OBAMA-BIDEN TRANSITION PROJECT

THIS DOCUMENT WAS PRODUCED BY AN OUTSIDE PARTY AND SUBMITTED TO THE OBAMA-BIDEN TRANSITION PROJECT.

U.S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D.C. 20250

DEPARTMENTAL REGULATION	Number: 1340-007
SUBJECT:: Policies on American Indians and Alaska Natives	DATE: March 14, 2008 OPI: Office of the General Counsel

1. PURPOSE

The purpose of this regulation is to (1) set forth the USDA's policy on government-to-government Tribal relations; and (2) provide policy and implementation guidance for Executive Order 13175 titled "Consultation and Coordination with Indian Tribal Governments."

2. SPECIAL INSTRUCTIONS

This regulation supersedes and replaces Departmental Regulation 1340-006 of October 16, 1992.

This regulation pertains to Federally Recognized Indian and Alaskan Native Tribes and provides guidance to USDA personnel.

3. DEFINITIONS

a. Indian tribe (or tribe). Any 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-1.

b. Alaska Native Corporation (ANC). Any Alaska Native village or regional corporation established pursuant to the Alaska Native Claims Settlement Act, Pub. L. No. 92-203 (ANCSA).

c. Indian. A member of an Indian tribe.

d. Alaska Native. As defined by section 3(b) of ANCSA, a citizen of the United States who is one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlakla Indian Community) Eskimo, or Aleut blood, or a combination thereof. The term includes any Native as so defined either or both of whose adoptive parents are not Natives. It also includes, in the absence of proof of minimum blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or Native group of which he/she claims to be a member of whose father or mother is (or, if deceased, was) regarded as Native by any village or group.

e. Tribal government. The governing body of an Indian tribe that has been officially recognized as such by the Federal Government.

4. BACKGROUND

The United States Government has a unique, legal and political relationship with Indians and their tribal governments as defined through treaties, statutes, court decisions and the United States

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Constitution. The United States Government has obligations under treaties and statutes to protect and maintain the lands, resources, and traditional use areas of Indians. Tribal governments have powers similar to those of state governments. In Alaska, the relationship with ANCs is defined by ANCSA, as amended.

5. POLICIES

   a. USDA is the lead department of the Federal Government for providing effective and efficient coordination of Federal agriculture, agricultural research, food assistance, food safety, natural resources and rural development programs. USDA recognizes that tribal governments and Alaska Native Corporations manage land for such agricultural activities as farming, grazing, hunting, fishing, subsistence agriculture and gathering of plants, plant products and animals. USDA further recognizes that such resources may hold a unique meaning in the spiritual as well as everyday life of many Indians and Native Alaskans. Consequently, and in furtherance of tribal self-governance, USDA incorporates the provisions of Executive Order 13175 herein and attaches this Executive Order hereto.

   b. USDA will observe the American Indian Religious Freedom Act, Pub. L. No. 95-341.

   c. USDA will work with tribal governments, tribal high schools, colleges and universities to encourage the development of agribusiness skills and awareness, and where needed agribusiness curricula and where needed, curricula. USDA will share information through the exchange of technical staffs and skills.

6. RESPONSIBILITY

   The Secretary of Agriculture is responsible for insuring that this policy is followed. The Secretary has delegated authority to certain USDA agencies for carrying out these policies. The Office of Native American Programs, a component of the USDA Office of External and Intergovernmental Affairs, has primary responsibility for coordinating USDA agencies' programs serving Indians and Alaska Natives. The Office of Advocacy and Enterprise has primary responsibility for coordinating USDA's equal employment, civil rights and employment-related outreach to Indians and Alaska Natives.

7. FUTURE AUTHORITY

   Future authority given to USDA by Congress shall automatically be incorporated into this regulation.

8. INQUIRES

   Inquiries, questions or comments pertaining to this regulation may be directed to the U.S. Department of Agriculture, Office of Native American Programs, Room 216-A, Whitten Bldg., Washington, D.C. 20250-1300 or by telephone at 202-720-6643.

   Further information on USDA programs will be available in the guide, "American Indians and Alaska Natives: A Guide to USDA Programs."

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Appendix A

Executive Order 13175

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Federal Register
Vol. 65, No. 218
Thursday, November 9, 2000

Presidential Documents

Title 3—

The President

Executive Order 13175 of November 6, 2000

Consultation and Coordination With Indian Tribal Governments

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. *Definitions.* For purposes of this order:

(a) "Policies that have tribal implications" refers to 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.

(b) "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.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

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.

Sec. 3. *Policymaking Criteria.* In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

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(a) 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.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. *Special Requirements for Legislative Proposals.* Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. *Consultation.* (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, 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 OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) 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 OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the

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need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. *Increasing Flexibility for Indian Tribal Waivers.*

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency 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.

(c) Each agency 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 the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. *Accountability.*

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. *Independent Agencies.* Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. *General Provisions.* (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A–19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

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Sec. 10. *Judicial Review.* This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

William J. Clinton

THE WHITE HOUSE,
November 6, 2000.

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