

Advisory Memorandum

To: All DOI Bureau and Office Heads

From: Assistant Secretary - Indian Affairs /s/ February 24, 1995

Subject: Guidance on the Federal/Tribal Government-to-Government Policy

On April 29, 1994, President Clinton issued an historic directive to each federal department and agency mandating that the rights of sovereign tribal governments are to be fully respected. The memorandum, which is attached to this document, directs that certain principles are to be followed by all federal entities when dealing with tribal governments in deference to the government to government relationship between the United States and American Indian and Alaska Native tribes. Pursuant to the President's directive, each bureau and agency is required to develop action plans to implement the principles it sets out. This memorandum is intended to assist in the incorporation and implementation of the President's directive into the daily activities and decision-making processes of all the Department's bureaus and offices.

I. BACKGROUND

A. Why are tribes recognized as having governmental status?

Article 1, Section 8 of the Constitution of the United States vests the Federal Government with the authority to engage in relations with the tribes, and, thereby, firmly places tribes in the Constitutional family of our nation. When the governmental authority of tribes was first challenged in the 1830's, Chief Justice John Marshall articulated the fundamental principle, which has guided the evolution of federal Indian law to the present day, that tribes possess a nationhood status and they retain inherent powers of self-government. The government-to-government relationship to which the President refers, therefore, is Constitutionally derived, and is firmly rooted in Supreme Court doctrine and federal statutory law.

B. What are the inherent powers of tribal self-government?

Tribes possess all powers of government, except those which have been expressly extinguished or which are inconsistent with overriding national interests. Tribes, therefore, possess the right to form their own government; to make and enforce laws, both civil and criminal; to tax; to establish membership; to license and regulate activities; to zone; and to exclude persons from tribal territories, among others. Limitations on tribal powers of self-government are few, and include the same limitations applicable to states. Tribes, like states, for example, lack the power to make war, engage in foreign relations, or coin money.

C. What is the relationship between Tribal and State Governments?

Because the Constitution vests authority over Indian Affairs in the Federal Government, states, generally, have no authority over tribal governments. Tribal governments are not subordinate to state governments, and usually have the right to enact and enforce stricter or more lenient laws and regulations than those of the neighboring state(s). Although tribes possess both the right and the power to regulate activities in their territories independently from the surrounding state government(s), they frequently collaborate and cooperate with states through compacts or other agreements. The Tribal to State relationship is also one of government-to-government.

II. Implementing the Government-to-Government Relationship

As indicated above, each bureau and agency is required to develop action plans to implement the principles set out in the President's directive. At a minimum, these plans should contain the following:

A. Provide Employee Education

Each bureau and office must provide employees working with tribes with materials, information, and/or training on principles of tribal sovereignty; the federal trust relationship; and the policy directives of the President and the Secretary. The Office of American Indian Trust (OAIT) is available to consult with all bureaus and agencies within the Department on these issues and has developed materials which may be helpful in this regard.

B. Respect for Tribal Sovereignty in all Dealings

Bureaus and offices should identify whether any of their planned activities, undertakings, rule-making, or other actions will affect tribes, tribal rights, or tribal resources, and ensure that appropriate steps for interaction with tribal governments are taken. Specifically, each agency should:

1. Take affirmative steps to become knowledgeable about tribal governments and processes generally, and where an agency or bureau is working with a specific tribe, ensure that all personnel have adequate knowledge about the specific tribe's government and procedures.
2. When dealing directly with a tribe, take affirmative action to become familiar with pertinent tribal law, rules, and regulations.
3. Determine the applicability of state law to activities on tribal land. Keep in mind that tribal regulatory, civil, and criminal laws apply on tribal lands unless a specific federal statute or court decision provides otherwise.

EXAMPLE: Where a tribe has promulgated water quality standards under the Clean Water Act, use such standards for planning and operations when appropriate.

EXAMPLE: Determine whether the tribe or the state has regulatory authority over the activity in question, such as hunting, fishing, or other recreation.

EXAMPLE: Determine whether the tribe or the state or both have authority to levy taxes against on-reservation activities. Ensure that the bureau or agency does not interfere with the tribe's ability to collect taxes due it.

EXAMPLE: Determine whether there is federal, tribal, or state jurisdiction when dealing with enforcement issues.

C. Design A Special Protocol

Establish and apply processes and procedures which recognize tribes as separate sovereigns with a special relationship with all federal bureaus and agencies.

EXAMPLE: Where a program requires the making of essential findings, ensure that tribes, like states, are invited to submit their own findings.

EXAMPLE: In public involvement programs or processes, do not categorize or treat tribes simply as "interest groups". Recognize that tribes are governmental entities with sovereign powers and a special legal relationship with all federal bureaus and agencies.

D. Take a Proactive Approach to Working with Tribal Governments

I. Communicate directly with tribes. Another term frequently used is "consult", which means to communicate formally with tribes whenever it appears that they may have an interest in the outcome of an agency's action. This should be done whether tribal interest is direct or indirect.

2. Establish permanent systems for communication between bureau management and tribal officials through appropriate channels as indicated by tribal officials. The Bureau of Indian Affairs maintains a directory of tribes which will be useful in the establishment of these systems.
3. Become knowledgeable about trust resources and Indian rights, recognizing that treaty obligations are binding on the United States, and are accorded "Supreme Law of the Land" status.
4. Assess potential impacts of Indian trust resources and rights early. Avoid actions which negatively or harmfully impact tribal treaty rights or trust resources in terms of quantity or quality because the United States may be financially liable for harm to trust resources.
5. Simplify agency processes for tribal customers. Speed up the delivery of services to the maximum degree possible because we have special fiduciary duties to tribes and their members that we do not have with respect to state or local governments.
6. Cooperate with and educate other federal agencies. The Federal Trust Relationship is shared by all federal departments and agencies.
7. Provide tribes with technical and other assistance as needed.

III. Comply with Self-determination and Self-governance Policies

Pursuant to the longstanding federal policies of Self-determination and Self-governance, federal programs have been created which provide funding and training for tribal governments to exercise their governmental powers, including the provision of services to their people. In furtherance of these policies, Interior bureaus and offices should:

- A. Familiarize employees with the policies and their related statutes, regulations and directives.
- B. Enter into Self-determination ("638") contracts/grants and Self-governance compacts when requested by tribes where possible.
- C. Provide employee training on these programs so that bureaus have the knowledge to enter into and administer Self-determination contracts/grants and Self-governance compacts.
- D. Take affirmative steps to promote Self-determination contracts/grants and Self-governance compacting and assure that tribes become aware of opportunities to participate in programs which serve their interests.
- E. Help tribes develop the technical expertise and infrastructure required to assume Self-determination and Self-governance roles. To do so, use training vehicles like Intergovernmental Personal Act placement and memoranda of agreement and/or understanding.
- F. Provide tribes opportunity to undertake technical and supporting roles in the provision of federal services when feasible.
- H. Identify opportunities for the transfer of technology to tribes. Develop an understanding about tribal programmatic and technological needs. Inform tribes about technologies available for transfer. Work together to design processes and test technologies.
- I. Provide economic assistance and training to facilitate development of tribal administrative and physical infrastructures. Meet with tribal officials to gain an understanding of their needs, then develop and implement appropriate programs.

see - Executive Memorandum Government to Government Relations