagement with potentially affected Indian Tribes will facilitate and enhance NOAA's rulemaking process.

G. Secretarial Order 3206—American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act

In 1997, this Order was issued by the Secretary of the Interior and the Secretary of Commerce to clarify the responsibilities of the two departments' component agencies, bureaus, and offices when taking actions under authority of the Endangered Species Act of 1973 (ESA) and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights, as defined in the Order. The Order acknowledges the trust responsibility and treaty obligations of the United States toward Indian Tribes and tribal members and its government-to-government relationship in dealing with Tribes. The Order directs the departments to carry out their ESA responsibilities in a manner that harmonizes the Federal trust responsibility to Tribes, tribal sovereignty, and statutory missions of the departments, and to strive to ensure that Indian Tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation. The Order does not apply to Alaska Native Corporations or Tribes, in recognition of the distinct provisions that govern the taking of ESA-listed species by Alaska Natives for subsistence purposes. The procedures in this Handbook supplement the procedures of Secretarial Order 3206 and are not intended to substitute for or alter Secretarial Order 3206.

Appendices and Glossary

APPENDIX A : Line Office Tribal Liaisons (as of November 12, 2013)

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APPENDIX B: Executive Order 13175--Consultation and Coordination with Indian Tribal Governments (November 6, 2000)

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 policymaking 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,
c. Consulted with tribal officials early in the process of developing the proposed regulation;
d. 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

e. Makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

f. 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.

g. 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.

William J. Clinton
The White House, November 6, 2000.

APPENDIX C: PRESIDENTIAL MEMORANDA ON TRIBAL CONSULTATION

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release November 5, 2009

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Tribal Consultation

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.

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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 more (OVER) 2 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.

BARACK OBAMA

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APPENDIX D: DEPARTMENT OF COMMERCE ADMINISTRATIVE ORDER 218-8

TRANSMITTAL_____

United States of America DEPARTMENT OF COMMERCE	DEPARTMENT ADMINISTRATIVE ORDER 218-8	
DEPARTMENT ADMINISTRATIVE ORDER SERIES	DATE OF ISSUANCE APR 27 2012	EFFECTIVE DATE APR 26 2012

SUBJECT

CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS

SECTION 1. PURPOSE.

.01 This Order implements Executive Order (E.O.) No. 13175, "Consultation and Coordination with Indian Tribal Governments" (November 6, 2000), Presidential Memorandum, "Tribal Consultation," 2009 Daily Comp. Pres. Docs. 887 (November 5, 2009), and the Office of Management and Budget Memorandum, "Guidance for Implementing E.O. 13175, 'Consultation and Coordination with Indian Tribal Governments.'"

.02 This Order describes the actions to be followed by all Department of Commerce (the Department) operating units in their implementation of E.O. No. 13175 and outlines the principles governing Department interactions with Indian tribal governments (Tribal governments) relating to the development of Department policies that have tribal implications.

.03 The Department works with Tribes on a government-to-government basis to address issues concerning tribal self-government, tribal trust resources, tribal treaty, and other rights. The Department seeks to enhance the government-to-government relationship between the Federal government and Tribal governments and support Tribes in the development of strong and stable economies able to participate in today's national and global marketplace.

.04 The Department recognizes that the Tribal right of self-government flows from the unique legal relationship between the Federal government and Tribal governments.

SECTION 2. AUTHORITY AND SCOPE.

.01 This Order is issued under the authority of 5 U.S.C. § 301.

.02 This Order applies to all Department operating units and describes the baseline responsibilities necessary to meet the objectives of E.O. No. 13175, including guidance for Department personnel on tribal consultation and related policies.

.03 This Order is for internal management only and shall not be construed to grant to or vest any right in any party with respect to federal actions not otherwise granted or vested by existing law or regulations.

.04 Additional guidance for compliance with E.O. No. 13175 can be found in the "Tribal Consultation and Coordination Policy of the U.S. Department of Commerce" (Tribal Consultation Policy). For purposes of policy and guidance, the Tribal Consultation Policy should be considered an extension of this Order and carry the same force and effect as this Department Administrative Order (DAO).

USCOMM-DC 89-8911

SECTION 3. DEFINITIONS.

.01 Consultation refers to an accountable process ensuring meaningful and timely input from tribal officials on Department policies that have tribal implications.

.02 Indian tribe (or 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.

.03 Operating units are organizational entities outside the Office of the Secretary charged with carrying out specified substantive functions (i.e., programs) for the Department. The operating units are the components of the Department through which most of its substantive functions are carried out.

.04 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.

.05 Tribal Consultation Official means the designee of the Secretary of Commerce (the Secretary) with principal responsibility for the implementation of this Order.

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

SECTION 4. DELEGATION OF AUTHORITY.

.01 Pursuant to the authority vested in the Secretary by law and subject to such policy and directives as may be prescribed, the Director of the Office of Legislative and Intergovernmental Affairs (OLIA) within the Office of the Secretary is hereby delegated the following authorities of the Secretary insofar as they apply to performing the functions assigned in this Order:

a. The authority under section 5(a) of E.O. No. 13175 to designate an official with principal responsibility for the Department's implementation of the E.O.

b. Other authorities of the Secretary pertinent to such functions.

.02 The Director of OLIA may delegate the authorities in Section 4.01 of this Order to any employee of the Department subject to such conditions in the exercise of such authority as may be prescribed by the Secretary.

SECTION 5. ROLES AND RESPONSIBILITIES.

.01 The Director of OLIA will designate a Tribal Consultation Official within the Office of the Secretary.

a. Pursuant to Section 5(a) of E.O. No. 13175, the Tribal Consultation Official is designated as the official with principal responsibility for the Department's implementation of the E.O.

b. The Tribal Consultation Official has principal responsibility for the implementation of this Order and the Tribal Consultation Policy.

c. The Tribal Consultation Official has the authority to act as a liaison between the Secretary and Tribal officials. The Tribal Consultation Official may delegate this authority to heads of operating units.

d. The Tribal Consultation Official will make online training and other resources available for Department personnel assisting with tribal consultations.

.02 Heads of operating units, as applicable, will:

a. Implement all provisions of this Order as well as the Tribal Consultation Policy within their respective organizations and throughout all facilities within their organizations.

b. Designate appropriate official(s) to ensure implementation of the Tribal Consultation Policy at the operating unit level.

c. Ensure meaningful and timely consultation with affected Tribes on policies that have tribal implications, and work with the Tribal Consultation Official to ensure that an accountable consultation process is in place.

d. Operating units may develop, issue, and implement tribal consultation guidance (including guidelines, handbooks, and procedures) specific to the operating unit, so long as the Department's Tribal Consultation Official reviews the guidance and it complies with the Tribal Consultation Policy. Consultation may take a variety of forms and is described in greater detail in the Tribal Consultation Policy and operating unit guidance, as appropriate.

e. Whenever a consultation occurs between the Department or its operating units and Tribal officials, provide the Tribal officials with a formal, written communication that summarizes the consultation process, and responds to the issues and concerns, if any, identified during consultation. Operating units will maintain documentation addressing the consultation process, tribal concerns, and recommendations in conformance with applicable records retention schedules.

f. Operating units will ensure that personnel assisting with tribal consultations have appropriate training.

Secretary of Commerce

Office of Primary Interest
Office of Legislative and
Intergovernmental Affairs

APPENDIX E: Tribal Consultation and Coordination Policy of the U.S. Department of Commerce

Section 1. Introduction

01. This "Tribal Consultation and Coordination Policy of the U.S. Department of Commerce" ("Tribal Consultation Policy" or "Policy") establishes the manner in which the Department of Commerce ("Department") works with Indian tribes on a government-to-government basis to build a durable relationship and address issues concerning tribal self-government, tribal trust resources, and tribal treaty and other rights, as well as support tribes in developing strong and stable economies able to participate in the national and global marketplace. The Department recognizes Indian tribal self-government and supports tribal sovereignty and self-determination.

02. The Department recognizes the Federal Government's unique legal relationship, as established in the Constitution, statutes, treaties and federal court decisions, between Tribal governments and the Federal Government.

03. The Department and operating units will seek and promote cooperation within the Department and with other agencies that have related responsibilities. The Department's mission encompasses many complex issues where cooperation and mutual consideration among governments (federal, state, tribal, and local) are essential. The Department and operating units will promote intradepartmental and interagency coordination and cooperation to assist Tribal governments in resolving issues requiring mutual effort.

04. Executive Order (E.O.) No. 13175, "Consultation and Coordination with Indian Tribal Governments," requires federal agencies to have an accountable process to ensure meaningful and timely input by tribal officials in developing policies that have tribal implications. This Policy provides uniform standards and methodology outlining consultation procedures for all Department personnel working with Tribal governments regarding policies that have tribal implications. This Policy is to be construed consistent with Federal statutes, regulations, Presidential memoranda, Executive Orders, and other relevant Federal legal authorities.

Section 2. Background

01. This Policy builds upon and expands the principles expressed in the "American Indian and Alaska Native Policy of the Department of Commerce," promulgated by the Department on March 30, 1995. The Tribal Consultation Policy incorporates the requirements of E.O. No. 13175; Presidential Memorandum, "Tribal Consultation," 2009 Daily Comp. Pres. Docs. 887 (November 5, 2009); the Office of Management and Budget Memorandum, "Guidance for Implementing E.O. 13175, 'Consultation and Coordination with Indian tribal Governments;'" and the Consolidated Appropriations Act, 2004, Pub. L. 108-199, Div. H § 161, 118 Stat. 3, 452 (2004), as amended by Consolidated Appropriations Act, 2005, Pub. L. 108-447, Div. H., Title V § 518, 118 Stat. 2809, 3267, relating to consultation with Alaska Native Corporations.

02. This Policy is for internal management only and shall not be construed to grant or vest any right to any party not otherwise granted or vested by existing law or regulations.

Section 3. Authority

01. This Tribal Consultation Policy is issued pursuant to the authority of 5 U.S.C. § 301 and Department Administrative Order (DAO) 218-8, "Consultation and Coordination with Indian Tribal Governments." This Policy shall have the same force and effect as a DAO. Amendments (substantive changes) or revisions (corrections or updates) to this Policy may be developed and issued by the Department of Commerce Tribal Consultation Official or the Secretary's designee in consultation with Tribal governments.

Section 4. Definitions

01. "Consultation," as defined in Section 5 of E.O. No. 13175, refers to an accountable process ensuring meaningful and timely input from tribal officials on Department policies that have tribal implications.

02. "Indian tribe (or Tribe)," as defined in Section 1(b) of E.O. No. 13175, 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.

03. "Operating units," as defined in Section 3.c.1 of Department Organization Order 1-1, are organizational entities outside the Office of the Secretary charged with carrying out specified substantive functions (i.e., programs) of the Department. The operating units are the components of the Department through which most of its substantive functions are carried out. "Operating units" includes all Department bureaus and agencies.

04. "Policies that have tribal implications," as defined in Section 1(a) of E.O. No. 13175, 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.

05. "Tribal Consultation Official," as defined in Section 5(a) of E.O. No. 13175, means the designee of the Secretary with principal responsibility for the implementation of this Policy.

06. "Tribal officials," as defined in Section 1(d) of E.O. No. 13175, means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

07. "Alaska Native Corporation," pursuant to 43 U.S.C. §§ 1602 *et seq.*, any Regional Corporation, any Village Corporation, any Urban Corporation, and any Group Corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act.

Section 5. Roles and Responsibilities for Consultations

01. Department of Commerce Tribal Consultation Official

a. The Tribal Consultation Official is an individual in the Office of Legislative and Intergovernmental Affairs (OLIA) within the Office of the Secretary who is duly appointed to act as a liaison between the Secretary of Commerce and Tribal officials. The Tribal Consultation Official may delegate authority, as necessary, to the head of each operating unit. The Tribal Consultation Official has primary responsibility for ensuring compliance with DAO 218-8, this Policy, and E.O. No. 13175, and is responsible for tribal consultations and coordination for the Office of the Secretary programs.

b. The Tribal Consultation Official has responsibility for coordinating the implementation of this Policy and DAO 218-8 within the Department and all operating units.

c. The Tribal Consultation Official will engage tribal officials in periodic dialogue to discuss the Department's implementation of this Policy. The dialogue will provide an opportunity for tribal officials to assess policy implementation, program delivery, and discuss outreach and communication efforts, and other issues.

d. The Tribal Consultation Official is responsible for submitting an annual report to OMB pursuant section 7(a) of E.O. No. 13175.

02. Head of operating unit Responsibilities

a. The head of each operating unit will designate an official in the headquarters office who has primary responsibility for ensuring compliance with this Policy within the operating unit. Each operating unit's designated official will work with the Department Tribal Consultation Official to ensure coordination of tribal consultations, as necessary. The designated official is responsible for the development, maintenance and internal distribution of any guidance produced by the operating unit in compliance with the requirements of this Policy.

b. The head of each operating unit or the designated official may delegate authority to appropriate individuals within the operating unit.

c. The head of each operating unit will consult with Tribes and prepare tribal summary impact statements when promulgating any regulations that have tribal implications, that impose substantial direct compliance costs on Indian tribal governments, and that are not required by statute; and when promulgating any regulations that have tribal implications and that preempt tribal law.

Section 6. Training and Guidance

01. The Tribal Consultation Official and the head of each operating unit will ensure that personnel assisting with tribal consultations have appropriate training.

02. Each operating unit may develop and issue tribal consultation guidance to assist staff in preparing, reviewing and managing the consultation process within their respective operating

units, so long as:

a. The guidance is consistent with DAO 218-8, and

b. The Department's Tribal Consultation Official reviews the guidance.

Section 7. Consultation

01. The Consultation Process. Consultation may take a variety of forms. Implementing this Policy may require a range of formal and informal planning activities. The Department and operating units' consultation processes may include one or more of the following: meetings, letters, conference calls, webinars, on-site visits, or participation in regional and national events. The Tribal Consultation Official or the head of each operating unit, as applicable, will make a reasonable effort to accommodate a tribal request for consultation. Ultimately, the consultation process is to entail an informed discussion of the proposed federal policy and associated tribal concerns between the designated Tribal Consultation Official and tribal officials.

02. Elements of the Consultation Process.

a. Ongoing communication shall be a regular part of the government-to-government relationship with tribal governments. The Department and operating units will engage in meaningful dialogue with Tribes regarding all policies that have tribal implications.

b. Exchange of Information. The Department and operating units will make a reasonable effort to identify and provide timely and accurate information for consultation.

c. Notification. The Department and operating units will notify Tribes of policies that have tribal implications. Follow-up may be necessary to ensure the appropriate tribal official has received the consultation notification and accompanying documents. These notifications do not replace or supersede any notifications that are required by statute or E.O. regarding tribal consultations.

d. Consultation Planning. The Department or operating units will coordinate with tribal officials to plan logistical considerations for the consultation. The Department or operating units will, when practical, allow Tribes a reasonable amount of time to prepare for consultation and submit their views on policies that have tribal implications. The Tribal Consultation Official or the head of each operating unit, as applicable, will treat a request for consultation from a tribal official in an expedited fashion and provide a written response confirming receipt of the request.

e. Written Communication and Record-Keeping. When a consultation occurs between the Department or its operating units and Tribal officials, the Department or operating unit will provide the Tribal officials with a formal, written communication that summarizes the consultation, and responds to the issues and concerns, if any, identified during consultation. The Tribal Consultation Official or head of each operating unit conducting a consultation will

maintain documentation addressing the consultation, tribal concerns, and recommendations in conformance with applicable records retention schedules.

Section 8. Consultation with Alaska Native Corporations

01. In 2004, through two consolidated appropriations acts, Congress required federal agencies to consult with Alaska Native Corporations on the same basis as Federally-recognized Indian Tribes under E.O. 13175 (Public Law 108-199, 118 Stat. 452, as amended by Pub. L. 108-447, 118 Stat. 3267).

02. The Department interprets the term "Alaska Native Corporations" in this requirement to mean "Native Corporations" as that term is defined under the Alaska Native Claims Settlement Act (ANCSA) of 1971. Congress created regional, village, and urban corporations to manage the lands, funds, and other assets conveyed to Alaska Natives by ANCSA. There are 13 regional corporations and over 200 village corporations in Alaska. The village corporations generally represent shareholders in villages associated with the 229 federally recognized tribes in Alaska. Most Alaska Native Corporation shareholders also are members of a Federally-recognized tribe in Alaska.

03. The Department will implement the requirement to consult with Alaska Native Corporations in a manner as close as possible to consultations with federally recognized tribes in Alaska, while recognizing the important differences between sovereign tribal governments and the federal trust responsibility to those tribal governments and corporations obligated to maximize financial returns to shareholders. Alaska Native Corporations were established to operate as for-profit enterprises, and may not necessarily represent the same perspective or interests as the tribes. Consultation and coordination with the corporations will follow the same process as described in this Policy for tribes, with the following exceptions:

a. Consultations with Alaska Native Corporations will occur on a "government-to-corporation" basis, rather than "government-to-government" basis to reflect the distinction between sovereign governments and corporate entities.

b. Government-to-corporations consultations will occur with appropriate adjustments given the unique status, structure, and interests of Alaska Native Corporations.

Section 9. Implementation

01. The Tribal Consultation Official, located in OLIA within the Office of the Secretary, is responsible for ensuring implementation of this Policy. This responsibility may be delegated as appropriate. This Policy does not alter or affect any existing duty or authority of any individual operating unit.

02. This Policy is not intended to, and does not, grant, expand, create or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this Policy be construed to alter, amend, repeal, interpret, or modify tribal sovereignty, any treaty rights of any Indian tribes, or to

preempt, modify, or limit the exercise of any such rights.

03. This Policy is intended to improve the Department's management of its relations and cooperative activities with Indian tribes. The Department and operating units have no obligation to engage in any consultation activities under this policy unless they are practicable and permitted by law. Nothing in this policy requires any budgetary obligation or creates a right of action against the Department for failure to comply with this policy nor creates any right, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

04. This Policy shall be updated as necessary.

Section 10. Effective Date

01. This Policy is effective beginning with the date of this memorandum and will remain in effect until it is amended, superseded by a Departmental Administrative Order, or revoked.