

Tribal Consultation Best Practices

This briefing paper provides an overview of the legal foundations for government-to-government consultation between the United States and Tribal Nations and outlines what meaningful Tribal consultation looks like in practice. As the Administration works to implement its policy priorities, the unique legal rights of Tribal Nations will often require government-to-government consultation prior to implementation. ***The ultimate goal of Tribal consultation is for the United States and Tribal Nations to reach consensus on policies impacting Indian Country and how they should be implemented.***

Tribal Nations’ Government-to-Government Relationships with the United States Are the Foundation of Tribal Consultation. The United States recognized Tribal Nations as sovereigns from the very beginning. Today, federal recognition of a Tribal Nation remains a formal political act that solidifies the government-to-government relationship between a particular Tribal Nation and the United States.

Tribal Consultation Is, First-and-Foremost, a Legal Right. The United States has embedded Tribal consultation requirements into specific and enforceable statutes.¹ The Executive Branch has recognized a duty to consult with Tribal Nations on federal actions that may have Tribal implications.²

Federal Officials with Decision-Making Authority Must Carry Out Tribal Consultation. Tribal consultation is a right solely between sovereigns, and the responsibilities and privileges associated with it cannot be delegated to other actors. While other entities, experts, and stakeholders might be asked to inform public policy decisions or federal actions, the legal obligation of Tribal consultation is held solely by the United States. Thus, Tribal consultation must take the form of interactions between Tribal and federal officials who have government-binding decision-making authority.

Tribal Consultation Must Occur Before Federal Officials Have Made Decisions. Tribal consultation is more than the mere conveyance of information by federal officials to Tribal leaders. Tribal consultation requires the federal government to discuss federal proposals before it makes decisions on moving forward. Meaningful Tribal consultation must allow for dialogue, questions, and openness to different ways of addressing an issue.

Meaningful Tribal Consultation Utilizes Processes Designed to Level the Playing Field and Assist in Reaching Consensus. While government-to-government consultation need not adhere to a single, uniform process, meaningful Tribal consultation meets certain key requirements, in addition to those described above.

- Tribal Nations are given adequate *notice*.
 - Meaningful Tribal leader participation in consultation sessions is more likely to occur with more advanced notice provided.
 - Federal Agency Example: The Department of the Interior’s Indian Affairs’ (IA) Tribal Consultation Process³ requires that “consultation occurs early in the process,” meaning “as soon as realistically possible once . . . a project, approach, or regulation that may potentially impact Tribal lands, people,

¹ See, e.g., 54 U.S.C. § 300108 (implemented through 36 C.F.R. pt. 800).

² See, e.g., Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).

³ 18 IAM 6: Tribal Consultation Process (Dec. 26, 2024).

programs, or rights” is identified, and it requires formal notice “*at least 30 calendar days in advance* of the first scheduled consultation session” unless “exceptional circumstances” exist.⁴

- Tribal Nations are provided *complete information*.
 - In order to provide meaningful substantive feedback on complex policy or legal issues, Tribal leaders need full information about the issue and the potential actions the federal agency is considering.
 - Federal Agency Example: IA’s Tribal Consultation Process requires that, at the time notice is given of upcoming Tribal consultation sessions, Tribal Nations must be provided with documentation containing “sufficient detail of the topic to be discussed to allow Tribal officials an opportunity to fully engage in the consultation.”⁵
- Tribal Nations may access *technical assistance* about topics subject to Tribal consultation.
 - Due to varying levels of capacity, all Tribal Nations must be given the opportunity to obtain technical assistance prior to a given consultation session—particularly when the topic of a Tribal consultation requires specialized knowledge to meaningfully provide feedback.
 - Federal Agency Example: In certain circumstances, IA’s Tribal Consultation Process requires providing “guidance and technical assistance” to Tribal Nations.⁶
- Tribal Nations are given *adequate time* to provide meaningful feedback.
 - Tribal Nations need ample time to prepare in advance of Tribal consultation sessions—and the more complex the issue, the more time is needed to prepare.
 - Tribal Nations also require time after all Tribal consultation sessions on a specific topic have ended to consider and provide final written comments to the federal agency for consideration.
 - Federal Agency Example: IA’s Tribal Consultation Process requires a written comment period to occur after consultation sessions have ended, and it requires incorporating all such written comments into the official record and their consideration prior to taking any action.⁷
- Tribal Nations receive *follow-up reports* from federal agencies detailing how Tribal leader feedback was taken into account in the ultimate decision-making.
 - Tribal consultation records should be shared with Tribal Nations, but with sensitive Tribal Nation information protected.
 - Federal Agency Example: IA’s Tribal Consultation Process requires the agency “to provide . . . the record of the consultation and decisions made as a result of the consultation,” which is accomplished through a “Consultation Summary Report” posted on the Bureau of Indian Affairs’ webpage.⁸

⁴ *Id.* at 1.5(B)(4), 1.7(A)(3) (emphasis added).

⁵ *Id.* at 1.7(A)(3).

⁶ *Id.* at 1.7(A)(2).

⁷ *Id.* at 1.7(A)(6).

⁸ *Id.*