

**[This document is a draft of a proposed DOT Order to revise DOT Order 5301.1]**

Subject: DEPARTMENT OF TRANSPORTATION TRIBAL CONSULTATION ORDER

1. PURPOSE. This Order conveys policy, delegates authority, and assigns responsibility to ensure that the United States Department of Transportation (DOT or Department) and its Operating Administrations (OAs), including all components of the Office of the Secretary (OST), meet the requirements related to consultation with Indian Tribes pursuant to Executive Order (EO) 13175, *Consultation and Coordination with Indian Tribal Governments*, and other applicable requirements set forth in statute, regulation, or executive actions. With this Order, the Department will also ensure that programs, policies, and procedures administered by DOT are responsive to the needs and concerns of Indian Tribes.
2. CANCELLATION AND EFFECTIVE DATE. This Order cancels:
  - a. DOT Order 5301.1, *Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes*, issued November 16, 1999, and
  - b. *U.S. Department of Transportation Tribal Consultation Plan*, (2010).
  - c. This Order is effective upon issuance.
3. APPLICABILITY. This Order applies to all DOT regulatory, legislative, and policy actions or other Department actions, that have implications on Federally Recognized Tribes and Alaska Native Claims Settlement Act corporations.
  - a. For the purpose of this Order, Operating Administration (OA) refers to the nine DOT OAs, the Office of the Secretary (OST), and the Office of Inspector General.
  - b. OAs must comply with all applicable laws, regulations, executive actions, and other directives, including the goals and actions set forth in the Appendix to this Order, any legal requirements not cited herein, and such laws and directives that may be established after issuance of this Order.
  - c. This Order is intended solely to improve the internal management of the Department. It is not intended to and does not create any right or benefit, substantive or procedural, enforceable by any party against the United States, the

Department, or its entities, officers, employees, or agents, or any other person.

#### 4. AUTHORITIES AND REFERENCES

This list is not all-inclusive but is intended to help in the understanding of this DOT Order.

##### **Statutes:**

- a. Alaska Native Claims Settlement Act of 1971 (ANCSA), as amended, 43 U.S.C. §§ 1601-1629g.
- b. American Indian Religious Freedom Act of 1978, as amended, 42 U.S.C. § 1996.
- c. Antiquities Act of 1906, as amended, 54 U.S.C. §§ 320301-320303 (2014).
- d. Archeological Resources Protection Act of 1979, as amended, 16 U.S.C. §§ 470aa - 470mm.
- e. Buy Indian Act, 25 U.S.C. § 47, as amended.
- f. Consolidated Appropriations Act, 2004, Pub. L. 108–199, Div. II. Sec. 161, 118 Stat. 3, 452 (2004) as amended by Consolidated Appropriations Act, 2005, Pub. L. 108–447, Div. H., Title V. Sec. 518., 118 Stat. 2809, 3267 (2004) (inclusion of ANSCA corporations for consultation purposes).
- g. Equity in Educational Land Grant Status Act of 1994, 7 U.S.C. § 301 note.
- h. Fixing America’s Surface Transportation Act, 23 U.S.C. §207.
- i. Federally Recognized Indian Tribe List Act of 1994, as amended, 25 U.S.C. §§ 5130 and 5131.
- j. Historic Sites Act of 1935, 54 U.S.C. §§ 320101-320106 (2014).
- k. Indian Self-Determination and Education Assistance Act of 1975, as amended, 25 U.S.C. § 5301 *et seq.*
- l. Intergovernmental Personnel Act 5 U.S.C. § 4701 (allows temporary employment of Tribal government officials) and 42 U.S.C. §§ 4771-4772 (authority allowing Tribal officials to participate in Federal training).
- m. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4321 note, 4331-4335, 4341-4346b, 4347 and implementing regulations at 40 CFR 1500–1508.
- n. National Historic Preservation Act of 1966, as amended, 54 U.S.C. §100101, *et seq.*

- o. Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001-3013 and implementing regulations at 43 CFR Part 10.
- p. Navajo Community College Assistance Act of 1978, 25 U.S.C. § 640a note.
- q. Religious Freedom Restoration Act of 1992, 42 U.S.C. §§ 2000bb-2000bb - 4.
- r. Section 4(f), 23 U.S.C. § 138 and 49 U.S.C. §303.
- s. Title VI of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000d, *et seq.*
- t. Tribal Self-Governance Act of 1994, 25 U.S.C. §§ 5361 *et seq.*
- u. Tribally Controlled Community College Assistance Act of 1978, 25 U.S.C. §§ 1801-1815.
- v. Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 602, 658, 658a- 658g, and Chapter 25.
- w. 25 U.S.C. § 5325(i), made applicable to the Department by 23 U.S.C. 207(l)(8), which incorporates by reference 25 U.S.C. § 5396(a).

**Executive Orders and Memoranda:**

- x. Executive Order 12866, Regulatory Planning and Review (58 Fed. Reg. 51739, October 4, 1993).
- y. Executive Order 12875, Enhancing the Intergovernmental Partnership (58 Fed. Reg. 58093, October 28, 1993).
- z. Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 Fed. Reg. 7629, February 16, 1994).
- aa. Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes, Memorandum for the Heads of Executive Departments and Agencies, signed by the President (59 Fed. Reg. 22953, May 4, 1994).
- bb. Presidential Memorandum on Government-to-Government Consultation with Native American Tribal Governments (59 Fed. Reg. 22951, May 4, 1994).
- cc. Office of Management and Budget Memorandum M-95-20, Guidelines and Instructions for Implementing Section 204, "State, Local, and Tribal Government Input," of Title II of P.L. 104-4, September 21, 1995.

- dd. Executive Order 13007, Indian Sacred Sites (61 Fed. Reg. 26771, May 29, 1996).
- ee. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, (65 Fed. Reg. 67249, November 9, 2000).
- ff. Presidential Memorandum on Tribal Consultation (74 Fed. Reg. 57879, November 9, 2009).
- gg. Executive Order 13592, Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities (76 Fed. Reg. 76603, December 8, 2011).
- hh. Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, (86 Fed. Reg. 7491, January 29, 2021).

**DOT Orders:**

- ii. DOT 5610.1C, Procedures for Considering Environmental Impacts, dated September 18, 1979.
- jj. DOT 1325.2C, DOT Correspondence Policy, dated October 29, 1993.
- kk. DOT 5610.2B, Department of Transportation Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, November 18, 2020.
- ll. DOT 1000.12C, The U.S. Department of Transportation Title VI Program, dated June 11, 2021.

5. DEFINITIONS

American Indian. Refers to a person who is a citizen of an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior recognizes as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a. The term “American Indian” is commonly used to refer to citizens of such populations residing in the lower 48 States.

Alaska Native. Refers to a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or combination thereof.

ANCSA Corporations. Refers to corporate entities organized under the Alaska Native Claims Settlement Act of 1971 (ANCSA) that hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of Alaska Native shareholders. Under Federal law (legal citations for the law are set forth above in Section 4, line f), Federal agencies must

consult with ANCSA corporations on the same basis as Indian Tribes under Executive Order 13175.

Consultation. Refers to a government-to-government meeting conducted in person or by other appropriate means where there is a meaningful, timely, and clear exchange of information between the heads of the Federal and Tribal governments, or their authorized officials, on a specific proposed policy that has Tribal implications.

Department. Refers to the U.S. Department of Transportation, including the Office of the Secretary and all components within the Office of the Secretary. Unless the context requires otherwise, the term also includes the Department's Operating Administrations.

Environmental Justice. Refers to the fair treatment and meaningful involvement of all people, regardless of race, ethnicity, income, national origin, or educational level with respect to the development, implementation and enforcement of environmental laws, regulations, and policies. Fair treatment means that no population, due to policy or economic disempowerment, is forced to bear a disproportionate burden of the negative human health and environmental impacts, including social and economic effects, resulting from transportation decisions, programs and policies made, implemented and enforced at the Federal, State, local or tribal level.

Federally Recognized Tribe, Tribe, or Indian Tribe. Refers to any Indian tribe, band, nation, pueblo, village, community, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. § 1601, *et seq.*), that the Secretary of the Interior recognizes as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, (25 U.S.C. § 479a). The descriptive term "Tribal" relates to this definition.

Listening session. Refers to a meeting in person or by other appropriate means that is initiated either by the Department or Tribes where information and input is solicited and discussed regarding a potential policy under general consideration that may have Tribal implications.

Operating Administration. Refers to any entity established within the Department as listed in 49 CFR §1.2.

Tribal Citizen. Refers to a person who is an enrolled citizen of a Federally Recognized Tribe as determined by a Tribe's laws or customs.

Tribal Colleges and Universities. Refers to those institutions cited in Section 532 of the Equity in Educational Land Grant Status Act of 1994 (7 U.S.C. § 301 note) and any other institution that qualifies for funding under the Tribally Controlled Community College Assistance Act of 1978 (25 U.S.C. § 1801, *et seq.*) and Navajo Community College, authorized in the Navajo Community College Assistance Act of 1978 (Public Law 95-471), Title II (25 U.S.C. § 640a note).

Tribal Government. Refers to the recognized government of a Tribe by the U.S. Department of the Interior, Bureau of Indian Affairs.

Tribal implications. Refers to regulations or policies 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 between the Federal government and Indian tribes. This term includes the development of new Federal standards by DOT that would affect Tribal governments.

Tribal interest. Refers to the interest of a Tribe based on rights established in treaties, the U.S. Constitution, statutes, court decisions, executive orders, the trust responsibility, or the inherent rights of an Indian tribe.

Tribal officials: Refers to elected or duly appointed officials of Tribal governments or authorized intertribal organizations.

Tribal organization. Refers to a Tribal Government; any legally established organization of a Tribe which is controlled, sanctioned, or chartered by such Tribal Government or which is democratically elected by the adult citizens of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities.

Tribal sovereignty. Refers to the unique legal status of Federally Recognized Tribes as set forth in the U. S. Constitution, treaties, and Federal statutes, executive orders, and court decisions, which establish Tribes, as sovereign domestic nations subject to the protection of the U.S. Government. As domestic nations, Tribes exercise inherent sovereign powers over their citizens and territory unless such powers are explicitly removed by Congress.

Trust resources. Refers to natural resources such as, but not limited to, water, fish, wildlife, air, minerals, natural gas, oil, forests, plants, land, rivers, cultural resources, that are held in trust by the Federal Government on behalf of Federally Recognized Tribes.

Trust responsibility. Refers to the obligation of the Federal Government, principally in return for the cession of lands by Indian Tribes, to provide support and ensure the protection of Tribal interests, Tribal lands, and Tribal resources as set forth in treaties, Acts of Congress, executive orders, U.S. Supreme Court decisions, and other applicable law.

## 6. BACKGROUND.

- a. American Indians and Alaska Natives have a special place in our Nation's history and culture, and certain laws and policies apply to them.
- b. The Federal Government has a unique legal and political relationship with Federally Recognized Tribes subject to specific Federal laws and policies.
- c. The Federal Government has a trust obligation for resources held by the Federal Government on behalf of Federally Recognized Tribes and their citizens to ensure that they are conserved for the benefit of present and future generations.

- d. The Federal Government, in carrying out its trust responsibility, has the duty to act in good faith and loyalty to the best interests of Federally Recognized Tribes, among these being the rights of Federally Recognized Tribes to self-determination and self-governance.
- e. In 1975, Congress passed the Indian Self-Determination and Education Assistance Act (Public Law 93-638). This Act recognized the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of Federal services.
- f. On April 29, 1994, a Presidential Memorandum was issued, entitled, “Government-to-Government Relations with Native American Tribal Governments.” This Memorandum directed all Executive Departments and Agencies to implement activities affecting Indian Tribal rights or trust resources by consulting with tribes in a knowledgeable, sensitive manner respectful of Tribal sovereignty.
- g. Executive Order (EO) 13175, dated November 6, 2000, entitled, “Consultation and Coordination with Indian Tribal Governments” directs Federal agencies to consult with Federally Recognized Tribes before adopting “policies that have tribal implications”. Executive Order 13175 describes such policies that have Tribal implications as “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.”
- h. On November 5, 2009, a Presidential Memorandum was issued, entitled, “Tribal Consultation.” This Memorandum noted that “pursuant to Executive Order 13175 of November 6, 2000, . . . 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.” This Memorandum directed all agencies to develop a “detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175” following Tribal consultation, and to provide annual progress reports on the status of the plan and any proposed updates.
- i. On January 26, 2021, a Presidential Memorandum was issued entitled “Tribal Consultation and Strengthening Nation-to-Nation Relationships.” This Memorandum reaffirmed the consultation policy announced in the 2009 Memorandum and directed agencies to submit an updated plan for implementing Executive Order 13175. The Department’s Tribal Consultation Plan is set forth in the Appendix to this Order.

- j. This updated Order reaffirms the Department's commitment to working with Federally Recognized Tribes and ANCSA Corporations, and to clarify the roles and responsibilities for carrying out the Department's consultation responsibilities.

## 7. POLICY AND PROCESS.

Based on the principles and directives in EO 13175, and the express policies of the United States with respect to Indian Tribes, in conducting and administering activities and programs, and fostering relationships with Federally Recognized Tribes and ANCSA corporations, the Department and all Operating Administrations (OAs) shall, to the extent practicable and permitted by law:

- a. Carry out DOT's mission, strategic goals, policies, programs, and activities affecting Tribes, American Indians, Alaska Natives, and ANCSA corporations in a manner that reflects a high commitment to consistent and efficient Departmental operations.
- b. Consult with Federally Recognized Tribes and ANSCA corporations before taking any action on a regulatory or other policy that has Tribal implications. The Consultation procedures and requirements in this Order are distinct and separate from project-level consultations with Tribes under the National Historic Preservation Act and other similar Federal laws or with respect to one-on-one consultations between an Indian Tribe and the Department concerning a Tribal interest.
- c. Ensure that a Tribal consultation process regarding policies that have Tribal implications shall, at a minimum, comply with the following:
  - i. The Department must send or issue timely notice of the Consultation to affected Tribes via the Federal Register, email, direct mail, or on the Department's website. In no event may a consultation meeting with Tribes occur less than 60 calendar days from the date of publication or issuance of a consultation notice, unless consented to by Tribes or unless otherwise directed by the Congress or the President.
  - ii. The Department's notice must clearly explain the purpose of the consultation and provide a copy or description of the proposed policy with Tribal implications to Tribes.
  - iii. The Department's proposed approach for in-person Consultation must be using a means accessible to Tribes or at a location that is convenient to Tribes.
  - iv. The Department's consultation should involve a meaningful



discussion with Tribes regarding the proposed policy with Tribal implications. The term “meaningful” refers to a communication process where Tribes are afforded the opportunity to provide their unique perspective and input on a proposed policy that has Tribal implications and where authorized Federal officials listen, discuss, and act in good faith and in full consideration of such Tribal perspective and input.

- v. The Department must afford Tribes with the opportunity to submit written comments during a period that extends from the date of the publication or issuance of the consultation notice to a date that is thirty (30) days after the last consultation meeting or to the extent permitted by law.
  - vi. The Department must record the proceedings and oral comments at Consultation meetings by a court reporter or through other means such as electronic recordings and make available a link to the transcript or electronic recording on the Department’s website when such recording becomes available.
  - vii. The Department must provide responses that sufficiently explain the basis of the Department’s responses to Tribal comments regarding a proposed policy with Tribal implications using one or more of the following methods of notice: Federal Register, email, direct mail, or on the Department’s website.
- d. Meet the goals and carry out the actions and accountability directives in the Department’s Tribal Consultation Plan (See Appendix) to fully implement the purpose and objectives of EO 13175.
- e. Carry out the statutory or regulatory waiver process in a manner that provides priority to Tribal requests for such waiver in connection with any programs administered solely by the Department to the extent practicable and permitted by law. At a minimum, a process should include the following:
- i. The date when the request was received.
  - ii. The date when the response is due.
  - iii. Within 30 days of the receipt of the request, a letter acknowledging the receipt should be sent to the Tribe.
  - iv. The request should be promptly reviewed in coordination with the Office of General Counsel and Office of Policy and in accordance with objectives in Section 6 of E.O. 13175.
  - v. A response to the request should be issued within 120 days from the receipt of the request or as otherwise required by law or regulation.
  - vi. If the 120-day response time cannot be met, a letter should

be sent to the Tribe explaining the delay and stating when a response will be forthcoming.

- f. Respect the right of Federally Recognized Tribes, ANCSA Corporations, and their designated representatives, to advocate and represent their respective interests.
- g. Exercise creativity and flexibility in fostering partnerships among the Tribes, States, and local governments.
- h. Assess the environmental impact of DOT activities on Tribal interests and trust resources consistent with the National Environmental Policy Act and other applicable requirements and ensure that such interests and resources are considered before DOT activities are undertaken. This assessment must include ensuring that the concerns of Federally Recognized Tribes, regarding the potential impact on trust resources and Tribal interests, are properly addressed in agency policies, programs, and activities.
- i. Respond effectively to the transportation concerns of American Indians and Alaska Natives related to environmental justice, children's safety and environmental health risks, occupational health and safety, and other environmental matters.
- j. Solicit input from Federally Recognized Tribes through listening sessions regarding a potential policy that has Tribal implications. For such listening sessions, the Department may, but is not required to, follow the same procedures that are outlined in this Order regarding consultations on policies that have Tribal implications.
- k. Streamline DOT procedures, where applicable, for working directly with Federally Recognized Tribes on activities that affect trust resources or Tribal self-determination and self-governance.
- l. Encourage direct relationships with Tribes and seek Tribal representation in relevant DOT sponsored meetings, negotiated rulemaking efforts, forums, advisory committees, focus groups, public surveys, research protocols, and data collection activities.
- m. Design solutions and tailor DOT programs as appropriate to address specific or unique needs of Federally Recognized Tribes.
- n. Recognize and work to redress inequities in policies and programs that serve as barriers to equal opportunity to Tribes and Tribal citizens.
- o. Consider opportunities under the Intergovernmental Personnel Act for

temporarily hiring Tribal citizens and publicizing eligibility of Tribal citizens to participate in Federal training activities.

- p. Foster opportunities such as internships, fellowships, scholarships, or other related DOT programs in education and research for American Indians and Alaska Natives.
- q. Include Tribal colleges and universities in DOT educational, research, and program activities as prescribed in paragraph 8(f)(i)(8). This may also include helping the institutions through such activities as providing DOT personnel as temporary instructors and providing surplus property and equipment.
- r. Ensure non-discrimination in employment of and services to American Indians and Alaska Natives.
- s. Integrate information about Federal laws and policies on relations with Federally Recognized Tribes and ANCSA Corporations into DOT training.
- t. Treat correspondence from leaders of Federally Recognized Tribes concerning a Tribal interest in the same manner as congressional correspondence. This does not apply to correspondence pursuant to Department regulation or to correspondence relating to routine programmatic matters.
- u. Cooperate with other Federal, State, or local agencies to accomplish government-to-government relations, carry out consultations, address regulatory issues, and solve problems in accordance with the policy objectives above.
- v. Stress the importance of Tribal involvement in transportation planning and decision-making.
- w. Encourage Tribes to develop and establish their own policies and standards to carry out and administer transportation projects and activities. To the extent practicable, the Department and OAs will provide technical assistance to Tribes in this process to ensure that Tribally established policies and standards are consistent with Federal policies and standards.
- x. Afford Tribes the maximum administrative discretion possible by identifying and evaluating the statutes and regulations of the Department and its OAs to determine when such discretion may be granted to Tribes. The Department will carry out the identification and evaluation process by conferring with Tribes and by collaborating with its OAs on a review of the

statutes and regulations to determine the maximum administrative discretion that may be granted to Tribes.

## 8. MANAGING COMPLIANCE IN THE DEPARTMENT

The following officials and entities are responsible for implementing this Order:

- a. **Assistant Secretary for Governmental Affairs.** The Secretary has delegated to the Assistant Secretary for Governmental Affairs the duties set forth in 49 CFR § 1.35.
- b. **Deputy Assistant Secretary for Tribal Affairs.** The Deputy Assistant Secretary for Tribal Affairs shall have the duties set forth in 49 U.S.C. § 102(f) and 49 CFR § 1.35 to plan and coordinate the Department's policies and programs with respect to Federally Recognized Tribes, American Indians, ANCSA Corporations, and Tribal organizations. The Deputy Assistant Secretary for Tribal Affairs will advise and make recommendations to the Secretary of Transportation on DOT policies, issues, programs, and activities that have Tribal implications. The Deputy Assistant Secretary for Tribal Affairs will also oversee any updates to the Department's Tribal Consultation Plan, as necessary, in accordance with this Order.
- c. **Director of Tribal Affairs.** The Director of Tribal Affairs, under the supervision of the Deputy Assistant Secretary for Tribal Affairs, will advise and make recommendations to the Secretary of Transportation on American Indian, Alaska Native, and Tribal policies, issues, programs, and activities. The Director of Tribal Affairs will ensure the Department carries out the mission and responsibilities described below. The mission of the Director of Tribal Affairs is to facilitate a consistent Departmental policy and strategy relative to American Indian, Alaska Native, and Tribal transportation matters to the extent practicable and permitted by law. The duties of the Director of Tribal Affairs include:
  - i. Providing Departmental oversight, guidance, direction, and recommendations to the Office of the Secretary and the Department's OAs with regard to implementing this Order and achieving the goals listed in paragraphs 8(f)(i)(1) through 8(f)(i)(10) of this Order and the Department's Tribal Consultation Plan (See Appendix). This includes collecting and providing summary information and/or reports on behalf of the Deputy Assistant Secretary for Tribal Affairs on the Department's efforts as described in the Tribal Consultation Plan.
  - ii. Educating DOT employees on American Indian, Alaska Native and Tribal laws, policies, programs, activities, cultures, and traditions.
  - iii. Facilitating Tribal input in the development of new or amended policies, regulation, and legislative actions with Tribal implications initiated by DOT.
  - iv. Supporting OAs to ensure full compliance and accountability with this Order.

- v. Facilitating meetings between DOT and an Indian tribe or a Tribal citizen to seek a solution on a program or project issue affecting or pertaining to a Tribal interest or trust resource.
- vi. Coordinating the scheduling of DOT consultation and listening sessions with other Federal departments and agencies to ensure full participation by Tribes.
- vii. Assisting OA implementation of the goals listed in paragraphs 8(f)(i)(1) through 8(f)(i)(10) of this Order and the Department's Tribal Consultation Plan (See Appendix) through the following:
  - 1. Maintain a current directory of DOT programs, including a list of responsible program officials, for which Federally Recognized Tribes, Alaska Natives, and ANCSA Corporations are eligible.
  - 2. Coordinate and promote innovative partnerships among Federal, State, and local government programs and activities that will have the optimal positive effect on American Indians and Alaska Natives.
  - 3. Serve on the White House Domestic Policy Council/Native American Subcommittee, the White House Council for Native American Affairs, and, as appropriate, interagency forums on American Indian and Alaska Native issues or concerns.
  - 4. Seek opportunities for training and information exchange via meetings, conferences, workshops, and forums.
  - 5. Facilitate communication and dialogue among Federal, State, Tribal representatives, and other government entities.
  - 6. Ensure the DOT website focuses on DOT programs, policies, activities, and issues affecting Indian Tribes, Alaska Natives, and ANSCA corporations.
  - 7. Determine through information or recommendations from Indian Tribes the best communication channels to disseminate DOT information.
  - 8. Establish an effective mechanism for initiating contact and providing information about DOT programs, policies, and activities to Tribal officials.
  - 9. Support full and open internal and external communications that allow the Department and the OAs to speak with one voice regarding American Indian, Alaska Native, ANCSA Corporations, and Tribal transportation concerns.
  - 10. Maintain a point of contact to address, coordinate, and resolve American Indian, Alaska Native, and Tribal policy, programs, and activities while

providing for maximum participation by OAs and recognizing the unique nature of the programs and operations of each OA.

11. Improve DOT regulations and guidance by assisting with and making recommendations concerning the development, establishment, and maintenance of Departmental policy, guidance, procedures and regulations affecting Indian Tribes, Alaska Natives, and ANCSA Corporations.
12. Participate in Department-wide review and any modification of existing regulations affecting Indian Tribes, Alaska Natives, and ANCSA Corporations.

e. **Office of the General Counsel.** The Office of the General Counsel (OGC) interprets and provides counsel at a Departmental level regarding compliance with EO 13175, this Order, and other applicable requirements affecting Tribes, where appropriate. It provides guidance on all applicable statutes, regulations, EOs, and other legal requirements for OST, or other OAs as requested. OGC liaises with OAs and the Department of Justice on relevant litigation.

f. **OA Administrators.** Each OA Administrator ensures that the OA conforms to and implements all applicable requirements set forth in this Order. The OA Administrator may delegate responsibilities as necessary. Related to the requirements of this Order, OA Administrators must ensure each OA carries out policies, programs, and activities affecting Federally Recognized Tribes and ANCSA Corporations consistent with applicable requirements and to the extent practicable and permitted by law. Specific responsibilities of each OA Administrator in this regard include the following:

- i. Ensure that an effective mechanism is in place to achieve the following goals:
  1. Improve communication with Federally Recognized Tribes and ANCSA Corporations to respond more effectively to their transportation concerns.
  2. Review and, if necessary, update the OA's Tribal Consultation process in coordination with the Director of Tribal Affairs to ensure that the OA's Tribal Consultation process is consistent with this Order. An OA that does not have an established Tribal Consultation policy must comply with the Consultation provisions of this Order.
  3. Adapt processes to recognize American Indian, Alaska Native, and Tribal culture and traditions.
  4. Address Tribal transportation issues and concerns consistent with Departmental priorities.

5. Ensure consistency, as appropriate, between the procedures, regulations, and guidance of the Office of the Secretary and the OA for addressing Tribal transportation issues.
  6. Maximize cooperation and coordination among the OAs and with other Federal agencies, and appropriate public and private organizations on transportation matters affecting Federally Recognized Tribes and ANCSA Corporations.
  7. Share information with other OAs about the OA's programs, activities, and accomplishments as they relate to Tribal matters.
  8. Maximize participation of Tribal colleges and universities in DOT education, employment, and mission-related programs, as appropriate.
  9. Avoid infringing on Tribal lands and accommodate access to and ceremonial use of sacred sites and ancestral burial grounds on Federal and Tribal lands to the extent practicable and consistent with essential agency functions.
  10. Invite participation of American Indian and Alaska Native employees of DOT to help achieve communication goals.
- ii. Review efforts to achieve the goals listed in paragraphs 8(f)(i)(1) through 8(f)(i)(10) and the Department's Tribal Consultation Plan (See Appendix) annually and take appropriate action, as necessary, to improve accomplishment of established goals.
  - iii. Designate a point of contact experienced in working with Tribes or knowledgeable in laws, regulations, and policies regarding Federally Recognized Tribes and ANCSA Corporations, to serve as a resource for the Department.
  - iv. Notify the Director of Tribal Affairs prior to OA Consultations on policies that have Tribal implications. The notice should be provided in a reasonable amount of time prior to the consultation. This notification does not include project-level consultations prescribed by Federal statute or regulation, such as the Section 106 consultation process.
  - v. Respond expeditiously to any requests for information submitted by the Office of the Secretary regarding Tribal matters.

## 9. POLICY UPDATES AND/OR REVISIONS.

This Order must be reviewed to determine whether updates or revisions are necessary at least once every five years. In the interim, all applicable laws enacted by Congress and all new executive actions or guidance related to the relationship between the Federal Government and Indian Tribes are incorporated by reference.

10. DISTRIBUTION

This Order is distributed to all Secretarial offices and all OA Administrators.

11. CONTACT

If you have specific questions related to this Order, please contact Milo Booth, Director of Tribal Affairs at [milo.booth@dot.gov](mailto:milo.booth@dot.gov).

This Order is issued on this \_\_\_\_\_ day of \_\_\_\_\_, 202\_\_.

SECRETARY OF TRANSPORTATION

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APPENDIX



# **U.S. Department of Transportation Tribal Consultation Plan**

## **1. Purpose Statement**

The United States government has a unique legal relationship with Federally recognized Indian Tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. The Federal government recognizes the right of self-determination for Indian Tribal governments, the Federal trust responsibility, and the obligation to work with Indian Tribal governments in a government-to-government relationship. As an executive agency, the U.S. Department of Transportation (DOT) has a responsibility and is committed to working with Indian Tribal governments in this unique relationship, respecting Tribal sovereignty, the trust relationship, and self-determination. DOT seeks to foster and facilitate positive government-to-government relations between the Department and all Federally recognized Indian tribes. The purpose of this plan is to develop, improve, and maintain partnerships with Indian tribes by using agreed upon processes when the Department develops, changes, or implements policies, programs, or services with Tribal implications.

## **2. Designated Official**

The Director of Tribal Affairs is the Department's Designated Official responsible for implementation of this plan, and related policies and requirements. The Designated Official will advise and make recommendations to the Secretary of Transportation on DOT policies, issues, programs, and activities with Tribal implications. The Designated Official will also update this plan as necessary in accordance with this Order.

## **3. Summary of the Memoranda, Executive Order and DOT Order**

The Presidential Memorandum on Tribal Consultation (74 Fed. Reg. 57879) issued on November 9, 2009 reaffirmed the unique legal and political relationship with Indian Tribal governments and tasked executive departments and agencies with creating detailed plans of actions that they will take to implement the policies and directives of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments" (Nov. 6, 2000). The memorandum gives agencies 90 days from issuance to create their plans of actions and directs agencies to create their plans in consultation with Indian tribes and Tribal officials. Most recently, the Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (86 Fed. Reg. 7491) issued on January 26, 2021 reaffirmed the unique legal and government-to-government relationship between the United States and Indian tribes and

directed executive departments and agencies to prepare, after consultation with Indian tribes and Tribal officials, a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175 and established an accountability process.

Executive Order 13175 recognizes the unique legal relationship that the Federal government has with Indian tribes and sets forth the criteria agencies should follow when formulating and implementing policies that have Tribal implications. In addition, Executive Order 13175 requires Federal agencies to establish a consultation process for interactions with Indian tribes in the development of regulatory policies that have Tribal implications.

DOT Order 5301.1A, “U.S. Department of Transportation Tribal Consultation Order”, affirms the Department’s and DOT Operating Administrations’ unique legal relationship with Indian tribes, establishes the Department’s consultation and coordination process with Indian tribes for any action that may have Tribal implications, and lists goals for Operating Administrations to meet when carrying out policies, programs, and activities affecting American Indians and Alaska Natives. The requirements established for Operating Administrations under this Order are designed to recognize Indian statutory preferences in employment, Federal financial assistance arrangements, and contracting; respond to the transportation concerns of Indian tribes related to environmental justice, children’s safety and environmental health risks, occupational health and safety, and environmental matters; foster opportunities for hiring Tribal citizens and increasing participation in Federal training activities; include Tribal colleges and universities in Departmental educational, research, and program activities; and treat correspondence from leaders of Indian tribes in the same manner as Congressional correspondence. The Department affirms its commitment to these principles and those set forth in Executive Order 13175 and the 2009 and 2021 Presidential Memoranda in establishing these goals and plan of actions.

#### **4. Goals and Plan of Actions**

**Goal 1:** Foster meaningful government-to-government relations by:

- Ensuring participation by Department officials at national Tribal conferences, Tribal/State meetings, summits, and conferences discussing Tribal issues.
- Establishing direct contact with Indian Tribal governments, including visiting Tribal governments at reservations, Native Villages, and Tribal communities.

- Seeking Tribal government representation in meetings, conferences, summits, advisory committees, and review boards concerning issues with Tribal implications.
- Conducting outreach at national Tribal conferences, summits, and regional conferences, regarding DOT's Tribal Transportation Self-Governance Program.

**Goal 2:** Improve existing Tribal programs by:

- Consulting with Tribes when the DOT is considering developing or revising regulations with Tribal implications or developing Federal standards and providing adequate time to allow for comment.
- Notifying Tribes of grant opportunities through multiple means, including direct letters and emails whenever appropriate, as well as announcements on the DOT website, the Federal Register, and on DOT social media platforms. DOT may also disseminate notice through national and regional Tribal organizations.
- Providing timely technical assistance to Tribes on changes to legislation, regulations, programs, grants, and other program-related areas.

**Goal 3:** Ensure meaningful Tribal input into existing and future Tribal transportation programs by:

- Developing and, where appropriate, revising policy and programs using input, guidance, and recommendations from Tribal leaders.
- Seeking, considering, and responding to comments from Tribal governments and Tribal organizations.
- Soliciting Tribal comments in the development or revision of the DOT's surface transportation reauthorization proposal.
- Conducting meetings throughout Indian Country by the Department or an OA after the passage of each surface transportation authorization legislation to discuss impacts on and opportunities for the Tribes and their transportation systems.
- Working with Tribal governments on making transportation services available to improve mobility; employment opportunities; access to community services for people who have disabilities, are elderly, or low-income; and other services or areas that rely on transportation for Tribal communities.

**Goal 4:** Ensure the DOT's uniform and effective delivery of Tribal programs throughout the country by:

- Reviewing existing Tribal policies in DOT's OAs to ensure consistency with this action plan and the incorporation of such policies in this plan.
- Assessing the resource needs of the Tribal transportation programs at DOT.
- Developing implementing, evaluating, and making improvements to training modules for DOT employees on Tribal transit and highway programs to ensure DOT employees are knowledgeable on Tribal programs.
- Developing, implementing, evaluating, and making improvements to a training program for DOT employees regarding Tribes, the sovereignty of Tribal governments, and the unique government-to-government relationship between Tribes and the Federal government.
- Reaffirming DOT's commitment to working with the Bureau of Indian Affairs on the administration of Tribal highway safety grants and any other Federal and state agency that provides services or programs that impact Tribes and DOT.
- Continuing to support, implement, evaluate, and make improvements to the Tribal Technical Assistance Program (TTAP).
- Addressing Tribal transportation issues in DOT Strategic Plans.
- Enhancing support for Tribal liaisons in the Federal Transit Administration, the Federal Highway Administration, the Federal Aviation Administration, and other staff throughout the Department working with Tribal governments.
- Coordinating efforts among DOT's OAs by establishing a Department-wide working group tasked with making specific recommendations to the Secretary of Transportation.

**Goal 5:** Assist in implementing Tribal infrastructure projects by:

- Building capacity of Tribes on DOT Programs and processes, including the Tribal Transportation Program and the Tribal Transit Program.
- Initiating a review of the grant process for the Tribal Transit Program in consultation with the Tribes.
- Working with Tribal governments to develop case studies and best practices in transportation planning and highway safety and sharing the best practices with Tribes..
- Developing, implementing, evaluating, and making improvements to a highway Safety Management System (SMS) for Tribal governments and forming a Steering Committee that includes Tribal representatives to advise on the SMS.

- Identifying and communicating to Tribal leaders emerging issues that could impact Tribal transportation programs and engaging with Tribes on how to alleviate such issues.
- Publishing guidance on DOT's programs with potential benefits to Tribal governments and providing notice to Tribes through multiple means, including direct letters and emails whenever appropriate, as well as announcements on the DOT website, the Federal Register, and on DOT social media platforms. DOT may also disseminate notice through national and regional Tribal organizations.

**Goal 6:** Assist Tribal citizens in developing transportation capacities by:

- Increasing internships and employment for American Indians and Alaska Natives at DOT through outreach to Tribal colleges, universities, and job fairs.
- Creating and frequently maintaining and updating a webpage that is easily accessible and user-friendly for Tribes on the DOT website.
- Increasing the representation of American Indians and Alaska Natives in the DOT workforce, within merit principles and consistent with the application of appropriate veterans preference criteria.

**Goal 7:** Assist efforts to coordinate national Tribal infrastructure policy and programs within the Federal government by:

- Working with other departments, agencies, and administrations, such as the Indian Health Service, Federal Emergency Management Administration, Department of Defense, and for-profit and non-profit organizations to coordinate Federal/Tribal infrastructure programs and incorporating livability principles as adopted by departments, such as DOT's Sustainability Partnership with the Department of Housing and Urban Development, Environmental Protection Agency, and other departments/agencies that are appropriate to Tribal projects.

## **5. Accountability**

**Plan Transmission.** In accordance with the Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (86 Fed. Reg. 7491) issued on January 26, 2021, the Designated Official after consultation with Tribal Nations and Tribal officials submitted to the Director of the Office of Management and Budget (OMB) within 90 days of the Memorandum a detailed plan of actions that DOT will take to implement the policies and directives of Executive Order 13175.

**Progress Reports.** The Designated Official will submit to the Director of OMB a progress report on the status of each action included in this plan, together with any proposed updates to this plan, within 270 days. The Designated Official will submit such progress reports annually thereafter.

**Regulations.** In transmitting any draft final regulation that has Tribal implications to OMB, DOT shall include a certification from the Designated Official stating that the requirements of this plan have been met in a meaningful and timely manner in accordance with Executive Order 13175.

**Legislation.** In transmitting proposed legislation that has Tribal implications to OMB, DOT shall include a certification from the Designated Official stating that all relevant requirements of this plan have been met in accordance with Executive Order 13175.