

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-4580-N-01]

Tribal Government-to-Government Consultation Policy

AGENCY: Office of the Secretary, HUD.

ACTION: Notice.

SUMMARY: Through this notice HUD advises the public of its tribal government-to-government consultation policy. The purpose of the consultation policy is to enhance communication and coordination between HUD and federally recognized Indian tribes, and to outline guiding principles and procedures under which all HUD employees are to operate with regard to federally recognized Indian or Alaska Native tribes.

DATES: *Effective Date:* June 28, 2001.

FOR FURTHER INFORMATION CONTACT: Ted L. Key, Acting Deputy Assistant Secretary for Native American Programs, Office of Public and Indian Housing, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW, Room 4128, Washington, DC 20410; telephone (202) 401-7914 (this is not a toll-free telephone number). Persons with hearing or speech disabilities may access this number via TTY by calling the toll free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: This notice sets forth HUD's tribal government-to-government consultation policy. The purpose of the consultation policy is to enhance communication and coordination between HUD and federally recognized Indian tribes, and to outline guiding principles and procedures under which all HUD employees are to operate with regard to federally recognized Indian or Alaska Native tribes. The policy is as follows:

Department of Housing and Urban Development

Tribal Government-to-Government Consultation Policy

I. Introduction

A. The United States Government has a unique relationship with American Indian governments as set forth in the Constitution of the United States, treaties, statutes, court decisions, and executive orders and memoranda.

B. On April 29, 1994, a Presidential Memorandum was issued reaffirming the federal government's commitment to operate within a government-to-government relationship with federally recognized American Indian and Alaska

Native tribes, and to advance self-governance for such tribes. The Presidential Memorandum directs each executive department and agency, to the greatest extent practicable and to the extent permitted by law, to consult with tribal governments prior to taking actions that have substantial direct effects on federally recognized tribal governments. In order to ensure that the rights of sovereign tribal governments are fully respected, all such consultations are to be open and candid so that tribal governments may evaluate for themselves the potential impact of relevant proposals. On May 14, 1998, the President issued Executive Order 13084, "*Consultation and Coordination with Indian Tribal Governments*," which was revoked and superseded on November 6, 2000, by the identically titled Executive Order 13175, which sets forth guidelines for all federal agencies to (1) establish regular and meaningful consultation and collaboration with Indian 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 (3) reduce the imposition of unfunded mandates upon Indian tribes.

C. This consultation policy applies to all HUD programs that have substantial direct effects on federally recognized Indian tribal governments. In formulating or implementing such policies, HUD will be guided by the fundamental principles set forth in section 2 of Executive Order 13175, to the extent applicable to HUD programs. Section 2 of the Executive Order provides as follows:

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.

II. Definitions

A. "*Consultation*" means the *direct* and *inter-active* (i.e., collaborative) involvement of tribes in the development of regulatory policies on matters that have tribal implications.

Consultation is the active, affirmative process of (1) identifying and seeking input from appropriate Native American governing bodies, community groups and individuals; and (2) considering their interest as a necessary and integral part of HUD's decision-making process.

This definition adds to any statutorily mandated notification procedures. The goal of notification is to provide an *opportunity for comment*; however, with consultation procedures, the burden is on the federal agency to show that it has made a good faith effort to *elicit feedback*.

B. "*Exigent situation*" means an unforeseen combination of circumstances or the resulting state that calls for immediate action in order to preserve tribal resources, rights, interests, or federal funding.

C. "*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.

III. Principles

A. HUD acknowledges the unique relationship between the federal government and Indian tribes.

B. HUD recognizes and commits to a government-to-government relationship with Federally-recognized tribes.

C. HUD recognizes tribes as the appropriate non-federal parties for making their policy decisions and managing programs at the local level for their constituents.

D. HUD shall take appropriate steps to remove existing legal and programmatic impediments to working directly and effectively with tribes on housing and community development programs administered by HUD.

E. HUD shall encourage states and local governments to work with and cooperate with tribes to resolve problems of mutual concern.

F. HUD shall work with other federal departments and agencies to enlist their interest and support in cooperative efforts to assist tribes to accomplish their goals within the context of all HUD programs.

G. HUD shall be guided by these policy principles in its planning and management activities, including its budget, operating guidance, legislative initiatives, management accountability system and ongoing policy and regulation development processes for all programs affecting tribes.

IV. Tribal Coordination, Collaboration and Consultation

A. Tribal Coordination, Collaboration and Consultation applies when any proposed policies, programs or actions are identified by HUD as having a substantial direct effect on an Indian tribe. The Office of Native American Programs (ONAP), within the Office of Public and Indian Housing, may serve as the lead Departmental office for the implementation of this policy, and is the principal point of contact for consultation with tribes on all HUD programs.

B. *Procedures and Methods for Implementation—Tribal, Regional and National Forums.*

1. Based on a government-to-government relationship and in recognition of the uniqueness of each tribe, a primary focus for consultation activities is with individual tribal governments. The use of tribal organizations/committees will be in coordination with, and not to the exclusion of, consultation with individual tribal governments. When proposed federal government policies, programs or actions are determined by HUD as having tribal implications, HUD will notify the affected tribe(s) and take affirmative steps to consult and collaborate directly with the tribe(s) or its (their) designee. Tribes at any time may exercise their right to request consultation with HUD.

2. Tribes are encouraged to exercise their option to convene regional tribal meetings to identify and address issues. Tribes may schedule quarterly regional meetings with HUD representatives to address issues relevant to HUD policies, regulations, and statutes.

3. At least one national tribal consultation and coordination meeting will be held by HUD each year. To reduce costs and conserve resources, to the extent feasible, tribes and HUD will coordinate consultation meetings to be held before or after other regularly scheduled meetings such as multi-agency and association meetings.

C. *Tribal Advisory Organizations/Committees.* The principal focus for consultation activities of HUD is with individual tribal governments. However, it is frequently necessary that HUD have organizations/committees in place from which to solicit tribal advice and

recommendations, and to involve tribes in decision-making and policy development. In consultation with elected tribal governments, HUD recognizes tribal advisory organizations/committees. Consultation shall be conducted as follows:

1. *Headquarters.* HUD will consult with existing national organizations.

2. *Area Offices.* Each Area ONAP Administrator, in consultation with tribal governments, will consult with organizations/committees and/or representatives of tribal governments served by the Area ONAP. The tribal organizations/committees and/or representatives will provide advice and consultation to the Area ONAP Administrator and staff. Meetings with the Area ONAP shall occur at least annually, or more frequently when there is a need.

3. *National/Area Coordination.* To promote coordination in addressing issues arising from tribal consultation events at both the national and local level, a summary record of the comments made during national and area consultations will be made available to tribes.

D. *Joint Federal/Tribal Work Groups or Task Forces.* It may become necessary for HUD, to establish or select a work group or task force to develop recommendations on certain issues. The work group or task force may conduct its activities through conventional (e.g., telephone and mail), as well as innovative (e.g., e-mail and video conferences) means of communication.

1. *Membership and Meeting Notices.*

a. Tribal representation should be consistent with the established standard of geographically diverse small, medium and large tribes, whenever possible.

b. Meetings will be posted on the Internet and will be open to the public. In addition to internet posting, HUD may also announce meetings through FAX, letter, e-mail, publication in the **Federal Register**, or other appropriate means.

2. *Participation.*

a. *Attendance:* Work group members shall make good-faith attempts to attend all meetings. They may be accompanied by other individuals to advise them as they deem necessary.

b. *Appointment of Alternates:* Alternate work group members may be appointed by written notification signed by the member. Such alternates shall possess the authority of the work group member to make decisions on their behalf if such authority is so delegated to them in writing.

3. *Work Group Protocols that may be established.*

a. Roles of the work group members.

b. Process for decision-making.

c. Process for creating written products and other decisional documents.

d. Other items as deemed necessary by the work group.

4. *Work Group Final Products and Recommendations.* All final recommendations will be given serious consideration by HUD. Whenever possible, all work group products should be circulated to tribal leaders for review and comment.

V. Rulemaking

On issues relating to tribal self-government, tribal trust resources, or treaty and other rights, HUD will explore, and where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking. HUD may establish a standing committee, consisting of representatives of tribal governments, to consult on the appropriateness of using negotiated rulemaking procedures on particular matters. The procedures governing such a standing committee would be established through the mutual agreement of HUD and tribal governments.

VI. Unfunded Mandates

To the extent practicable and permitted by law, HUD shall not promulgate any regulation that is not required by statute, that has tribal implications, and that imposes substantial direct compliance costs on such communities, unless:

1. Funds necessary to pay the direct costs incurred by the Indian tribal government in complying with the regulation are provided by the federal government; or

2. HUD, prior to the formal promulgation of the regulation:

a. Consulted with tribal officials early in the process of developing the proposed regulation;

b. 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 the Office of Management and Budget a description of the extent of HUD's prior consultation with representatives of affected Indian tribal governments, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation; and

c. Makes available to the Director of the Office of Management and Budget any written communications submitted to HUD by such Indian tribal governments.

VII. Increasing Flexibility for Indian Tribal Waivers

HUD shall review the processes under which Indian tribal governments apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

1. HUD shall, to the extent practicable and permitted by law, consider any application by an Indian tribal government for a waiver of statutory or regulatory requirements in connection with any program administered by HUD 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.

2. HUD 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 HUD. HUD shall provide the applicant with timely written notice of the decision and, if the application for a waiver is not granted, the reasons for such denial.

3. This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by HUD. Applicable civil rights statutes and regulations are not subject to waiver.

VIII. Implementation

1. All committees shall be chaired by at least one tribal and one HUD representative.

2. *Time Frames.* Time frames for consultation outreach will depend on the need to act quickly. Suggested guidelines are not less than 60 days for significant new matters of national scale, 30 days for routine proposed actions, and 2–3 weeks with expanded tribal outreach efforts for proposed actions which must be “fast tracked” to

respond to critical deadlines. These time frames may be compressed in exigent situations.

3. *Methods of Communication.* The following are examples of communication means by which consultation can be accomplished. The method(s) of communication used will be determined by the significance of the consultation matter, the need to act quickly, and other relevant factors: Internet; broadcast fax; U.S. Postal Service; telephone-conference calls; multimedia; direct contact; and formal meetings.

4. *Reporting Mechanisms.* In all cases where a tribe or tribes have been involved in the consultation process, the tribe(s) shall be notified of the HUD decision by one or more of the communication method(s) identified above. This notification shall specifically include a discussion of the basis for the HUD decision, including public comments received, relationship to the concerns raised in consultation, and any avenues available for further discussion, protest or appeal of the decisions.

5. Internal HUD policies and procedures are excluded from this policy.

IX. Applicability of the Federal Advisory Committee Act

The provisions of the Federal Advisory Committee Act (5 U.S.C. App.) (FACA) do not apply to consultations undertaken pursuant to this policy. In accordance with section 204(b) of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, approved March 22, 1995), FACA is not applicable to consultations between the Federal government and elected officers of Indian tribal governments (or their designated employees with authority to act on their behalf). As the Office of Management and Budget stated in its guidelines implementing section 204(b):

This exemption applies to meetings between Federal officials and employees and * * * tribal governments acting through their elected officers, officials, employees, and Washington representatives, at which ‘views, information, or advice’ are exchanged concerning the implementation of intergovernmental responsibilities or administration, including those that arise explicitly or implicitly under statute, regulation, or Executive Order. The scope of meetings covered by this exemption should be construed broadly to include meetings called for any purpose relating to intergovernmental responsibilities or administration. Such meetings include, but are not limited to, meetings called for the purpose of seeking consensus, exchanging views, information, advice, and/or recommendations; or facilitating any other interaction relating to intergovernmental responsibilities or administration. (OMB Memorandum 95–20 (September 21, 1995), pp. 6–7, published at 60 FR 50651, 50653 (September 29, 1995)).

X. General Provisions

This document has been adopted for the purpose of enhancing government-to-government relationships, communications, and mutual cooperation between the U.S. Department of Housing and Urban Development and tribes and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other persons. This document is effective on the date it is signed.

Dated: June 28, 2001.

Mel Martinez,

Secretary.

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