

WINNEBAGO TRIBE OF NEBRASKA (WTN)
POLICY ON GOVERNMENT-TO-GOVERNMENT CONSULTATION

**For distribution to all appropriate
Federal Agencies, Departments, Programs, and Offices**

Government-to-Government consultation with the Winnebago Tribe of Nebraska (WTN) is an essential component of the trust responsibility owed by the United States and its federal agencies to WTN. “The doctrine of the trust responsibility had its beginning in the opinion of Chief Justice Marshall in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)” (Morisset 1999). In Presidential Executive Order No. 13175 *Consultation and Coordination with Indian Tribal Governments* it states “...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...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...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” (EO 13175 §2(b), §3(c)(1)(2), §5(a)).

In Memorandum, April 29, 1994 *Government-to-Government Relations with Native American Tribal Governments* it states “...Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals...Each executive department and agency shall assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities (Presidential Documents §(b),(c)).

The United States has approved the United Nations' Declaration on the Rights of Indigenous Peoples. The Declaration states indigenous peoples have “. . . the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature” and mandates that the United States “. . . provide redress through effective mechanisms . . . developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.” It further recognizes indigenous peoples have “the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains” and requires the United States to “. . . seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.” Under the Declaration, the WTN has “. . . the right to maintain and strengthen [its] distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources. . .” The Declaration further declares, “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions” and “have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions” and requires the United States to “. . . take effective measures to recognize and protect the exercise of these rights.” Pursuant to the Declaration, “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions” and the United States is required to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

PTN Policy for Government-to-Government Consultation:

Government-to-Government consultation with the WTN is the formal process of engaging in *face-to-face negotiating* and *joint-cooperative decision-making* taking place between the PTN and the United States Federal Government represented through its Executive Departments and other federal agencies. Face-to-face negotiating and joint-cooperative decision-making is the objective of every Government-to-Government consultation seeking to obtain a fair resolution to the issue(s) under discussion or open to question. Any federal agency submitting a “Notice to Consult” letter to the WTN informing them that a proposed federal undertaking will occur which may potentially affect a tribal cultural interest(s) or a resource(s) and, in which the agency is requesting/soliciting a return of written tribal comments addressing possible potential affects, is **NOT** Government-to-Government consultation. A failure to respond to such a Notice by the PTN **may not** be taken or construed by a federal agency to mean that a lack of response means a determination of “No Affect” has been declared by the WTN even if such language appears within the Notice letter. To promote successful consultation the WTN adheres to the following principles:

1. Commitment to consultation—the WTN is committed to consulting with federal agencies on matters that directly and potentially affects its interests.
2. Consultations—Consultations between the WTN and any Federal agency should take place during the Planning Phase of any Federal Agency’s undertakings prior to their soliciting comments for a proposed undertaking.
3. Consultation is a two-way street—communications should be direct and involve two-way dialogue and feedback. Face-to-face meetings between the appropriate WTN representative(s) and federal agency representative(s) increases the understanding of any issue(s) under discussion or open to question and such meetings will enhance the cooperative development of effective and satisfactory resolution of the issue(s) under discussion or open to question.
4. Issues requiring consultation—if any issue should arise it needs to be identified as soon as possible. The need for consultation and who makes a determination to initiate a consultation process may be difficult to define at times. Consultation can be initiated by either the WTN or federal agency. As a general rule, any decision or action that potentially impacts or involves the WTN does require consultation.

To ensure sufficient time for input before decisions are made requires the early involvement of all parties affected by those actions.

5. Make every effort to respond to and participate in the consultation process—the WTN shall ensure that an appropriate response is provided to any request for consultation. If there is no response to an initial request to consult, it should not be assumed that the WTN has no interest in participating in the consultation process.
6. Ensure officials with comparable authority consult—in order to maintain the Government-to-Government relationship and engage in joint-cooperative decision-making, the WTN and other federal agencies should send officials who are authorized to represent those interests which require final decision making on the issue(s) under discussion or open to question.
7. Honesty and integrity in the consultation process—mutual respect and trust are fundamental elements in establishing an effective consultative Government-to-Government relationships. All consulting parties should be open and honest with all information beneficial or critical to making a decision or developing a position.
8. Build on-going Government-to-Government relationships—formation of specific actions to resolve an issue(s) under discussion or open to question are more productive if done within a framework of a Government-to-Government relationship. To that effect the WTN will:
 - a. Work directly with other federal agencies in a Government-to-Government relationship rather than as subdivisions of other governments.
 - b. Take appropriate steps to remove any legal and/or procedural impediments to working directly and effectively with the United States government and its programs.
 - c. Encourage cooperation between the WTN and other federal agencies to resolve problems of mutual concern.
 - d. Incorporate the WTN Policy on Government-to-Government consultation into the planning stages and management activities of ongoing policy and regulation development processes.

Through the process of Government-to-Government consultation federal agencies will come to better understand the traditional culture, politics, perspectives, worldview, and treaty rights of the Tribe. However; it is incumbent upon the WTN that it also understands the non-tribal politics and regulatory authority federal agencies possess to implement policy decisions potentially affecting the same. The goal of every consultation is to reach a consensus between the WTN and federal agencies, through the decision making process which acknowledges the interests and concerns of both parties, while recognizing that mutual agreements may not always be reached. Effective consultation requires that the WTN and consulting federal agencies carry on an enhanced form of communication between themselves that emphasizes trust and respect. This emphasis is a shared responsibility. Only through establishing trust and respect can the WTN and other federal agencies create a process for a free and unencumbered exchange of information that leads to obtaining a satisfactory resolution of the issue(s) under discussion or open to question.

PTN Objectives of Government-to-Government Consultation:

The objectives of Government-to-Government consultation is to establish the requirement that federal agencies must conduct face-to-face negotiations with the WTN to deliberate the issue(s) under discussion or open to question and engage in joint-cooperative decision-making in determining a satisfactory resolution(s) to the issue(s) under discussion or open to question. The four (4) objectives are:

1. To conduct face-to-face negotiations and engage in joint-cooperative decision-making between the Tribe and federal agencies in order to ensure that the WTN's Tribal Council and Tribal Historical Preservation Officer (THPO) understand the technical and legal issues relevant to the issue(s) under discussion or open to question so that all parties may evaluate for themselves the potential impact of all relevant proposals in order to make an informed decision.
2. To ensure that federal compliance with treaty and trust obligations, as well as applicable federal laws, regulations, Presidential Executive Orders, Memorandums, and policies, are taken into account and adequately addressed.
3. To ensure that all decisions regarding the issue(s) under discussion or open to question are arrived at through the process of joint-cooperative decision-making.

4. To ensure through the process of conducting face-to-face negotiations and joint-cooperative decision-making that the integrity and equality of the determination regarding a final decision agreed and settled upon between the WTN and federal agencies satisfactorily resolves the issue(s) under discussion or open to question.

Government-to-Government Consultation Principles:

Government-to-Government consultation requires that the WTN and federal agencies understand their respective roles and responsibilities in the consultation process. To initiate the Government-to-Government consultation process it is vital to note that the WTN and/or WTN THPO cannot fully understand the issue(s) under discussion or open to question without participating in face-to-face negotiations. Without face-to-face negotiations between the WTN and federal agencies consultation is meaningless and the interest(s) and concern(s) of the WTN will not be adequately met unless such negotiations occur. Any federal agency submitting a “Notice to Consult” letter to the WTN informing them that a proposed federal undertaking will occur which may potentially affect a tribal cultural interest(s) or a resource(s) and, in which the agency is requesting/soliciting a return of written tribal comments addressing possible potential affects, is **NOT** Government-to-Government consultation.

Prior to initiating a Government-to-Government consultation request, the following guiding principles should be followed by federal agencies:

1. Face-to-face negotiations—commit to conducting face-to-face negotiations with the PTN. In the planning stages of the proposed undertaking(s).
 - a. The purpose of the Government-to-Government consultation is to engage in joint-cooperative decision-making in which all parties are working together to reach a consensus agreement which satisfactorily resolves the issue(s) under discussion or open to question.
 - b. All federal agencies and WTN should be open to discussions about alternative solutions.
2. Identify point-of-contact—the WTN has the right to determine who will represent them in the consultation process. While the consulting parties should strive to establish participation at the appropriate level, WTN staff personnel and/or technical individuals may also participate in the consultation process. It should

not be expected that such personnel possess the authority to make policy decisions, or take formal positions without authorization from the WTN. However, all participants should disclose any limitations on their ability to make decisions on behalf of their own agency, prior to any consultation meetings.

3. Provide a clear description of the issue(s) under discussion or open to question—any related documentation or statements describing the issue(s) to be discussed or open to question should be provided in advance. These documents should clearly explain any proposed actions and the details of the decision or policy to be developed. Any sensitive information or legal limitations on or requirements for disclosure of information should be identified in advance.
 - a. Recognize that the WTN is traditionally, culturally and administratively different from a federal agency and possesses varying degrees of governmental infrastructure. It should be understood that some kinds of information are sensitive, especially regarding traditional religious practices and this can complicate the consultation process. In many cases, traditional custom or religious rules regarding issues of confidentiality may not be negotiable. Federal agencies should recognize and accept that the WTN may be hesitant to share such information unless confidentiality can be guaranteed.
4. Allow ample time to review documents—depending on the complexity of the issue(s) to be discussed, the amount of time for face-to-face negotiations will vary. While some decisions may require quick actions due to imposed deadlines, every effort should be made by all involved entities to provide advanced written notice to allow for adequate and meaningful input and response.
5. Establish a proposed schedule for consultation—the consulting parties should jointly determine the protocols, timing, and number of meetings needed to consult.

The purpose of this document is to provide a policy on how to conduct Government-to-Government consultations with the WTN. The WTN recognizes that maintaining open communications between itself and other federal agencies is not a guarantee of agreement on every issue requiring consultation. However, by maintaining open communications between the WTN and other federal agencies this will ensure that an effective working relationship exists between them.