



Tribal Consultation Briefing Materials

Departmental Regulation (DR) 1340-002: Consolidating
USDA Agencies' Services on Indian Reservations

September — 2023

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Introduction

The U.S. Department of Agriculture (USDA) is proposing updates to the Departmental Regulation (DR) 1340-002: Consolidating USDA Agencies' Services on Indian Reservations.¹ This will be an opportunity to hear directly from Tribal leaders or their proxies in an official Consultation with USDA about this proposal and ways to improve upon it. The Consultation will be immediately followed by open comment for the listening session portion.

The policy and legal experts from the Indigenous Food and Agriculture Initiative and the Intertribal Agriculture Council have drafted the following briefing materials to equip Tribal leaders and citizens with knowledge and background ahead of the Tribal Consultation on September 13, 2023 at 2 p.m EST.

Tribal Consultation:

Wednesday, September 13, 2023 from 2-3:30 p.m. EST

Online only and all participants must register - Zoom Link



Summary of proposed regulation

- The proposed regulation would expand current policy by creating a process for Tribes to request USDA suboffices on their reservations/jurisdictions.² Currently, there is no mechanism in regulations with a clear process for this. These USDA suboffices would provide technical assistance from the following USDA agencies:
 - in the Farm Production and Conservation (FPAC) Mission Area:
 - Farm Service Agency (FSA) and suboffice:
 - Natural Resources Conservation Service (NRCS)
 - in the Rural Development (RD) Mission Area:
 - Rural Business-Cooperative Service (RBCS)
 - Rural Housing Service (RHS)
 - Rural Utility Service (RUS)

First issued in 1991, and amended most recently in the Food, Conservation and Energy Act of 2008, this latest proposal updates the regulation to improve USDA customer service in Indian Country by creating a process for Tribes and USDA to follow for creating suboffices more accessible to Tribal producers. Tribal leaders and individual Tribal producers have long reported the challenge in fully utilizing USDA services due to a lack of on-the-ground technical assistance in rural, remote reservations and jurisdictions. Often USDA services are available through county extension services, but often these are not always located in or near Tribal reservations and jurisdictions. The Federally Recognized Tribal Extension Program (FRTEP) was created to help address this shortcoming in previous Farm Bills, but this program remains critically underfunded and understaffed. This gap in localized support for Indian Country producers from USDA agencies was a regular theme among the Native Farm Bill Coalition's Tribal roundtable events taking place in 2021-2022.

In 2019, a review group inside USDA identified a possible solution to this ongoing challenge. By placing these offices on these jurisdictions *at the invitation of the host Tribe*, it is hoped that Tribal producers in will receive improved services from USDA.

Process for requesting a USDA suboffice through a Tribal Request Letter to USDA

Under this DR, to request a suboffice, a Tribe must make an individual written request explaining the need for the suboffice, and send a copy to all of the following:⁴

- The agency lead within the state (State Conservationist for NRCS, State Executive Director for FSA, or State Director for RD);
- Principal agency head (Chief for NRCS or Administrator for FSA or a corresponding RD agency);
- The Office of Tribal Relations (OTR) Director.

The Tribal request letter must include a statement and demonstration of need for the sub-office.⁵

Possible questions or comments for Tribal officials to ask in Consultation about the request letter:

- Under existing law, USDA is already required to provide an FSA and NRCS sub-office for Tribes with reservations, regardless of demonstration of need.⁶ Why is USDA now requiring all Tribes to demonstrate need for FSA and NRCS sub-offices? This goes against USDA's existing legal obligation.
- What is the standard for proving "demonstration of need"?

Tribal Consultation with USDA about a suboffice request

Once the request letter is received, the proposed regulation says a Consultation will be arranged “as soon as soon as practicable.” The Consultation will be between the Tribe and USDA field office leadership. It will cover details like the suboffice’s location, why it is needed, the extent of the need, goals of the Tribe, metrics for evaluating the suboffice, budgetary implications and any issues raised in the Tribal request letter.⁷ If an agreement can be reached, the suboffice will be staffed by existing USDA employees who operate on a set schedule agreed to by all parties.

One part of the agreement *may* include consolidation of FSA, NRCS and RD agencies duties under one USDA staffer.⁸ The Secretary of Agriculture retains the ability to expand this regulation to include other USDA agencies if there is a demonstrated need and a written request by a Tribe. The Tribe must approve all agreements concerning schedules of virtual staffing by USDA, should funding be available for that service.⁹

If USDA field office leadership denies the Tribal request for a suboffice, the Tribe may appeal directly to the Secretary of Agriculture.

The Secretary has 90 days upon receipt of the written appeal to respond, and that decision is final.¹⁰



Possible questions or comments for Tribal officials to ask/discuss in Consultation about the process following USDA receipt of the Tribal suboffice request letter:

- Why is the proposed regulation authorizing broader agency discretion than the plain text of the law—which requires FSA and NRCS suboffices for Tribes with reservations—permits?
- The law does not provide for a mutual agreement standard for establishing a sub-office for Tribes with reservations. Rather, the law states “The Secretary shall require the Farm Service Agency and Natural Resources Conservation Service . . . in each county that has a reservation within its borders, to establish a consolidated suboffice at the tribal headquarters of said reservation and to staff said suboffice as needed” Why is a DR being proposed that increases hurdles to establishing an NRCS and FSA sub-office on tribal lands?
- The DR states that if the Tribe agrees, “the suboffice may be consolidated to represent FSA, NRCS, and agencies from RD.” This is unlikely to be a practical solution for Tribes. The programming available through participating agencies is so broad that one staffer is unlikely to provide support on all those programs and special Tribal considerations. *The Department should not deny a suboffice request if a Tribe chooses to not support a single staffer consolidation.*
- The USDA Office of Tribal Relations should be a mandatory participant in scheduling and attending an official Consultation with the requesting Tribe. This should be added to the regulation.

- The regulation says an official Consultation will be arranged “as soon as practicable” following the receipt of a suboffice request letter. This regulation should have a 60-day deadline to acknowledge the request letter and for State field office leadership to schedule a formal Consultation. Further, for tribes with reservations, the regulation should clarify the demonstration of need in the request letter is only applicable where the Secretary chooses to include offices and functions outside of NRCS and FSA.
- If the Secretary of Agriculture does not issue any approval or denial letter to a request they have received, is it deemed denied or approved?
- While virtual services can be an option available to Tribes, a Tribe's choice not to use virtual services should not be a factor in USDA denying a sub-office request.



Tribal-USDA MOU Considerations

The USDA-Tribal Consultation on a suboffice request will include discussion of the provisions ultimately included in a Memorandum of Understanding (MOU) that governs the agreement of a suboffice on reservation.¹¹

The MOU must include:

- The suboffice's location, including opportunities for virtual services.
- If a Tribe requests the ability to host virtual services at a suboffice, details of broadband capabilities at that site should be included in the request.
- Specific agencies and services being requested from USDA to take place at the suboffice.
- This should also include considerations on special accommodation or specific terms for USDA staff to adhere to while working on a Tribal-based suboffice. It should list steps taken to ensure the health, safety and welfare of those working there.
- The schedule federal staff are requested to be physically present at the suboffice.
- Metrics to track effectiveness of staff that are agreed on by the host Tribe and federal agencies.
- Tribal leaders should explicitly lay out in the MOU who can utilize the suboffice in terms of:
 - enrolled Tribal citizens of the host Tribe;
 - all producers – both Native and non-Native – operating inside the host Tribe's jurisdiction;
 - only Tribal members with a certain blood quantum (if applicable) from the host Tribe.
- Tribal leaders should also codify explicit uses of USDA information collection from the suboffice, including:
 - if the suboffice should report names of those it serves to the Tribal government;
 - land base data used for application to certain USDA programs;
 - information on sacred sites in data collection purposes that may fall under certain program applications.

Possible questions or comments for Tribal officials to ask in Consultation about the MOU:

- Can USDA explain specifically how “metrics to track the effectiveness of staff” will be measured? What kind of tracking platform will be used, and how frequently will that data be shared with the host Tribe?
- Can USDA track specific categories of new services obtained by Tribal agriculture producers through these suboffices instead of only listing services as technical assistance?
- What measures would host Tribes have should a USDA suboffice staffer not keep the agreed upon schedule listed in the MOU? Can Tribal feedback on USDA suboffice employees be considered in their annual performance reviews? Tribes would like these included in any MOU between USDA and the host Tribe.
- Are Tribes expected to fund the suboffice space or any other component of the arrangement? Will USDA be able to offer any funding, offset or reimbursement for that office space?
- Can USDA list specific standards for an in-person suboffice? Who is responsible for maintenance and upkeep costs of this location?
- If there is a building leased by BIA with suitable space would the USDA suboffice be able to be housed there?
- Will USDA be able to offer full time staff dedicated to the location or will staffing only be available on a part-time basis? Is that negotiable?
- If a suboffice staffer’s presence is needed for several days in a row in a remote location, is USDA responsible for funding their lodging, travel costs, per diem and meals?
- If broadband capabilities at the host Tribe don’t meet USDA standards for virtual suboffice services, *USDA should not use this basis for denial of a Tribal request.* Virtual or not, USDA is required to provide a staffed suboffice for FSA and NRCS for Tribes with reservations.
- What types of special accommodations for federal staff are anticipated?

Establishing and maintaining a USDA suboffice

If a suboffice is established, but a Tribe has additional need for services outside of those listed in the MOU, a Tribe must make a specific request for those functions/services directly in writing to the Secretary of Agriculture. Upon receipt, the Secretary has 90 calendar days to respond with a decision. If issuing a denial, the Secretary's response will include a justification. This decision cannot be appealed.¹²

If more than one Tribe in a State establishes a need for a suboffice under these agreements, USDA agency leads there may establish an MOU with multiple Tribes to improve USDA services.¹³

Should a Tribe's reservation overlap with multiple counties, the Tribe and relevant USDA offices will enter an MOU to avoid the duplication of services.¹⁴ Also, if a Tribe has more than one reservation or headquarters inside a State, the Tribe and USDA agencies may sign a similar agreement.¹⁵

While USDA is proposing these updated regulations, there is not additional specific funding for it appropriated by Congress. This means that the proposed regulation's implementation will be subject to agency budgets and the availability of funds.¹⁶ If lack of funds impacts the ability for USDA to meet this regulation's proposed goals through suboffices, the Department is required to notify and provide Tribes with alternative arrangement.¹⁷



Possible questions or comments for Tribal officials to ask/discuss in Consultation about the process following receipt of the Tribal suboffice request letter:

- The wording in the DR concerning multiple Tribal suboffice requests inside one State is unclear. This may allow USDA to deny a Tribe's suboffice request should they choose not to sign an MOU with other Tribes in the State for a shared suboffice. USDA does not have the right to deny a suboffice for NRCS or FSA for Tribes with reservations—USDA only has the right to contemplate a cooperative agreement to prevent duplication of efforts where one reservation is in multiple counties.
- A shared suboffice MOU with other Tribes potentially limits an individual Tribe's ability to adjust an MOU if circumstances change and they require specific changes to the agreement.
- States may have numerous Tribal nations inside their borders that may want individual suboffices. USDA should not deny an individual Tribe a request for a singular suboffice if it does not wish to take part in a multi-Tribe MOU regarding shared suboffice.
- Requesting these agencies presence on-reservation is a result of shortfalls in current USDA services to remote Tribal jurisdictions, many of which encompass hundreds or thousands of square miles. USDA should define a "duplication of efforts" in the final DR *before* using it as a reason to deny suboffice placements (a denial not within their authority where the request is for an FSA or NRCS suboffice for a Tribe with a reservation) on different Tribal jurisdictions despite being located in the same State.
- Tribes request USDA's OTR send out quarterly updates on funding availability for suboffice placements on reservations broken out by however the Department allocates funds. Tribal governments are often limited in staff, and may find a better use of their resources in not applying should no funding be available.

- Lack of agency funding and budgeting is not a basis for refusing to implement the underlying law for Tribes with reservations, the law requires NRCS and FSA suboffices be established and staffed “using existing staff, but no less than one day a week.” If there is a funded and staffed county office, then there is funding and a budget for a suboffice. If USDA lacks funds to meet its proposed goals in offering suboffices, it should notify a requesting Tribe of its exact plans to offer alternative arrangements within 90 days of receipt of the suboffice request. This time limit should be added to the DR. If USDA lacks funds to meet its requirement to staff a suboffice for a Tribe with a reservation, it must notify Congress of its inability to meet its statutory obligation.
- USDA should consider Tribes as an asset and incorporate them in the Department’s budgeting process. This framework has long existed at other federal agencies. Giving Tribes input on annual budgetary frameworks may go a long way in meeting this DR’s proposed goals of avoiding a “duplication of efforts” long before a denial letter is issued. Again, the underlying statute is not discretionary, and thus, funding and budgeting is not a legally sound basis for denying a suboffice request for a Tribe with a reservation.

ENDNOTES:

1 This Departmental Regulation (DR) establishes the procedures for forming United States 25 Department of Agriculture (USDA) suboffices on American Indian reservations per the 26 *Food, Agriculture, Conservation, and Trade Act of 1990* (7 United States Code (U.S.C.) 27 2279(i)).

2 The Secretary of Agriculture reserves the right to include such other⁹ offices and functions as deemed appropriate

3 Holden, L. (2021, July 29). Advocating for the Federally-recognized tribes extension program, 16. Available at: <https://nativeamericanagriculturefund.org/wp-content/uploads/2018/04/Advocating-for-the-Federally-Recognized-Ribes-Extension-Program.pdf>.

4 Section 6 - Bullet point a. of [DRAFT DR 1340 Consolidating USDA Agencies Services On Indian Reservations, Draft DR. 1340 § \(6\).IFAI - Draft Regulations 1340-002_DRAFT_8-24-23.pdf - All Documents \(sharepoint.com\)](#) .

5 Id.at § 6(g).

6 “The Secretary shall require the Farm Service Agency and Natural Resources Conservation Service, and such other offices and functions the Secretary may choose to include where there has been a need demonstrated, in each county that has a reservation within its borders, to establish a consolidated suboffice at the tribal headquarters of said reservation and to staff said suboffice as needed, using existing staff, but no less than one day a week or under such other arrangement agreed to by the tribe and the Department offices.”

ENDNOTES:

7 Id. at § 6(b).

8 Id. at § 6(c).

9 Id. at § 6(d).

10 *Id.*

11 Id. at § 6(g).

12 Id. at § 6(i).

13 Id. at § 6(e).

14 Id. at § 6(j).

15 *Id.*

16 Id. at § 6(h).

17 Id. at § 6(k).

