

U.S. Small Business Administration Tribal Consultation Policy

I. INTRODUCTION

The Federal government has a unique political relationship with American Indian 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 Indian 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 Indian tribes and government-to-corporation relationship with ANCs and to consult with tribal governments and ANCs prior to finalizing SBA policies that have tribal and ANC implications.

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 Indian tribes; and reduce the imposition of unfunded mandates upon Indian 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 on the same basis as federally recognized Indian tribes under Executive Order 13175.

In 2009, the White House signed an Executive Memorandum in support of Executive Order 13175 and issued directives to department and agency heads.¹

III. PURPOSE

The policy set forth here is designed to affirm the unique federal-tribal government relationship and meet the consultation and coordination requirements as reiterated in the 2009 Executive Memorandum on “Tribal Consultation”. The following delineates the principles and procedures that SBA will follow when interacting with tribal governments in the consultation process. SBA’s policy is to ensure timely input in the planning and development of policies that have tribal implications.

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

¹ SBA submitted the required documents to OMB in compliance with this November 5, 2009 Executive Memorandum and issued its Tribal Consultation Policy in February 2010. The Tribal Consultation Policy has since been updated and is reflected in the text of this document.

information and opinion among parties which leads to mutual understanding and comprehension. Consultation is integral to a deliberative process which results in an effective collaboration and informed decision making.

Indian Tribe – An Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of Interior acknowledges to exist as an Indian 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 an Indian 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 Indians because of their status as Indians by annual notice 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 Indian 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 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.

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 federal government-to-tribal government relationship and will observe appropriate protocols when interacting with tribal governments.

SBA recognizes and commits to a federal government-to-corporation 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 Indian tribes and ANCs and engage in consultation and collaboration with tribes and ANCs early in the decision-making process to assure 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 Indian tribes and ANCs and will ensure that formal federal-tribal and federal-ANC communications are culturally appropriate.

When appropriate, SBA works cooperatively with other Federal departments and agencies to enlist their interest in support of cooperative efforts.

VI. TRIBAL CONSULTATION PLAN

Consultation is a key element in the federal government-to-tribal government and federal government-to-corporation relationships 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 SBA policies with tribal implications. Tribal governments and ANCs may

exercise their right to request consultation with SBA at any time. The three major elements of the Agency's consultation plan are:

- A. Pre-Consultation Activities**
- B. Conducting the Consultation**
- C. Post-Consultation Activities**

A. Pre-Consultation Activities

The Assistant Administrator/Office of Native American Affairs (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. Prior to making decisions about policies that have tribal implications, program offices will provide advance notice to ONAA to arrange for consultation on a government-to-government (or government-to-corporation) basis. This notification must occur early in the planning stage of the decision-making process to allow for pre-draft consultation.

ONAA will meet with the program office(s) to discuss the proposed policy, clarify issues, identify additional informational needs, determine desired outcomes, and 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 help tribal governments provide meaningful input during the consultation process.

2. Design the Consultation Process

The Agency's consultation process will be flexible and appropriate for the type and level of policy that has tribal implications. It may be conducted through face-to-face meetings, telephone conferences, written comments or any combination of these three methods. SBA's consultation with Indian tribes (and/or ANCs) will be national in scope. The Agency may conduct a

series of regional meetings to solicit tribal and ANC input, when appropriate.

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 work to select meeting locations that are accessible to tribal and ANC participants logistically and economically.

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, and 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 use the Federal Register to announce formal consultations as well as post the information on the SBA website.

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 his/her government or officer within his/her ANC and to identify any interested third parties.

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

B. Conducting the Consultation

Based on our Nation's federal-tribal government relationship, the desired outcome of consultation should be full participation of the tribal governments on new or revised SBA policy that affects Indian tribes and full participation of ANCs on new or revised SBA policy that affects ANCs. Therefore, it is important for the Agency to ensure the meaningful input of Indian tribes and ANCs in 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 representatives of its Alaskan Native shareholders. It 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, taped, memorialized by SBA staffer notes, or transcribed by Ready Talk 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.

C. 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.

VII. COMMUNICATION WITH NATIVE HAWAIIAN ORGANIZATIONS AND STATE RECOGNIZED TRIBES

Due to special provisions in SBA's programs for Native Hawaiian Organizations (NHOs) and state recognized tribes, the Agency will also meet from time to time with such entities on program policies significantly affecting these entities, as appropriate.

David Sanborn

David Sanborn
Assistant Administrator

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Date