

**Testimony of the National Congress of American Indians
Before the House Natural Resources Committee
on HR 5608
"Consultation and Coordination with Indian Tribal Governments Act"**

April 9, 2008

On behalf of the National Congress of American Indians, I would like to thank Chairman Rahall and Representative Kildee for introducing this important legislation, and thank the Committee for this hearing. NCAI strongly supports the principle of this legislation, which is to require federal agencies to take seriously their responsibility to consult and coordinate with Indian tribal governments on matters that will affect the tribes. We sincerely thank you for your efforts to develop a stronger intergovernmental relationship between Indian tribes and the federal government.

Your attention to the issue of consultation is particularly important at this time. Consultation is at the cornerstone of the federal-tribal relationship and the federal policy of tribal self-determination. It is the primary mechanism through which the federal government's authority under the trust responsibility is reconciled with the tribal inherent right of self-government. In recent years, however, tribal leaders have witnessed a breakdown in effective consultation with the federal government that has undermined federal policy-making and frustrated tribal leaders. NCAI adopted Resolution # SAC 06-026 (attached) in 2006 calling for a re-evaluation of the federal consultation policy and consideration of recommendations for improving consultation.

Although the NCAI membership has not yet had an opportunity to take a formal position on HR 5608, the NCAI Executive Board, which is composed of regional representatives from across Indian Country, has considered the legislation and has several initial concerns that we encourage the Committee to resolve before moving forward with this legislation. First, we urge the Committee to expand the scope of this legislation to apply equally to all executive agencies. Second, we strongly recommend that the Committee consult widely with Indian tribes about the substance of the legislation.

NCAI has a long history of experience in facilitating policy negotiations between tribal leaders and federal agencies. We share some of the lessons we have learned from these experiences in this testimony in order to provide context for the Committee as it considers HR 5608.

"CONSULTATION AND COORDINATION"

HR 5608 refers to "consultation and coordination" with Indian tribal governments about proposed Federal actions that will impact tribal interests. Inherent in the notion of true government-to-government coordination is the idea that the tribal governments will be a partner in developing federal policies that will impact them. Consultation and coordination is not an empty procedure where the agency first talks to the tribes and then does whatever it wants. In our view, this is the most fundamental misunderstanding of the consultation policies. Consultation is the necessary precursor to federal decisions that are in the best interests of tribes and that support tribal self-government. The federal policy has substance and requires accommodation of tribal views.

In particular, the federal government has a trust responsibility to Indian tribes, to make decisions that are for the benefit of tribes. The federal government must be in communication with the tribes to be able to make beneficial decisions, and must assume that the tribes themselves are the best judge of their own interests. Secondly, tribal governments are sovereigns recognized under the U.S. Constitution. The relationship with tribes must respect the governmental status because the tribe performs important governmental functions like law enforcement that require intergovernmental coordination. Intergovernmental relationships require consultation to ensure comity and there is preference for negotiated resolutions rather than authoritarian decrees.

Consultation first became a part of federal Indian policy as tribes sought a means to resolve the problems caused by the federal policy of tribal termination in the 1950's and 1960's and federal policy shifted towards a policy of Indian self-determination. During the Termination Era, the proponents of terminating the federal-tribal relationship relied on the argument that Indian tribes would be better off if they were freed from the domination of the Bureau of Indian Affairs and released from federal oversight. Tribes were not consulted on this point, of course, and termination was a disaster for tribes both culturally and economically. In 1954, in the middle of the Congressional hearings on the termination bills, NCAI launched an offensive to stop termination. NCAI's "Declaration of Indian Rights" established the principles that tribes must first be informed of federal policies that would affect their rights, that tribes themselves were the best judge of their own interests, and that the federal government must consult with tribes and obtain their consent before implementing federal policies affecting tribal rights. These principles galvanized opposition to termination, educated Congress and the Administration, and were successful in first slowing and then stopping the efforts to terminate tribes.

As the alternative to termination, NCAI advocated instead for tribal self-determination and a review of federal policies. The 1961 "Declaration of Indian Purpose" called for the "right to choose our own way of life" and the repeal of the federal termination policy. The termination policy was repealed by Congress in 1968, and in 1970 President Nixon announced the policy of Self-Determination that created dual goals of maintaining the federal government's trust responsibility and promoting tribal self-government. Self-Determination has proven to be the most successful and stable tribal policy in U.S. history.

Congress and the Executive Branch both recognized the need for consultation with tribal leaders in the implementation of the Self-Determination policy:

Congress . . . recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of . . . Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

-- Public Law 93-368, Indian Self-Determination and Education Assistance Act, 1975

In 1994, President Clinton issued a memorandum to formalize consultation entitled *Government-to-Government Relations With Native American Tribal Governments*. Congress also addressed consultation in the mid-90's in the Unfunded Mandates Reform Act of 1995 (UMRA). The UMRA requires each agency to "develop an effective process to permit elected officers of State,

local, and tribal governments (or their designated employees with authority to act on their behalf) to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates." *UMRA, P.L. 104-4, § 204.*

President Clinton further articulated the consultation policy for the Executive branch in Executive Order (EO) 13084, *Consultation and Cooperation with Indian Tribal Governments*, in 1998. Ironically, EO 13084 and an accompanying Executive Order concerning consultation of state and local governments, were developed without consultation with either group. EO 13084 was replaced in 2001 by EO 13175. This Executive Order continues to be in effect today and was reaffirmed by President Bush in 2004.

EO 13175, which is binding on all executive branch agencies, acknowledges the federal government's trust responsibility to tribal governments and requires each federal agency to develop "an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." The EO extends beyond formal agency rule-makings and includes:

"regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."

Section 7 of the EO, "Accountability," requires the agencies to certify that the requirements of the order have been complied with whenever an agency submits final draft regulations to Office on Management and Budget (OMB). This section does not, however, create any mechanism for tribal recourse if the federal government fails to adequately consult on a matter. During the development of EO 13175, NCAI and many tribal governments recommended that an accountability mechanism be included in Section 7 of the EO. Specifically, NCAI recommended including the following language:

"If the agency fails to meet the consultation requirements, the objecting tribe shall report to OMB and OMB shall review the tribe's concerns. If the concerns are warranted, the draft final regulations shall be returned to the offending agency to follow the prescribed consultation policy with the necessary tribe(s)."

This language was not, however, included in the Executive Order.

The federal policy-making criteria set forth in Section 3 of the Executive Order provide some insight into the very active role that tribes are expected to play in the consultation process and the high level of deference that the federal government is expected to give to tribal policy decisions. Section 3 states that:

"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; and
- (3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.”

Under EO 13175, each agency was given 30 days to designate an official with the primary responsibility for implementation of the Executive Order. That official was directed to submit the agency's consultation process to OMB within 60 days of the effective date of the Executive Order. The consultation processes developed by the federal agencies vary widely and play an important part in giving meaning to the policy established in the Executive Order. The agencies with substantial activities in Indian Country, like the BIA and IHS, have much more detailed and formalized consultation policies than agencies who deal with tribal issues less frequently.

CONSULTATION IN PRACTICE

As a matter of practice, consultation has taken many different forms depending on the issue to be discussed. The scope of the consultation frequently correlates with the breadth of the proposal, and timelines may vary. Consultation can be more or less formal and may involve a core group of tribal representatives, a period of written comments, a one-time national meeting, region or area specific meetings, a series of large-scale national consultation meetings, or some combination of any of these. This flexibility allows tribes and the federal government to develop a process that is appropriately tailored for a given issue.

The federal government has held more than 30 consultation sessions in the past year alone on topics ranging from the development of a rule on government contracting to a major overhaul of the Bureau of Indian Affairs. These sessions have varied widely in their scope and effectiveness. NCAI has participated in or observed many of these consultation sessions and has informally and formally collected feedback from tribal leaders participating in many of these sessions. An analysis of this feedback reveals that while consultation sessions are happening in significant numbers, the impact of these sessions is unclear.

On some of the most important and controversial issues, tribal leaders have repeatedly raised concerns that there is no consultation, or that consultation is held after the decision is already made. At the same time, on other issues there is a sense among many tribal leaders that they are being “consulted to death,” with lots of meetings but little opportunity for meaningful input into important federal decisions. Tribal leaders have great concerns that the federal representatives attending the consultations lack decision-making authority. Lack of follow-up to a consultation session is another recurrent criticism. Tribal leaders describe many of the sessions as meetings where the same things are said over and over again and no action is taken. Or, as sessions where tribal leaders come and express their opinions, but the federal government had already made a decision and the tribal input had no impact. Moreover, tribal leaders repeatedly expressed frustration that there is no way for them to hold the federal government accountable when it fails to adequately consult or ignores their views. In light of all of these concerns, many tribal leaders have expressed that the frequent consultation sessions are becoming an unjustifiable drain on tribal resources

On the other hand, federal representatives have expressed concern that tribal leaders attending consultation sessions are not well-versed in the issues to be discussed, and that the feedback they receive at consultation sessions is not always helpful. The federal government representatives also expressed frustration that tribal leaders raise issues that are matters for Congress and outside the agency's authority. There are concerns about the timing of consultation. If it takes place before the agency develops a policy the tribes complain that they have nothing to consult on. If it takes place after development of a policy, tribes complain that they were not consulted in the first place. Concerns were also raised about the cost and time spent conducting consultation sessions.

An analysis of the consultation sessions that were deemed by tribal leaders and federal officials to be more successful reveals a number of common elements. First, in successful consultation sessions, expectations were clearly established from the outset with timeframes and goals communicated to all participants. Second, successful consultation sessions generally focused on a relatively well-defined regulatory issue that was shared with tribal leaders in advance. Third, many successful consultation sessions centered around a drafting process involving a written document that could be discussed in detail and fine-tuned with an opportunity to exchange information over several meetings. Fourth, successful consultation sessions generally involved an informal pre-consultation scoping discussion with a small group of tribal experts. Fifth, the most productive sessions were attended by federal agency staff who were well-informed, part of the decision-making chain, and willing to be frank and open about internal agency concerns, as well as attended by tribal leaders who were willing to spend time and effort to learn about the details of an issue and were accompanied by appropriate technical staff and other tribal employees with expertise on the subject matter.

THE CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS ACT

HR 5608 would largely codify EO 13175 as applied to the Department of Interior (DOI), the National Indian Gaming Commission (NIGC), and the Indian Health Service (IHS). HR 5608 differs from EO 13175 in three key ways: First, federal agencies other than NIGC, IHS, and DOI are not included in the legislation. Presumably these agencies, many of which play an important role in setting policies that impact tribal communities, would continue to be covered by the Executive Order. NCAI is concerned, however, that setting up two tiers of consultation requirements could well have unintended consequences. For example, it may be read by some to suggest that the consultation obligation at the Department of Justice, Department of Education, or Department of Homeland Security, for example, is somehow less important than that of the Department of Interior. It could also have a chilling effect on multi-agency consultation sessions, which are very important when dealing with issues that cut across agencies such as public safety, public health, or economic development. NCAI urges the Committee to consider amending HR 5608 to include all federal agencies.

Second, HR 5608 defines "accountable consultation process," a term that was left undefined in EO 13175. Specifically, the legislation would establish four minimum criteria for an "accountable consultation process," including: 1) ample opportunity for tribal input; 2) full consideration of tribal recommendations; 3) written notification of agency decisions; and 4) a 60-day period after notice is given to tribes before the agency decision takes effect.

Creating a common understanding of what constitutes an "accountable consultation process" is an important step toward improving government-to-government consultation. NCAI encourages the Committee to consider additional elements that might be part of an accountable consultation process such as: ensuring that adequate notice is given to tribal governments of all consultation sessions that includes the relatively well-defined topic to be addressed at the consultation session; requiring that consultation be conducted at the outset of any proposal, before decisions have been made at the agency level; ensuring that the maximum amount of deference possible should be given to tribal leaders to develop policies that will impact tribal communities; and providing for a written explanation when tribal suggestions or recommendations cannot be accommodated. Notice and information-sharing are a chronic problem. This Committee may also want to consider directing the Administration to develop an internet-based system to share information with tribes using web sites and e-mail list-serves.

In addition, we are concerned that the 60-day period for agency action to take effect provided for in HR 5608 could cause delays to important regulatory changes that will benefit Indian tribes. NCAI recommends that the Committee consult with Indian tribal governments about this and other elements of an "accountable consultation process" to gain the benefits of the years of experience tribes have with various consultation processes and to be sure that the criteria maintains adequate flexibility.

Third, HR 5608 would likely create a legal right that tribal governments could enforce in court. To the extent that the agency action in question constitutes an administrative action, it will be governed by the Administrative Procedures Act (APA). In such cases, tribes would have the ability to ask a federal court to review an agency's failure to comply with the standards set out in HR 5608, and to stop the proposed action until consultation takes place. Allowing tribes to have some mechanism for holding the federal government accountable when it fails to consult is an integral part of improving the government-to-government consultation process and would demonstrate that the United States is fully committed to a government-to-government relationship with Indian tribes.

CONCLUSION

Tribal leaders' experiences with consultation over the past 10 years, reveal that consultation under the existing federal policies have fallen short of what a true government-to-government relationship requires. In some instances, agencies are not complying with existing federal consultation policies and are not committed to the principles underlying EO 13175. As a result, simply ratcheting up consultation requirements in written policies is unlikely to make a difference without an increased commitment on the part of the Administration to conduct meaningful consultation, and the creation of a mechanism for tribes to hold the federal government accountable when it fails to adequately consult with tribal governments.

It goes without saying that any efforts to reform federal consultation policies and practice must be undertaken in consultation with Indian tribal governments. NCAI urges this Committee to solicit the feedback of tribal governments from across the country and to see this hearing as the first step in a collaborative process.



NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution #SAC-06-026

TITLE: Calling for the Creation of an Ad Hoc Tribal Task Force to Re-evaluate the Federal Consultation Policy

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WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, meaningful dialogue and conferral with Indian Tribes and Alaska Native tribal governments on all federal actions that relate to Indian Affairs is the cornerstone of the Government-to-Government relationship between each Tribal government and the United States, and is the primary component of the relationship that exists by virtue of federal recognition of a Tribal government; and

WHEREAS, on June 18, 2003, by Resolution #PHX-03-038 NCAI had to formally request the BIA to consult with Tribes on an effort to Reorganize the BIA Office of Indian Education Programs; and

WHEREAS, due to lack of any meaningful discussion and conferral with tribes in a consultation process, on November 21, 2003, by Resolution #ABQ-03-076 NCAI formally opposed the Reorganization of the BIA Office of Indian Education Programs and requested hearings before the Senate Committee on Indian Affairs and the House Natural Resources Committee so that Tribal Leaders could testify as to their concerns about this matter; and

WHEREAS, the Bureau of Indian Affairs' Office of Indian Education Programs, separated from the Bureau of Indian Affairs (BIA) in July of 2006 and now named the Bureau of Indian Education Programs (referred to as "BIE"), is implementing a reorganization originally conceived in 2003, but not fully described to American Indian and Alaska Native Tribal Governments prior to implementation; and

WHEREAS, in three years of meetings the BIA and the BIE did not once engage in a meaningful and systematic consultation process with the members prior to implementing this reorganization and failed to (1) provide actual notice of what was the agency intended to do in the reorganization at any meeting; (2) disclose with candor all information known to the BIA or BIE that could potentially have any impact on the members; (3) did not comply with the BIA's own consultation policy or federal regulations addressing the components of a valid consultation; and (4) is still not complying with the consultation policy or federal regulations with regard to personnel actions taken as part of the implementation; and

WHEREAS, in Resolution #ABQ-03-076 the NCAI protested the fact that the Bureau of Indian Affairs is raising standards while reducing financial and human resources presently available to Bureau operated and funded schools, while at the same time high level education positions were not subject to any funding reductions; and

WHEREAS, as a result of the failure of the BIA and BIE to engage in all of the elements of meaningful consultation with American Indian Tribes and Alaska Native Tribal Governments, the reorganization that is being implemented continues to require program cuts, fewer resources at some local agency offices while increasing the number of Deputy and Associate Deputy Director Positions in the BIA to at least 7, all of which are to be from the Senior Executive Service and therefore having a salary of up to \$160,000 per year.

NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby call for the creation of an ad hoc Tribal Task Force to re-evaluate the Federal Consultation Policy and make recommendations for improvement to the consultation process; and

BE IT FURTHER RESOLVED, the NCAI recommends that the Task Force evaluate the policy changes in the attached document and consider the following reforms:

- Distinguishing between major federal actions of national importance and other actions that may be of minor importance;
- Allowing and encouraging federal agencies to engage in early informal consultation with tribal leaders when the agency is beginning to consider an issue and before any actions have been planned; and

BE IT FURTHER RESOLVED, that the NCAI does hereby request hearings before the Senate Committee on Indian Affairs and the House Natural Resources Committee and a meeting with the White House so that Tribal Leaders may testify as to (1) why a federal statute with the minimum requirements of "consultation" should be adopted; and (2) what would be the minimum requirements of a valid "consultation;" and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2006 63rd Annual Session of the National Congress of American Indians, held at the Sacramento Convention Center in Sacramento, California on October 1-6, 2006, with a quorum present.



President

ATTEST:



Recording Secretary

Proposed minimum requirements of a valid consultation prior to taking federal action:

(a) For Federal Action at the National or Regional Level:

(1) Adequate notice so that Tribal governments have a meaningful opportunity to be heard. Adequate notice shall include, but is not limited to:

(A) a candid written statement of what a federal Department or Agency is proposing to do, including all components of a proposed action provided at least two months before any meeting with Tribal governments to address the proposed action; and

(B) all information that the federal Department or Agency has that shows a reasonable basis for the proposal and any information that the federal Department or Agency has that questions the basis for the proposal, to be provided to Tribal governments at least two months before any meeting with Tribal governments to address the proposed action;

(C) a statement of all potential effects of the proposed action on Tribal governments, their members, and tribal resources of all kinds, and present and future federal resources for federal agency undertakings to assist or fund Tribal governments or other undertakings that affect Tribal governments and tribal resources of all kinds;

(2) A Meaningful Opportunity to be Heard includes, but is not limited to:

(A) an initial meeting at the local agency office level, after giving adequate notice, where Tribal governments may state their views on the proposed action, request additional information, suggest alternatives to the proposed action, and where there shall be joint deliberation among the Tribal governments and the agency; and,

(B) a second meeting at the local agency office level after any requested additional information has been provided to Tribal governments, to allow Tribal governments to give any comments, suggestions, including alternatives and recommendations on the proposed action after reviewing the additional information: and,

(C) a third meeting at the regional office level to provide for joint deliberation and collaboration among Tribal governments from other agencies in the region and the federal department or agency, and an opportunity for Tribal governments to parties to give any comments, suggestions, including alternatives and recommendations on the proposed action as a result of that collaboration and joint deliberation; and,

(D) No change shall be made in a proposed action until completion of all regional level meeting are completed and all actions required under the following section (3) have been completed.

(E) All meetings shall be transcribed by a court reporter as part of the official record of the consultation process.

(3) Publication of Tribal Comments, Questions, Suggested Alternatives and other Recommendations

(A) The Secretary of a Department or a designated actor for the Secretary shall produce a written summary of the Tribal governments' comments, questions, suggested alternatives and other recommendations as to the proposed action, and provide answers to the questions asked; and,

(B) The Secretary of a Department shall cause the written summary to be distributed to all Tribal governments, with two months' prior notice of a nation-wide meeting; and

(C) The Secretary shall hold the nation-wide meeting to provide an opportunity for Tribal governments to participate in joint deliberation and collaboration among Tribal governments from all regions and the federal department or agency, and an opportunity for Tribal governments and other interested parties to give any comments, suggestions, including alternatives and recommendations on the proposed action as a result of that collaboration and joint deliberations; and.

(D) The nation-wide meeting shall be transcribed by a court reporter as part of the official record of the consultation process.

(4) Serious Consideration of Tribal Comments, Suggested Alternatives and other Recommendations.

(A) The Secretary shall issue notice of a proposed final action to all Tribal governments and other interested parties that participated in local, regional or nation-wide meetings. A proposed action cannot be implemented is provided to all Tribal governments and other interested parties until notice that the final action shall be implemented. There shall be a period for submission of written comments between issuance of the proposed final action and notice of implementation.

(B) The proposed final action shall incorporate, to the extent feasible, the comments, suggested alternatives and other recommendations of Tribal governments, including recommendations that the proposed action not be done.

(C) Where appropriate, based upon the suggested alternatives, comments, questions and other recommendations, the proposed final action shall provide for different forms of implementation at the local level to address specialized issues arising out of forms of Tribal government decision-making, and unique aspects of Tribal culture.

(D) Where a suggested comment, alternative or other recommendation has not been given effect in the proposed final action, the Secretary shall provide in writing to the Tribal government or other interested party making the comment, alternative or other recommendation, the reason for not incorporating the suggested comment, alternative or other recommendation into the proposed final action. Any reason for not incorporating the suggested comment, alternative or other recommendation must be substantial.

(E) Notwithstanding any other provision of this paragraph, if percent (50%) of the federally recognized American Indian and Alaska Native Tribal governments affirmatively state their opposition to the proposed action, after notice, and the end of at least a two month period to submit comments or recommendations, the action shall not be implemented and the Secretary shall state in writing.

(b) For Federal Action at the Local Agency Level:

(1) Adequate notice so that Tribal governments have a meaningful opportunity to be heard. Adequate notice shall include, but is not limited to:

(A) a candid written statement of what a federal Department or Agency is proposing to do, including all components of a proposed action provided at least two months before any meeting with Tribal governments to address the proposed action; and

(B) all information that the federal Department or Agency has that shows a reasonable basis for the proposal and any information that the federal Department or Agency has that questions the basis for the proposal, to be provided to Tribal governments at least two months before any meeting with Tribal governments to address the proposed action;

(C) a statement of all potential effects of the proposed action on Tribal governments, their members, and tribal resources of all kinds, and present and future federal resources for federal agency undertakings to assist or fund Tribal governments or other undertakings that affect Tribal governments and tribal resources of all kinds;

(2) A Meaningful Opportunity to be Heard includes, but is not limited to:

(A) an initial meeting at the local agency office level, after giving adequate notice, where Tribal governments and other interested parties may state their views on the proposed action, request additional information, suggest alternatives to the proposed action, and where there shall be joint deliberation among the Tribal governments, other interested parties and the agency; and,

(B) Where there was any Tribal Questions, Suggested Alternative or other Recommendation stated at the first meeting, a second meeting shall be held at the local agency office level after any requested additional information has been provided to Tribal governments and other interested parties, to allow Tribal governments and other interested parties to state their views and engage in joint deliberations on the proposed action after reviewing the additional information and hearing the comments of the Tribal governments and other interested parties; and,

(C) No change shall be made in a proposed action until all meetings are completed and all actions required under the following section (3) have been completed.

(D) All meetings shall be transcribed by a court reporter as part of the official record of the consultation process.

(3) Publication of Tribal Comments, Questions, Suggested Alternatives and other Recommendations

(A) The Director of the Local Agency or a designated actor for the Director shall produce a written summary of the comments, questions, suggested alternatives and other recommendations as to the proposed action, and provide answers to the questions; and,

(B) The Director of the Local Agency shall cause the written summary to be distributed to all Tribal governments served by Local Agency, with one month's prior notice of a meeting to consider a proposed final action.

(4) Serious Consideration of Tribal Comments, Suggested Alternatives and other Recommendations.

(A) The Director of the Local Agency shall issue notice of a proposed final action to all Tribal governments and other interested parties that participated in meetings or submitted comments to the Local Agency. A proposed action cannot be implemented until all Tribal governments served by the Local Agency and other interested parties are given notice that the final action shall be implemented. There shall be a period for submission of written comments between issuance of the proposed final action and notice of implementation.

(B) The proposed final action shall incorporate, to the extent feasible, the comments, suggested alternatives and other recommendations of Tribal governments, including recommendations that the proposed action not be done.

(C) Where a suggested comment, alternative or other recommendation has not been given effect in the proposed final action, the Director of the Local Agency shall provide in writing to the Tribal government or other interested party making the comment, alternative or other recommendation, the reason for not incorporating the suggested comment, alternative or other recommendation into the proposed final action. Any reason for not incorporating the suggested comment, alternative or other recommendation must be substantial.

(D) Notwithstanding any other provision of this paragraph, if percent (50%) of the federally recognized American Indian and Alaska Native Tribal governments served by the Local Agency affirmatively state their opposition to the proposed action, after notice, and the end of at least a one month period to submit comments or recommendations, the action shall not be implemented and the Director of the Local Agency Secretary shall state in writing that the proposed action is not being implemented and the reason why the proposed action is not being implemented

(c) Nothing in this section is intended to apply to the personnel matters of any Department or Agency that has existing statutes, regulations and policies concerning consultation with Tribal governments on personnel matters.