

U.S. Small Business Administration Tribal Consultation Policy

I. INTRODUCTION

The Federal government has a unique political relationship with Native American governments as set forth in the Constitution of the United States, and the various treaties, statutes, executive orders and court decisions. The relationship, which is based on indigenous Tribes' nationhood status and their inherent powers of self-governance, acknowledges and recognizes the Federal government's trust responsibility to protect tribal sovereignty and self-determination, tribal lands, assets, resources, treaties and other federally recognized and reserved rights.

In recognition of our Nation's responsibilities to American Indian and Alaska Native Tribes and Alaska Native Corporations (ANCs), it is the policy of the U.S. Small Business Administration (SBA or Agency) to operate within a government-to-government relationship with federally recognized indigenous Tribes and Alaska Native Corporations (ANCs) and to consult with tribal governments and ANCs prior to finalizing SBA policies that have implications for these stakeholders.

II. BACKGROUND

On April 29, 1994, a Presidential Memorandum entitled, "Government-to-Government Relations with Native American Tribal Governments" was issued to reaffirm the Federal government's commitment to operate within a government-to-government relationship with federally recognized Native American Tribes that respects their rights of self-governance. Among other requirements, it directs each executive department and agency to consult, to the greatest extent possible, with tribal governments prior to taking actions that affect federally recognized tribal governments. These consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.

On November 6, 2000, the President issued Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments", which provides guidance for Federal agencies to (1) establish regular and meaningful consultation and collaboration with tribal officials in the

development of Federal policies that have tribal implications; (2) strengthen the United States government-to-government relationships with Native American Tribes; and reduce the imposition of unfunded mandates upon Native American Tribes.

In 2004, Congress passed two consolidated appropriations acts (Pub. L. 108-199, 118 Stat. 452, as amended by Pub. L. 108-447, 118 Stat. 3267) requiring federal agencies to recognize Alaska Native Corporations having the same status as federally recognized Native American Tribes under Executive Order 13175.

In 2009, the White House signed an Executive Memorandum on “Tribal Consultation” in support of Executive Order 13175 and directed each agency to develop a detailed plan to implement the guidance of Executive Order 13175. In response, SBA issued its first Tribal Consultation Policy in February 2010. The Tribal Consultation Policy was updated and revised in 2016.

The Executive Memorandum of January 26, 2021, “Tribal Consultation and Strengthening Nation-to-Nation Relationships” reaffirmed the White House policies announced in the 2009 Executive Memorandum, and directed each agency to update its Tribal Consultation Policy in the same manner as before. The 2021 updates are reflected in this document.

III. PURPOSE

This policy is designed to reaffirm the unique government-to-government relationship and meet the consultation and coordination requirements as outlined in the Executive Memoranda as previously discussed. This document delineates the principles and procedures that SBA will follow when interacting with tribal governments in the consultation process. The SBA’s policy is to ensure Native American stakeholders are given an opportunity to provide their input into the planning and development of policies that have tribal implications.

The SBA’s policy is for internal management only and does not grant or vest any right to any party in respect to any Federal action not otherwise granted or vested by existing law or regulations.

IV. DEFINITIONS

Alaska Native Corporation – Any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq.).

Consultation – An enhanced form of communication which emphasizes trust, respect, and shared responsibility. It is an open and free exchange of information and opinion among parties which leads to mutual understanding and comprehension. Consultation is integral to a deliberative process that results in an effective collaboration and informed decision making.

Native American Tribe – An indigenous Native American or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of Interior acknowledges to exist as a Native American Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a or any subsequent list.

Native Hawaiian Organization – A community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

Tribal Government – The recognized government of a Native American Tribe and any affiliated or component Band government of such Tribe that the Secretary of the Interior recognizes as eligible for the special programs and services provided by the United States to Native Americans due to their status. The list of Federally recognized Tribes is published annually in the Federal Register pursuant to the Federally Recognized Indian Tribe List of 1994, 25 U.S.C. 479a.

Tribal Officials – Elected or duly appointed officials of Native American tribal governments or authorized intertribal organizations.

Policies that have Tribal Implications – Regulations, legislative comments or proposed legislation, and other policy statements or actions that have

substantial direct effects on one or more Native American Tribes, on the relationship between the Federal Government and Native American Tribes, or on the distribution of power and responsibilities between the Federal Government and Native American Tribes.

V. POLICY PRINCIPLES

The following principles will guide SBA's interactions with federally recognized tribal governments and ANCs and its formulation of policies with tribal implications:

SBA recognizes and commits to a government-to-government relationship with federally recognized Native American Tribes and will observe appropriate protocols when interacting with Tribal governments.

SBA recognizes and commits to a federal government-to-government relationship with ANCs and will observe appropriate protocols when interacting with ANCs.

SBA recognizes the federal trust responsibility to Tribal governments as established by specific statutes, treaties, executive orders, court decisions, regulation and policies.

SBA respects and supports the sovereignty of federally recognized Tribes, which includes the inherent right of such Tribes to exercise self-determination and self-governance.

SBA will assess the impact of its proposed policies on Native American Tribes and ANCs and engage in consultation and collaboration with Tribes and ANCs early in the decision-making process to ensure that Tribal government and ANC rights and concerns are considered.

SBA acknowledges its responsibility to inform Tribal governments and ANCs about Agency programs and services and will conduct appropriate outreach and education initiatives.

SBA understands and respects the cultural diversity of Native American Tribes and ANCs and will ensure that formal government-to-government communications are culturally appropriate.

When appropriate, SBA collaborates with other Federal departments and agencies to gauge interest in supporting joint efforts.

VI. TRIBAL CONSULTATION PLAN

Consultation is a key element in the government-to-government relationship and should be initiated early in the decision-making process. The following procedures are flexible and provide guidance for facilitating the exchange of information and ensuring that Tribal governments have meaningful input into those SBA policies with Tribal implications. Tribal governments and ANCs may exercise their right to request consultation with SBA at any time.

The four major elements of the Agency's consultation plan are:

- A. When Consultation is Appropriate**
- B. Pre-Consultation Activities**
- C. Conducting the Consultation**
- D. Post-Consultation Activities**

A. When Consultation is Appropriate

The SBA implements a variety of programs that provide business and entrepreneurial development assistance, federal contract support, access to capital and credit, and grant funding to small businesses owned by Native American Tribes and ANCs. These programs include, but are not limited to, the 8(a) Business Development Program, the HUBZone program, the Small Business Innovation Research and Small Business Technology Transfer Programs, the Economic Injury Disaster Loan Program, the 7(a) Loan Program, and the 504 Loan program. SBA will consult with Tribes and ANCs prior to implementing regulatory or policy changes impacting these programs whenever such changes would have a substantial direct effect on Tribal or ANC participation.

The SBA may also consult with Tribes and ANCs on significant regulatory or policy actions that do not have substantial Tribal implications but will impact the broader small business community, including small business concerns owned by Native American Tribes and ANCs, as well as small businesses individually owned by Native American individuals. Where such changes are being considered, SBA

will, to the extent practicable, make specific and direct efforts to include Tribes and ANCs in the outreach normally conducted with other stakeholders impacted by the changes.

Because consultation is intended to facilitate effective collaboration and informed policy making, SBA further recognizes the importance of regular communication and collaboration with Tribes and ANCs, irrespective of whether specific regulatory or policy changes are being considered.

The Assistant Administrator/Office of Native American Affairs (AA/ONAA) will be the designated official with principal responsibility for SBA's implementation of Executive Order 13175 and will lead and coordinate tribal consultations for the Agency. The AA/ONAA, the responsible program office lead, and the Associate General Counsel for Procurement Law (AGC/PL) will determine when consultation and outreach are appropriate.

1. Designating proposed regulations or policies for consultation

A particular policy or regulation may be identified for consultation in one of the following two ways. First, the responsible program office lead must notify the AA/ONAA of all prospective regulations and policies that may have substantial tribal or ANC implications. Second, a Native American Tribe or ANC may request that SBA consult on a specific proposed regulation or policy. Where the responsible program office lead determines that one or more proposed policies may have substantial tribal or ANC implications, that individual will provide advance notice to the AA/ONAA to arrange for consultation on a government-to-government basis. This notification must occur early in the planning stage of the decision-making process to allow for pre-draft consultation, if practicable. Where a Tribe or ANC requests consultation with SBA, the Tribe or ANC must submit its request in writing to the AA/ONAA. SBA strongly encourages Tribes and ANCs to submit such requests via e-mail to tribalconsultation@sba.gov to allow for consultation prior to policy implementation. Requests for consultation may also be submitted to this address:

Attn: AA/ONAA
409 3rd Street, SW
Washington DC, 20416

Any such request must identify the specific regulatory or policy action(s) at issue and describe the prospective tribal or ANC implication of the action(s).

Once a proposed regulatory or policy is identified for consultation, the AA/ONAA will meet with the responsible program office(s) and the AGC/PL to discuss the proposed policy, clarify issues, identify additional informational needs, determine desired outcomes, and, if consultation is deemed appropriate, plan the consultation in accordance with Article VI ¶ B.

2. Regular Dialogue through Consultation

Tribes and ANCs also participate in the SBA's programs through for-profit subsidiaries. The clear intent of such participation is to benefit Native American communities. SBA recognizes that regular communication and collaboration between the SBA and its Tribal and ANC stakeholders are vital to improving their program participation experience and maximizing the benefits to Native American communities, even where SBA is not actively considering specific regulatory or policy changes with Tribal implications. SBA will therefore make efforts to consult Tribes and ANCs periodically, on at least on an annual basis, to obtain input on how the SBA could improve its programs to better serve Native American stakeholders.

B. Pre-Consultation Activities

Once a proposed regulation or policy is identified for consultation, ONAA will meet with the responsible program office(s) and the AGC/PL to plan the consultation.

1. Develop an Information Package For Prospective Tribal Consultation Participants

After gathering sufficient preliminary information about the proposed

action, the appropriate program office(s) will prepare an information package containing a description of the proposed action, an initial list of issues and concerns, and any other materials that will assist Tribal governments and ANCs in analyzing the proposed action and provide input during the consultation process.

2. Design the Consultation Process

The Agency's consultation process will be flexible and appropriate for the scope and magnitude of a policy that has Tribal and ANC implications. Consultation may be conducted through face-to-face meetings, virtual conferences, written comments or any combination of these three methods. Where a face-to-face meeting is not feasible, SBA will use a video conferencing platform with a dial-in option (e.g., Microsoft Teams, Zoom). SBA's consultation with Native American Tribes (and/or ANCs) will be national in scope. When appropriate, the Agency may conduct a series of regional meetings to solicit Tribal and ANC input.

3. Select an Appropriate Meeting Site

If the consultation process for a particular policy includes a face-to-face meeting or telephone conference, the Agency will select meeting locations that are accessible to Tribal and ANC participants.

4. Provide Notice to Tribal Governments

After determining the level of consultation, ONAA will notify the tribal governments and/or ANCs of the consultation's purpose, location, schedule, meeting format, registration process, comment submission and testimony presentation procedures using methods of communication such as the Federal Register, certified letters, e-mail, news media and the Internet. SBA will notify Tribal governments and/or ANCs as early as possible, but not less than 30 days from the date of the consultation. SBA will use the Federal Register to announce formal consultations and post the information onto the SBA website. Any such announcement or notification will summarize the information packet referenced in Article VI ¶ B(1). This information package will also be available upon request. Requests should be submitted to the AA/ONAA.

5. Identify the participants in the consultation process.

ONAA will review the list of those who respond to the consultation notice to determine the position and role of each tribal official within their government or officer within their ANC and to identify any interested third parties.

ONAA will also identify Agency officials who are the decision makers in the SBA's planning and implementation processes. ONAA will contact these officials who are expected to participate in the consultation process.

C. Conducting the Consultation

Based on our Nation's government-to-government relationship with Native American Tribes and ANCs, the desired outcome of consultation should be full participation of the Tribal governments on new or revised SBA policy that affects Native American Tribes and full participation of ANCs on new or revised SBA policy that affects ANCs. Therefore, it is important for the Agency to ensure that Native American Tribes and ANCs have the opportunity to review information and provide input into the Federal decision-making process.

1. Consultation must be conducted in a manner that respects Tribal sovereignty and formally recognizes Tribal officials as government representatives of other nations. Consultation must respect the unique status of ANCs and formally recognize ANC representatives as the proxy of Alaska Native shareholders. The dialogue must be open and candid and encourage exchanges of information, views, and recommendations to enable federal, Tribal, and ANC officials to make an informed decision.
2. Consultation proceedings may be transcribed by a certified stenographer, recorded, memorialized by SBA staffer notes, or transcribed by software and become part of the official record of the meeting.
3. Following the consultation, if practicable and appropriate, the written record will remain open for a specified time period to allow tribal officials the opportunity to submit additional comments. All follow-up comments should be submitted via e-mail to

tribalconsultation@sba.gov or mailed:

Attn: AA/ONAA
409 3rd Street, SW
Washington DC, 20416

D. Post-Consultation Activities

1. SBA may post transcripts of the consultation proceedings on its website for public review and will consider comments and recommendations submitted by Tribal officials and ANCs prior to publishing the proposed policy action in the Federal Register.
2. The Agency will publish the proposed action in the Federal Register and address the comments received during the public comment period.
3. For regulatory actions, SBA will address and summarize the comments and input received during the consultation process in the preamble to the rule. This written explanation will set forth the reasons for accepting or declining input from the tribal and/or ANC communities.

VII. COMMUNICATION WITH NATIVE HAWAIIAN ORGANIZATIONS AND STATE RECOGNIZED TRIBES

Native Hawaiian Organizations (NHOs) and State recognized Tribes also participate in the SBA's programs. As appropriate, the Agency will also meet with such entities regarding program policies that may have a significant effect on them and their stakeholders.