



# NATIONAL CONGRESS OF AMERICAN INDIANS

November 24, 2009

Honorable Arne Duncan  
Secretary of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202

Dear Secretary Duncan:

On November 5, 2009, President Obama held an historic meeting with tribal government leaders from across the United States. It was a proud day for our country as President Obama promised to improve the partnership between the federal government and tribal nations. As an initial step toward fulfilling his promise, the President issued an Executive Memorandum that directs all federal agencies to develop a plan within 90 days for consultation and coordination with tribal governments under President Clinton's Executive Order 13175.

The National Congress of American Indians is the oldest, largest, and most representative national organization representing the broad interests of American Indian and Alaska Native tribal governments. I am writing to extend our assistance in meeting the President's charge, and have attached a short briefing paper for your consideration on ways to increase dialogue and cooperation with tribal governments. February 3, 2010 is fast approaching, and we want to make it as easy as possible for the Department of Education to engage with tribal leaders in developing a plan.

Our fundamental request is that the federal government will go beyond dialogue and truly take action to meet its responsibilities in Indian Country. Tribal governments have a unique status in our federal system under the U.S. Constitution and numerous federal laws, treaties, and federal court decisions. Indian tribes have the power and responsibility to enact civil and criminal laws, and provide a broad range of governmental services to our citizens including law enforcement, education, health care, and management of lands the size of seven states.

As Secretary of Education, we particularly hope that you will give serious consideration to ways in which tribal schools can become eligible entities for future funding and grant opportunities such as the Race to the Top grant. Due to a legislative oversight, tribal schools – who service some of the County's most at-risk students – are ineligible for crucial funding opportunities.

Please feel free to contact me at any time if we can be of assistance, or ask one of your staff to contact Ahniwake Rose at 202.466.7767 or [Arose@ncai.org](mailto:Arose@ncai.org).

Sincerely,

Jefferson Keel

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**Background and Recommendations on Tribal Consultation  
and Government-to-Government Coordination**

This background paper is intended to assist federal agencies in preparing to execute President Obama’s November 5<sup>th</sup> Executive Memorandum, which requires each federal agency to develop a plan to implement Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments. E.O. 13175 was issued by President Clinton on November 9, 2000. The Executive Order was required by the Unfunded Mandates Reform Act of 1995, and is the companion to E.O. 13132 – Federalism – which applies to state governments. Although E.O. 13175 was created during the Clinton Administration, it is rooted in the longstanding relationship found in the U.S. Constitution, the Indian treaties, and the federal trust relationship.

In general, tribal leaders have strongly supported E.O. 13175, but have significant concerns about the way it has been implemented. Tribal concerns boil down to two points: 1) The Executive Order is viewed by federal agencies as merely a procedural requirement with no focus on the substantive goals of tribal self-government and fulfillment of the federal trust responsibility. Tribal leaders spend a great deal of time and resources engaging with a federal agency only to receive little response directed toward tribal recommendations. 2) Sometimes federal agencies ignore or refuse to carry out their responsibilities under the Executive Order, and there are no mechanisms for accountability.

Although these are serious concerns about the consultation process, tribal leaders acknowledge that the E.O. is a useful tool for improving the federal-tribal relationship, and that some consultation processes have worked well and generated positive and substantive results.

**Recommendation #1 – Refocus on Substantive Goals while Respecting Tribal Sovereignty and the Federal Trust Responsibility**

To address the first concern, federal agencies should focus on the substantive requirements of Executive Order 13175. Too often, federal agency officials fulfill the procedural requirements of “consultation,” but fail to reflect tribal concerns in final federal policies and regulations. Interpreting the Executive Order as only a procedural requirement another hoop to jump through— undermines the effectiveness of the Order.

Section 3 of the Executive Order contains substantive “Policymaking Criteria” that lie at the heart of the federal-tribal relationship: “Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.” Section 3 specifically supports tribal self-government, directing federal agencies to “defer to Indian tribes to establish standards,” and “preserve the prerogatives and authority of Indian tribes.”

The purpose of the Executive Order is to improve the governmental services and programs on Indian reservations within a framework of tribal self-determination. Refocusing on action components provides a context for tribal consultation as a tool that is used to implement larger policy goals and not as an end in itself. In a nation-to-nation relationship, tribal consultation



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should be defined as a process of decision-making that works in a cooperative manner toward reaching a consensus before a decision is made or action is taken. The goal of consultation is to reach mutually agreeable understandings and decisions that acknowledge the interests of both the federal and tribal governments.

Agency plans should also acknowledge the fundamental purpose of tribal self-determination and the federal trust responsibility. These are longstanding federal policies intended to assure that Indian tribes will maintain their cultures and viability as distinct groups of people. An understanding of the values of tribal cultures is needed in order to instill meaning into what are otherwise abstract principles.

### **Recommendation #2 – Develop Accountability and Tracking Provisions**

NCAI strongly urges the federal agencies to develop accountability and tracking provisions under the Executive Order. Section 7 of the Executive Order contains provisions on accountability to be carried out by the Office of Management and Budget (OMB), but these have not been effective. It has been too easy for federal officials to ignore both the substantive and the procedural aspects of the Executive Order. On substantive issues such as law enforcement, land management, health care, and education federal reports demonstrate that tribal leaders have raised similar issues for decades and most often have received little response. In addition, some agencies have intentionally bypassed tribal consultation in order to avoid certain tribal opposition. (For example, in 2006 the Department of Justice submitted Adam Walsh Act amendments to Congress that seriously undermine tribal sovereignty. Tribal leaders support the goals of the Adam Walsh Act, but oppose the provisions that shift jurisdiction to states.)

NCAI encourages federal agencies to develop a tracking system to ensure that the agency responds and takes action to address the issues that are raised through tribal consultation. Tribes understand that the federal agencies are bound by legal, fiscal, and policy restraints, but within those boundaries, the federal government has a responsibility to respond to legitimate tribal concerns and to engage in real dialogue and negotiation to find solutions. A tracking and oversight system is needed to ensure that such a response take place.

In addition, OMB has the primary responsibility under the Executive Order for oversight. Our view is that OMB is not organized to effectively review tribal government issues. This lack of focus on tribal government issues also exists with regard to OMB's primary role in developing the federal budget. NCAI has recommended to the Obama Transition Team that the President create an OMB Assistant Director for Tribal Government Programs. Currently, tribal programs are organized under natural resources programs and budgets. We strongly urge a reorganization of OMB to appropriately prioritize Indian programs and ensure that meaningful consultation occurs with tribal governments.

### **Recommendation #3 – Focus on Solutions, Bring Decisionmakers to Tribal Consultation and Engage in Real Dialogue**

As noted above, too often tribal consultation has become little more than a “listening session” without dialogue or efforts to find solutions. Unfortunately this has become an ingrained habit

with both federal agencies and tribes, and it will require some effort to change. NCAI's experience is that tribal consultation works best when it is focused on a particular subject, and when the agency is forthcoming about the factors that affect its decision making process. For example, a federal agency may have budget constraints or external political pressures that prevent it from fully adopting a tribal solution. Too often federal agencies are silent on the internal issues they face, and then get frustrated when tribal leaders do not propose workable solutions. Tribes are effective at negotiating solutions when they have an opportunity to fully understand the federal agency's perspective on the issues. This type of dialogue can only occur when the federal agency is represented by decision makers who are empowered to discuss issues in detail.

#### **Recommendation #4 – InterAgency Cooperation**

NCAI strongly recommends the development of interagency task forces to address issues that are the responsibility of more than one federal agency. For example, law enforcement on Indian reservations is managed by a range of federal agencies, but primarily the Bureau of Indian Affairs, Federal Bureau of Investigation, and U.S. Attorneys offices, and the Department of Justice. Too often these agencies have had very little coordination to ensure effective law enforcement policies. High level direction is needed to ensure that the federal agencies work together to resolve common issues.

#### **Recommendation #5 – Create Opportunities for both Formal Consultation on Developed Proposals and Early Informal Scoping on Tribal Issues**

With any effort by the federal government to consult with outside entities, including tribal governments, a dilemma looms. The problem is that most of the opportunities for sharing information happen early in the decision-making process, long before any specific proposal has been committed to paper. But it is difficult to hold a consultation on a proposal that does not yet exist. Conversely, once a large bureaucracy like the federal government has formulated written proposals, it is easy to hold a consultation meeting, but by then, decisions have already been made on the fundamental questions regarding the need for action and the scope of issues to be considered. In sum, it becomes more and more difficult to influence federal policy decisions if you wait until they are ready for a formal consultation.

There will always be a need for formal consultation with tribal governments on major federal regulatory proposals. At the same time, the consultation requirement should not become a barrier to the regular communications that enable federal officials to learn about tribal issues. NCAI actually heard this comment recently from a federal official: "I wanted to talk to the tribes about this issue, but I hadn't taken the training, and we didn't have time for a consultation." The purpose of consultation should not be lost in the formalities.

Federal officials should be encouraged to pick up the phone and engage in informal discussions with tribal leaders so that both sides understand the basic parameters of the issues. Without early discussions, the federal agency will develop proposals based on an incomplete and anecdotal understanding of the issues that surround a particular matter. Such proposals often create severe unintended consequences for tribal governments. Issues in Indian Country are

often more complex than they first seem, in part because of the great diversity among tribes. An open process in the initial stages creates better and more efficient consultation. For example, early discussions may provide the basis for the federal agency determining that no action is necessary. More broadly, pre-draft consultation helps insure that real problems are identified at the beginning and properly studied; that issues that are of no concern do not consume time and effort; that subsequent drafts are balanced and thorough; and that the delays and costs occasioned by redoing an inadequate draft are avoided.

**Conclusion** – This paper is intended to provide background information and recommendations for federal agencies to consider in developing their implementation plans for tribal consultation. We expect that many more ideas will come forward in the process of discussions with tribal leaders. If you have any questions or comments on this issue, please contact Jacqueline Johnson Pata, NCAI Executive Director at [jpata@ncai.org](mailto:jpata@ncai.org), or John Dossett, NCAI General Counsel at [jdossett@ncai.org](mailto:jdossett@ncai.org).