



# Tribal Consultation: Administration Guidance and Policy Consideration

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On January 26, 2021, President Biden issued a [Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships](#) (2021 P.M.). The 2021 P.M. requires agencies to create a “detailed plan of actions” to implement [Executive Order 13175](#) (E.O. 13175), issued November 6, 2000, which mandates federal agencies to consult with tribes when developing federal policies with “tribal implications.” The 2021 P.M. reaffirms the policy announced in the [Presidential Memorandum of November 5, 2009](#) (2009 P.M.) requiring agencies to “prepare and periodically update” a “detailed plan of actions” to implement E.O. 13175. According to the 2021 P.M., the Biden Administration’s priorities include the following: respecting tribal sovereignty and self-governance, fulfilling federal trust and treaty obligations, and engaging in “regular, meaningful, and robust” consultation with tribes.

This Insight provides an overview of executive actions on tribal consultation from 2000 to 2021 and observer and stakeholder comments about the 2021 P.M. This Insight also discusses potential policy considerations for Congress.

## Executive Actions on Tribal Consultation

The 2021 P.M. cites two prior presidential actions on tribal consultation: E.O. 13175 and the 2009 P.M. E.O. 13175 mandates tribal consultation when federal agency policies involve regulations, proposed legislation, or other policy actions that have a “substantial direct effect” on tribes. Among other things, E.O. 13175 requires agencies to develop a process ensuring “meaningful and timely input” by tribes under these circumstances.

The 2009 P.M. directed each agency to submit within 90 days of its issuance a “detailed plan of actions” to the Office of Management and Budget (OMB) describing how the agency will implement E.O. 13175. Accordingly, for example, the Department of the Interior’s [plan of actions](#) included developing a department-wide consultation policy and supplemental bureau policies. The 2009 P.M. required tribal consultation on agency plans prior to submittal to OMB and directed agencies to submit progress reports to OMB and the Assistant to the President for Domestic Policy (APDP). The 2009 P.M. also required OMB and APDP to report to the President on agency implementation of E.O. 13175 and recommend improvements to agency plans and tribal consultation.

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The 2021 P.M. reaffirms the 2009 P.M.’s policy objectives and restates the 2009 P.M. requirements. Agencies are again required to develop a “detailed plan of actions” implementing E.O. 13175, consult with tribes about the plan, and submit the plan to OMB within 90 days from the date of the memorandum. Similarly, agencies are directed to submit progress reports on plan implementation, and OMB and APDP are required to report to the President on agency implementation of E.O. 13175.

## Observer and Stakeholder Commentary

Various Administration and tribal officials have commented on the 2021 P.M. The special assistant to the President for Native American Affairs on the White House Domestic Policy Council stated the 2021 P.M. requires agencies to have a “[strong process in place for consultation.](#)” The Department of Housing and Urban Development issued a [press release](#) addressing the memorandum and the department’s commitment to implement it. Although one news source commented that the 2021 P.M. is [not a large departure from current federal policy](#), [some tribes](#) and tribal organizations support the memorandum. The chairwoman of the National Congress of American Indians stated she is [encouraged](#) by the Administration’s commitment to tribal consultation. Cherokee Nation remarked that the 2021 P.M. gives the tribe [hope for better communication with the federal government](#).

## Policy Considerations

Agency responses to the 2021 P.M. are not yet known, although some [agencies](#) have scheduled tribal consultations on the detailed plan of actions. Impediments to tribal consultation have been identified as an issue in recent years. Notably, in 2019, the Government Accountability Office issued a [report](#) identifying factors hindering effective tribal consultation in federal infrastructure projects. Some factors identified by tribes included timing of consultation, such as consulting late into project development stages; insufficient tribal resources to participate in consultation, such as staffing resources to respond to consultation requests; and inadequate agency officials’ training on consultation requirements. Some factors identified by agencies included difficulties in initiating consultation, such as identifying the relevant tribes to consult; limited tribal response and participation in consultation; and insufficient agency resources to conduct consultation, such as limited funding and staff to support consultation.

In 2016, in response to Standing Rock Sioux Tribe’s objections to the Dakota Access pipeline, the Departments of the Interior, Army, and Justice (Departments) engaged in [tribal consultations to discuss nationwide reform](#) in considering tribes’ input into federal infrastructure decisions. In 2017, the Departments released a [report](#) that, among other things, articulated overarching federal principles for effective consultation, such as initiating consultation as soon as agencies contemplate a federal action impacting tribal interests and reaching a consensus with tribes on decisionmaking where possible.

In the 115<sup>th</sup> Congress, the “Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act” (H.R. 2689) would have prescribed tribal consultation procedures for federal agencies. Congress did not enact H.R. 2689 and has not passed legislation establishing a general mandate requiring federal agencies to engage in tribal consultation. However, some laws may require agencies to consult with tribes for a specific purpose. For instance, the [National Historic Preservation Act](#) created a [review process](#) for agencies to follow when a federal “[undertaking](#)” may affect a “[historic property](#)” of religious and cultural significance to a tribe.

Some tribes have expressed support for a more rigorous standard of “[free, prior, and informed consent](#)”—or FPIC. In the 116<sup>th</sup> Congress, several bills addressed potential impacts to land and resources of Indian tribes and incorporated FPIC, such as [H.R. 2532](#) and [S. 4331](#), but were not enacted.

Congress may consider whether to change or maintain existing requirements under law for agencies to engage in tribal consultation. Should Congress choose to change these requirements, Congress may examine key principles for consultation, the extent of federal agency actions covered, and potential budgetary impacts in changing consultation mandates.

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