

Tribal Sovereignty and Federal Consultations

The Federal government and Native American tribes have had an inconsistent and unreliable relationship for centuries. This relationship has ranged from wars to treaties, from reservations to forced assimilation, and most recently from domestic dependent nations to sovereign nations within the U.S. borders.

Trust Doctrine and tribes

In 1831, Chief Justice of the Supreme Court, John Marshall, tried to define the status of Native American tribes and their relationship with the U.S. government. He declared Indian tribes were, “domestic dependent nations whose relation to the United States resembles that of a ward to his guardian.” Perhaps without even realizing it, Justice Marshall was recognizing the difference between the relationship the U.S. government has with Native American tribes as different than their relationship with other minorities in the U.S. This means Native American tribes are viewed as both separate governments and part of the United States.

Additionally, in identifying the U.S. government as a guardian to tribes, and the tribes as wards or dependents of the government, he created difficult roles for both. A guardian is supposed to prepare dependents for adult independence, which the government interpreted as ensuring tribes would assimilate into the mainstream culture established by the European settlers. However, guardians also protect and nurture their wards until adulthood, and therefore Marshall also suggested the federal government must take care of Native Americans. As a result, federal policy towards Native Americans has been conflicted, sometimes pushing tribes to assimilate into the main culture, other times recognizing the tribes sovereignty and treaty rights, and at other times recognizing the need to assist tribes in their effort towards self-determination and independence.

Federal Policy Recognizing Tribal Sovereignty

On February 16, 1994, President Clinton signed Executive Order (EO) 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. Its purpose is to ensure federal agencies have a plan in place to identify and address disproportionately high and adverse human health or environmental effects their actions may have on minority and low-income communities, including Native American tribes.

In addition to EO 12898, in April 1994 President Clinton issued a Memorandum entitled *Government-to-Government Relations with Native American Tribal Governments*. It ensures the head of each executive department and agency, “operates within a government-to-government relationship with Federally-recognized Tribal governments.” An agency’s compliance with the requirements of government-to-government relationships between federal agencies and tribes involves an open and honest discussion between the tribe’s decision-maker(s) and the federal agency’s decision-maker(s).

In November 2000, President Clinton signed EO 13175 *Consultation and Coordination with Indian Tribal Governments*. Much like the 1964 memorandum, the purpose of the Executive Order was to ensure federal agencies recognize the right of Native American tribes to self-government, and the need for government-to-government consultation. It recognizes that in addition to open and honest discussions, effective consultation with tribes requires mutual respect and trust if we are going to successfully address issues concerning the effects of federal actions on tribal members, lands, resources, treaties, and other tribal rights.

In November 2009, President Obama also signed a Presidential Memorandum stressing his commitment to regular and meaningful consultation and collaboration with tribal officials in federal policy decisions with tribal implications, as stated in EO 13175. As part of his commitment, President Obama required federal agencies to submit a plan to the Office of Management and Budget (OMB) detailing the agencies' plan of actions for implementing the policies and directives of EO 13175.

Shortly after taking office President Biden issued his own *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*, which reaffirms President Obama's Memorandum requiring federal agencies to develop a plan of action for implementing EO 13175. The newest memorandum states, "It is a priority of my Administration to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy."

In addition to President Biden's commitment to meaningful consultation with tribes, the new Secretary for the Department of Interior (DOI), Deb Haaland, has also taken steps to ensure agencies within DOI make a commitment to strengthening tribal sovereignty and self-governance. After weeks of gathering information from prior assessments and recent consultations with tribes, the DOI submitted to the OMB, *A Detailed Plan for Improving Interior's Implementation of EO 13175*.

The DOI sees this plan as a new chapter in consultation between the tribes and the agencies within the DOI, which include: the Bureau of Indian Affairs, the U.S. Fish and Wildlife Service, the National Park Service, and the Bureau of Land Management. In the introduction to the plan, Ms. Haaland notes, "Tribes are not interest groups. Tribes are sovereign entities with indigenous perspectives and knowledge that can improve the quality of Federal decisions and result in better outcomes for all affected communities."

New Shipley Group Course

To address compliance with the policies set in place for government-to-government consultation over the last 20-plus years, the Shipley Group has developed a new one-day course. The goal of the course is to assist government agencies in recognizing and implementing effective tribal consultation practices. The course will include:

- Reviewing the history of tribal and federal government relationships.
- Discussing tribal consultation requirements put into place by laws and policies.
- Identifying what meaningful tribal consultation entails, including concerns the tribes have identified as problems in consultation with federal agencies.
- Understanding how federal agencies can improve their government-to-government consultations.