



## Side-by-Side Comparison of USDA Departmental Regulations on Tribal Consultations

DR (1340-007) – March 14, 2008: Policies on American Indian and Alaska Natives	DR (1350-001) – September 11, 2008: Tribal Consultation	DR (1350-002) – January 18, 2013: Tribal Consultation, Coordination, and Collaboration	DR (1350-002) – April 30, 2024: Tribal Consultation
Replaces <a href="#">DR 1340-006 (October 16/92)</a> ; policy and implementation guide for <a href="#">Executive Order 13175: Consultation and Coordination with Indian Tribal Governments</a> .	Requires Tribal consultation; incorporates significant amount (approx. 80%) of the text from <a href="#">EO 13175</a>	Clarified and complemented <a href="#">DRS 1340-007</a> , 1350-001.	Supersedes all previous DRs.
PURPOSE and BACKGROUND			
Purpose <ul style="list-style-type: none"> <li>• The purpose of this regulation is to:               <ol style="list-style-type: none"> <li>1. set forth the USDA’s policy on government-to-government Tribal relations; and</li> <li>2. provide policy and implementation guidance for <a href="#">Executive Order 13175</a></li> </ol> </li> </ul> Background:	Purpose <ul style="list-style-type: none"> <li>• The United States Department of Agriculture (USDA) hereby establishes this policy requiring consultation and participation by and between Indian tribes on USDA policies and activities.</li> </ul>	Background and Policy <ul style="list-style-type: none"> <li>• Introduction, Background, and Purpose               <ul style="list-style-type: none"> <li>○ Uses the term “government-to-government.”</li> <li>○ Use of the words “treaty” or “treaties” is foundational to the purpose of the Departmental Regulation and overall relationship between USDA and Tribal sovereign governments.</li> </ul> </li> </ul>	Purpose and Background <ul style="list-style-type: none"> <li>• Uses the term “nation-to-nation,” which the previous three DRs do not use.</li> <li>• Use of the word “treaty” appears in the policy section and is used as context to policy implications.</li> </ul>

<p>Outlines the unique and legal relationship between the federal government and Indians and their Tribal governments. This DR specifically mentions the term “political relationship” in addition to unique and legal.</p>			
<b>SPECIAL INSTRUCTIONS</b>			
<p>Special Instructions</p> <ul style="list-style-type: none"> <li>Specifically states: “pertains to Federally Recognized Indian and Alaskan Native Tribes and provides guidance to USDA personnel.” <a href="#">DR 1350-001</a> is silent on this special instruction.</li> </ul>	<p>Not mentioned</p>	<ul style="list-style-type: none"> <li>Special Instructions <ul style="list-style-type: none"> <li>Clarifies two previous DRs.</li> </ul> </li> </ul>	<p>Special Instructions/Cancellations</p> <ul style="list-style-type: none"> <li>Highlights when the DR takes effect: “Immediately when published.”</li> </ul>
<b>DEFINITION OF TRIBES, CONSULTING OFFICIALS AND SCOPE</b>			
<p>Definitions</p> <ul style="list-style-type: none"> <li>Indian 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”</li> <li>Includes definitions for Alaska Native Corporation (ANC), Alaska Native, and Tribal government.</li> </ul>	<p>Definitions</p> <ul style="list-style-type: none"> <li>Indian tribe: “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 or any subsequent List.”</li> <li>No reference to Alaska Native Corporation (ANC), Alaska Native, and Tribal government.</li> <li>While the term “Tribal government” exists in the body of the DR, there’s no specific definition for the term in the ‘Definitions’ section.</li> </ul>	<p>Scope</p> <ul style="list-style-type: none"> <li>There is no reference to ‘scope’</li> </ul> <p>Definition of USDA Consulting Officials:</p> <ul style="list-style-type: none"> <li>“For USDA, consultation may only be conducted by <b>employees who have delegated authority for consultation</b>. This delegation occurs through the Secretary to Department Leadership and flows from the Under Secretaries to the agencies. Whether the USDA consulting official is the Secretary, Deputy Secretary, Assistant Secretary, Under Secretary, agency head, or another agency official depends on the nature of the regulation, policy, program or planning decision and how it may affect the consulting Tribe(s).”</li> </ul>	<p>Scope</p> <ul style="list-style-type: none"> <li>This DR applies to all USDA Mission Areas, agencies, and staff offices.</li> </ul> <p>Definition of USDA Consulting Officials:</p> <ul style="list-style-type: none"> <li>“The consulting official should be a <b>senior-level official with the statutory or delegated authority to make decisions on the regulation, policy, or other USDA action in question</b>. All USDA officials charged with consultation must complete the Tier 1 trainings, as stated in Jan. 2013 <a href="#">DR 1350-002</a>, and any other trainings required by the Department.”</li> </ul> <p>Definition of Tribal Consulting Officials:</p>

		<p>Definition of Tribal Consulting Officials:</p> <ul style="list-style-type: none"> <li>• “For the Tribes, consultation is conducted by elected Tribal representatives or Tribal employees or <b>designees who have delegated authority from their Tribal government for consultation</b>. This delegation is determined by the Tribes themselves as sovereign governments. The consulting official must be designated by the Tribe, and agencies should get written confirmation from the Tribe that any official participating in consultation has authority from their Tribal government. “</li> </ul>	<ul style="list-style-type: none"> <li>• “Only elected leadership or <b>their designated representative(s) can represent Tribes at consultations</b>. Delegations of authority from Tribal leaders must be in writing, signed by the elected delegating official, and given to USDA prior to the consultation. If an official is in a non-elected position but was appointed permanently to a position by a Tribal leader in that subject area, then a written delegation of authority is not required.”</li> </ul>
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PRINCIPLES OF CONSULTATION

<p><a href="#">EO 13175</a> sets the Fundamental Principles for this DR:</p> <ul style="list-style-type: none"> <li>• “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.</li> <li>• 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.</li> <li>• The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.”</li> </ul>	<p>Fundamental Principles</p> <ul style="list-style-type: none"> <li>• Same as <a href="#">DR (1340-007)</a> this entire section is lifted from <a href="#">EO 13175</a>:</li> </ul>	<p>Includes a definition of the Principle of Mutual Concurrence:</p> <ul style="list-style-type: none"> <li>• “As a general principle, consultation only occurs when the office or agency and Tribal officials mutually agree that consultation is taking place. Office and agency consulting officials and their staffs should be clear in identifying, in collaboration with the relevant Tribal official(s), when an action or set of actions constitutes government-to-government consultation.”</li> </ul> <p>The Definition of consultation:</p> <ul style="list-style-type: none"> <li>• “Tribal consultation is the timely, meaningful, and substantive dialogue between USDA officials who have delegated authority to consult, and the official leadership of Federally recognized Indian Tribes, or their designated representative(s), pertaining to USDA policies that may have tribal implications.’ (p.8)</li> </ul> <p>Critical Triggers</p> <ul style="list-style-type: none"> <li>• The section on Critical Triggers clearly states <a href="#">EO 13175</a> as the baseline and provides examples of potential consultation triggers. Not to be considered exhaustive, critical triggers include: <ol style="list-style-type: none"> <li>1. Tribal Initiated <ul style="list-style-type: none"> <li>▪ Request from Tribal Leader</li> <li>▪ Request from Intertribal organizations representing Federally Recognized Tribes</li> </ul> </li> <li>2. USDA Agency Initiated <ul style="list-style-type: none"> <li>▪ USDA Structure</li> <li>▪ Rulemaking</li> <li>▪ Legislative Proposals</li> <li>▪ Legislative Positions</li> </ul> </li> </ol> </li> </ul>	<p><b>Does not include</b> the Principle of Mutual Concurrence:</p> <ul style="list-style-type: none"> <li>• This principle provides clarity for both parties that a consultation is taking place and “when an action or set of actions constitutes government-to-government consultation.”</li> </ul> <p>The Definition of Consultation is different from Jan. 2013 <a href="#">DR 1350-002</a>:</p> <ul style="list-style-type: none"> <li>• “Tribal consultation is the timely, meaningful, and substantive dialogue between USDA officials who have delegated authority to consult, and the elected leadership of federally recognized Tribes or their designated representative(s), pertaining to USDA policies that may have Tribal implications.” (p.B-1)</li> </ul> <p>Critical Triggers</p> <ul style="list-style-type: none"> <li>• The consultation triggers in this DR have been halved from four to two, now only allowing for “USDA initiated” and “Tribal leader initiated.”</li> <li>• The section on Critical Triggers is renamed as “When Consultation Occurs” and implies that Tribal Leader Initiated consultation must be put into context before it results in a consultation:</li> </ul> <p>“Tribal leaders can also request consultation regarding a regulation, policy, budget action, or other USDA action that they believe may have Tribal implications. Once this occurs, the appropriate Mission Area, agency, or staff office must then:</p>
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<b>CONSULTATION ROLES AND RESPONSIBILITIES AND ACCOUNTABILITES</b>			

<ul style="list-style-type: none"> <li>• Outlines several functions of USDA as a department of the Federal Government</li> <li>• This section also outlines the roles that Tribal governments and ANC have in managing “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.” <a href="#">[OIA]</a></li> <li>• States that “USDA will observe the American Indian Religious Freedom Act.”</li> <li>• In addition to working with Tribal governments, USDA is also required to work with Tribal high schools, colleges, and universities “to encourage the development of agribusiness skills and awareness, and where needed agribusiness curricula and where needed, curricula.” (NOTE: There is no mention of these educational institutions in <a href="#">EO 13175</a>)</li> </ul> <p>Responsibility</p> <ul style="list-style-type: none"> <li>• Assigns responsibility to the Secretary to ensure the policy is followed.</li> <li>• Also mentions USDA Office of External and Intergovernmental Affairs.</li> </ul>	<p>Policymaking Criteria</p> <ul style="list-style-type: none"> <li>• This entire section is lifted from <a href="#">EO 13175</a>.</li> </ul> <p>Responsibilities of USDA Officials</p> <ul style="list-style-type: none"> <li>• This section is new – not covered in <a href="#">DR 1340-007</a> or <a href="#">EO 13175</a>.</li> <li>• Outlines USDA responsibilities to inform, work with, and seek recommendations from Tribes.</li> </ul>	<p>Consultation and Related Roles</p> <ul style="list-style-type: none"> <li>• Delineates and defines all Tribal entities, including Intertribal organizations such as Intertribal Agriculture Council, Intertribal Timber Council, and the National Congress of American Indians. Although these entities are not Tribal governments that USDA must consult with in the same manner as a sovereign nation, this DR encouraged USDA officials to consider when and how they might need to be included given their representation of Tribal producers, governments, and other Tribal interests.</li> <li>• There is a specific sub-section on USDA “Accountability”.</li> <li>• This DR is very clear on the measure of the accountability process, saying</li> <li>• “An accountable process shall include, as a minimum, the ability for OMB, the Secretary, Under Secretaries, Agency Heads, and Agency Consulting Officials to determine: <ol style="list-style-type: none"> <li>1. The subject of the consultation;</li> <li>2. The critical trigger or decision to initiate consultation;</li> <li>3. Materials provided to, and received from, Consulting Officials relevant to the consultation topic;</li> <li>4. Names, titles and contact information of the Consulting Officials (Federal and Tribal Representatives) and any additional individuals who were involved in the consultation process (staff, etc.);</li> </ol> </li> </ul>	<p>Roles and Responsibilities</p> <ul style="list-style-type: none"> <li>• There are more than 2 pages dedicated to descriptions of USDA’s roles and responsibilities (pp 9-11).</li> <li>• Tribal entities' roles are in the Definition section and are not clearly delineated.</li> <li>• The words “accountable” or “accountability” do not exist in the DR.</li> <li>• Gives the USDA Office of Tribal Relations (OTR) a central role in the consultation process.</li> <li>• In contrast to the Jan. 2013 <a href="#">DR (1350-002)</a>, this DR outlines a much less robust accountability process:</li> <li>• “Compile, share with OTR, and maintain the record for their consultations within 30 days of any consultation, which includes: <ol style="list-style-type: none"> <li>1. Any invitations, letters, templates, or supporting materials sent to Tribal leaders;</li> <li>2. List of attendees;</li> <li>3. Delegation of authority letters;</li> <li>4. Agenda;</li> <li>5. Minutes, recordings, transcripts, or notes;</li> <li>6. Follow-up items;</li> <li>7. How the Mission Area, agency, or staff office considered input from the Tribe; and</li> <li>8. Any other documents related to the consultation.”</li> </ol> </li> </ul> <p>Compliance</p>
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		<ol style="list-style-type: none"> <li>5. How the consultation was conducted (the type and mode);</li> <li>6. The consultation schedule (dates, times, locations);</li> <li>7. Agendas, meeting minutes, or other records of consultation meetings;</li> <li>8. The outcome(s) of the consultation, including follow-up commitments, any agreements or points of disagreement;</li> <li>9. How the results of the consultation were considered in any decision-making process by the agency and whether they were incorporated or rejected in the final decision(s);</li> <li>10. What additional steps may need to be taken; and</li> <li>11. Appropriate public disclosure of the consultation record.”</li> </ol> <ul style="list-style-type: none"> <li>• Lists one of OTR’s responsibilities as: “Develop and maintain a USDA-wide Tribal Consultation Database”</li> <li>• Requires each USDA agency to “develop its own or shall modify existing policies for Tribal consultation and meet the minimum standards as established in this policy.”</li> <li>• Tribal Summary Impact statement is included in the Compliance section and does not have further description. (p.7)</li> </ul>	<ul style="list-style-type: none"> <li>• Compliance is a sub-section within the Policy section in Jan. 2013 <a href="#">DR 13520-002</a> There is a separate section on Compliance in this new DR, but it’s not an extensive section (p.11)</li> <li>• No mention for OTR to develop a USDA-wide Tribal Consultation Database.</li> <li>• Unlike Jan. 2013 <a href="#">DR 1350-002</a>, this DR does not require each agency to develop/modify its own Tribal consultation policy; rather “A representative designated by Mission Area, agency, or staff office leadership should develop <b>protocols for consultation</b> with the Tribes in their respective State.”</li> <li>• Tribal Summary Impact statement is in a section called Policy Burden on Tribes and has further description. (p.5)</li> <li>• In the sub-section on Supporting Documentation, the 14-day expectation for Framing Papers is</li> </ul>
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			included. This is not identified in Jan. 2013 <a href="#">DR 1350-002</a> .
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LEGISLATIVE AND MISCELLANEOUS

<p>Future Authority</p> <ul style="list-style-type: none"> <li>“Future authority given to USDA by Congress shall automatically be incorporated into this regulation.”</li> </ul>	<p>Legislative Proposals</p> <ul style="list-style-type: none"> <li>This entire section is lifted from <a href="#">EO 13175</a></li> </ul>	<ul style="list-style-type: none"> <li>Training and Education <ul style="list-style-type: none"> <li>Clear outline of Tiered training requirements for all USDA staff</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>There is a mention of Tier 1 Training for USDA Consulting Officials.</li> </ul>
<p>Inquiries</p> <ul style="list-style-type: none"> <li>There is no ‘Inquiries’ section in <a href="#">DR 350-001</a>.</li> </ul>	<p>Consultation on Regulations</p> <ul style="list-style-type: none"> <li>This entire section is lifted from <a href="#">EO 13175</a></li> </ul> <p>Preempting Tribal Law</p> <ul style="list-style-type: none"> <li>This entire section is lifted from <a href="#">EO 13175</a></li> </ul> <p>Other Consultation Issues</p> <ul style="list-style-type: none"> <li>This entire section is lifted from <a href="#">EO 13175</a></li> </ul> <p>Waivers</p> <ul style="list-style-type: none"> <li>This entire section is lifted from <a href="#">EO 13175</a></li> </ul> <p>Accountability</p> <ul style="list-style-type: none"> <li>This entire section is lifted from <a href="#">EO 13175</a></li> </ul> <p>Judicial Review</p> <ul style="list-style-type: none"> <li>This entire section is lifted from <a href="#">EO 13175</a></li> </ul>		
	<p><b>NOTE: This DR leaves out Section 5 of <a href="#">EO 13175</a>:</b>  “Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that</p>		

	<p>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.”</p>		
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