EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

January 11, 2001

M-01-07

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, AND INDEPENDENT REGULATORY AGENCIES

FROM: Jacob J. Lew
Director

SUBJECT: Guidance for Implementing E.O. 13175, "Consultation and Coordination with Indian Tribal Governments"

President Clinton issued Executive Order No. 13175, "Consultation and Coordination with Indian Tribal Governments," on November 6, 2000 (65 Fed. Reg. 67249 (November 9, 2000)). The Order takes effect on January 6, 2001. As the preamble indicates, the Order seeks "to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes." After emphasizing key principles and policymaking criteria, the order designates specific procedures for consultation with Indian tribal governments and calls for more flexible issuance of government waivers.

Within OMB, the Office of Information and Regulatory Affairs (OIRA) will have primary responsibility for implementing this order. Under Executive Order 12866, it already coordinates our regulatory review and planning functions. To assist you in complying with the Order, the Deputy Director for Management, Sally Katzen, has prepared the attached guidance for you. The guidance describes what agencies should do to comply with E.O. 13175 and how they should document that compliance to OMB consistent with E.O. 12866 procedures. Please circulate this memorandum (attached) to the appropriate officials within your agency for immediate attention.

It is important that each agency designate a tribal consultation official with principal responsibility for the agency's implementation of E.O. 13175. Please notify OIRA of your designation of this tribal consultation official as soon as possible.

Attachment

EXECUTIVE OFFICE OF THE PRESIDENT
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DEPUTY DIRECTOR
FOR MANAGEMENT

January 11, 2001

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, AND INDEPENDENT REGULATORY AGENCIES

FROM: Sally Katzen
Deputy Director for Management

SUBJECT: Guidance for Implementing E.O. 13175

President Clinton issued Executive Order No. 13175, "Consultation and Coordination with Indian Tribal Governments," on November 6, 2000 (65 Fed. Reg. 67249 (November 9, 2000), the "Order"). The Order emphasizes consultation with Indian tribal governments and respect for tribal sovereignty as agencies develop policy on issues that impact Indian communities. It establishes specific requirements that the Federal government must follow as it develops and carries out policy actions that affect Indian tribes. As the President stated, "[t]oday, I reaffirm our commitment to tribal sovereignty, self-determination, and self-government by issuing this revised Executive Order ... . This Executive Order builds on prior actions and strengthens our government-to-government relationship with Indian tribes."

The Order sets forth "Fundamental Principles" (Sec. 2), "Policymaking Criteria" (Sec. 3), "Special Requirements for Legislative Proposals" (Sec. 4), and specific procedures for consultation with Indian tribal governments and increased flexibility for Indian tribal waivers (Secs. 5 & 6). Please read the full text (see Appendix A).

This guidance is directed to the procedural requirements -- what agencies should do to comply with the Order, and how they should document that compliance to OMB.

1. When does the Order take effect?

E.O. 13175 becomes effective on January 5, 2001 (Sec. 9(d)).

2. What agencies does it cover?

E.O. 13175 binds all Federal agencies, except for the independent regulatory agencies (Sec. 1(c)). It encourages independent regulatory agencies to comply voluntarily with its provisions (Sec. 8). The Order adopts the definitions of "agency" and "independent regulatory agency" used by the Paperwork Reduction Act of 1995.

3. What is the role of an agency tribal consultation official and which agencies must have them?

The tribal consultation official has principal responsibility for the agency's implementation of the Order (Sec. 5(a)). Each tribal consultation official must:

- assure that agency program personnel have considered the fundamental principles and policymaking criteria stated in Sections 2 and 3 in formulating or implementing policies, and in the development of legislative proposals, that have tribal implications; and

- facilitate a meaningful and timely form of consultation concerning the development, administration, and enforcement of regulations that have tribal implications; and

- provide certifications of compliance to OMB.

Each agency and department must have a tribal consultation official (Section 5(a)). The tribal consultation official may designate staff to assist in the performance of these duties.

We note that the provisions relating to consultation with Indian tribal governments and the more flexible issuance of government waivers set forth in E.O. 13175 build upon those already established in E.O. 13084, "Consultation and Coordination with Indian Tribal Governments" (63 Fed. Reg. 27655 (May 19, 1998)). . We also note that the specific procedures for consultation with Indian tribal governments set forth in E.O. 13175 are closely similar to those set forth in E.O. 13132, "Federalism." Depending on how an agency has already decided to implement E.O. 13084 and E.O. 13132, an agency has the option of having the tribal consultation official designated under E.O. 13175 be the same official as the federalism official already designated under E.O. 13132.

4. When does an agency need to designate its tribal consultation official?

We encourage each agency to do so as soon as possible. The head of each agency must make this designation no later than February 4, 2001 (Sec. 5(a)). We request that you notify Ms. Tammy Croote in the Office of Information and Regulatory Affairs (OIRA) (202-395-3258 and Tcroote@omb.eop.gov) of this designation.

5. To what activities does the Order apply?

Section 2 sets forth "Fundamental Principles" to guide agencies in formulating and implementing policies that have tribal implications. Section 3 sets forth "Policymaking Criteria" to which agencies must adhere "to the extent permitted by law." These fundamental principles and policymaking criteria apply to an agency's "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" (Sec. 1(a)). The term "Indian tribe" means "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 ... ." (Sec. 1(b)).

6. What are the Order's policymaking criteria?

Under Section 3, "Policymaking Criteria," and in addition to adhering to the fundamental principles set forth in Section 2, agencies must adhere, to the extent permitted by law, to specified criteria when formulating and implementing policies that have tribal implications. Agencies must:

- respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments;

- with respect to Federal statutes and regulations administered by Indian tribal governments, grant Indian tribal governments the maximum administrative discretion possible;

- when undertaking to formulate and implement policies that have tribal implications,

  (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.

The Order establishes a process to ensure that agencies adhere to these policymaking criteria. For any draft final regulation that has tribal implications that is submitted to OIRA for review under E.O. 12866, the tribal consultation official must certify that the requirements of E.O. 13175 concerning both the evaluation of these policymaking criteria and consultation have been met in a meaningful and timely manner (Sec. 7(a)).

OIRA will require such certifications beginning on January 5, 2001, for all draft final rules that have tribal implications and that are submitted for OIRA review. (See Appendix B for a recommended certification format.) We understand that some final rules submitted for review on or after January 5, 2001, may have been preceded by Notices of Proposed Rulemaking

(NPRMs), published prior to November 6, 2000 (the date E.O. 13175 was signed). To the extent that a tribal consultation process has not occurred (as called for by E.O. 13175), the certification should so state. Agencies must publish a copy or summary of this certification in the preamble to each final rule.

7. What does the Order require concerning agency development of proposed legislation?

Agencies must not submit to the Congress legislation that would be inconsistent with the policymaking criteria stated in Section 3.

The Order establishes a process to ensure that agencies consider the "Special Requirements for Legislative Proposals" stated in Section 4. In transmitting for OMB clearance proposed legislation that has tribal implications, the tribal consultation official must certify that the "Special Requirements for Legislative Proposals" set forth in Section 4 have been met (Sec. 7(b)). Beginning on January 5, 2001, OMB's Legislative Reference Division will require such a certification for all proposed legislation with tribal implications that is submitted for OMB review. (See Appendix C for a recommended certification format.)

8. What does the Order require concerning agency development of regulations?

Agencies must have "an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications" (Sec. 5(a)). The consultation process must involve "tribal officials" (Sec. 5(a)), which the Order defines to to mean "elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations" (Sec. 1(d)).

We encourage each agency to submit to OMB "a description of the agency's consultation process" as soon as possible. You must make this submission no later than March 7, 2001 (Sec. 5(a)). We request that you send these descriptions to Tammy Croote in OIRA (202-395-3258 and TCroote@omb.eop.gov).

Each description should indicate how the agency identifies those policies that have tribal implications and the procedures the agency will use to ensure meaningful and timely input by tribal officials. This consultation process expands on the consultation procedures in Section 3 of E.O. 13084 (63 Fed. Reg. 27655 (May 19, 1998)). (E.O. 13175 revokes E.O. 13084.)

The Order establishes specific procedures for consultation with tribal officials in two circumstances – if a rule imposes unfunded mandates on tribes or if a rule preempts tribal law.

- Subsection 5(b) establishes specific procedures for unfunded mandates. Subsection 5(b) defines a mandate as "any regulation that has tribal implications, that imposes substantial

direct compliance costs on Indian tribal governments, and that is not required by statute." Subsection 5(b)(1) permits an agency not to follow the specific procedures if the Federal government funds the direct costs of complying with the mandate.

- Subsection 5(c) establishes the specific procedures for "any regulation that has tribal implications and that preempts tribal law."

The specific procedures are identical for regulations that impose unfunded mandates or preempt tribal law. Agencies must adhere to these specific procedures "to the extent practicable and permitted by law" (Secs. 5(b) and 5(c)).

- Each agency must consult, to the extent practicable and permitted by law, with tribal officials "early in the process of developing the proposed regulation" (Secs. 5(b)(2)(A) & 5(c)(1)). These consultations should seek comment on compliance costs or preemption as appropriate to the nature of the rulemaking under development. The timing, nature, detail, and extent of the consultation involved should also be appropriate to the nature of the regulation involved.

- When an agency submits a draft final regulation to OMB for review under E.O. 12866 prior to promulgation of the final regulation, the agency must include in "a separately identified portion of the preamble to the regulation" a "tribal summary impact statement" (Secs. 5(b)(2)(B) & 5(c)(2)).

- The "tribal summary impact statement" must include –

  – "a description of the extent of the agency's prior consultation with tribal officials;"

  – "a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation; and"

  – "a statement of the extent to which the concerns of tribal officials have been met" (Secs. 5(b)(2)(B) & 5(c)(2)).

- To the extent that an agency has carried out consultation with tribal officials prior to the publication of the Notice of Proposed Rulemaking (NPRM), the agency should help tribal officials, and the public as a whole, by including a "tribal summary impact statement" in its preamble to the NPRM.

- When submitting a draft final regulation to OMB for review, each agency must provide a copy of any formal policy-related correspondence from tribal officials, and must, on request, make available a copy of any other written communications submitted to the

agency by tribal officials (Secs. 5(b)(2)(C) & 5(c)(3)).

9. Will these consultations be subject to the Federal Advisory Committee Act?

No. The exemption to the Federal Advisory Committee Act provided in Section 204(b) of title II of P.L. 104-4, the "Unfunded Mandates Reform Act of 1995," remains in effect. As OMB stated in its guidelines for implementing Section 204(b):

> "In accordance with the legislative intent, the exemption should be read broadly to facilitate intergovernmental communications on responsibilities or administration."
>
> "This exemption applies to meetings between Federal officials and employees and State, local, or tribal governments, acting through their elected officers, officials, employees, and Washington representatives, at which "views, information, or advice" are exchanged concerning the implementation of intergovernmental responsibilities or administration, including those that arise explicitly or implicitly under statute, regulation, or Executive order. The scope of meetings covered by the exemption should be construed broadly to include any meetings called for any purpose relating to intergovernmental responsibilities or administration. Such meetings include, but are not limited to, meetings called for the purpose of seeking consensus; exchanging views, information, advice, and/or recommendations; or facilitating any other interaction relating to intergovernmental responsibilities or administration." (OMB Memorandum 95-20 (September 21, 1995), pp. 6-7, 60 Fed. Reg. 50651, 50653 (September 29, 1995); see Delegation of Authority To Issue Guidelines and Instructions to Federal Agencies on Consulting With State, Local, and Tribal Governments, President Clinton's Memorandum to the Director of the Office of Management and Budget (August 25, 1995), 60 Fed. Reg. 45039 (August 29, 1995)).

10. What does the Order provide concerning flexibility for Indian tribal waivers?

The waiver provisions in Section 6 are substantially identical to those stated in Section 4 of E.O. 13084. The Order directs agencies to "review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes" (Sec. 6(a)). It also sets forth the circumstances under which agencies must consider an application by an Indian tribe for a waiver of statutory or regulatory requirements. It encourages flexibility in granting waivers, but does not change applicable Federal waiver review criteria, including the principle of budget neutrality. It also sets a target completion date of 120 days after the filing of a complete waiver application for an agency decision. These provisions apply "only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency" (Sec. 6(d)).

11. When will OMB report on agency implementation of this order to Indian tribal officials?

No later than July 4, 2001, the OMB Director and the Assistant to the President for Intergovernmental Affairs will plan to confer with tribal officials to ensure that this Order is being properly and effectively implemented (Sec. 7(c)).

Under the Unfunded Mandates Reform Act (UMRA), Section 208, OMB must publish an annual report on agency compliance with the requirements Title II, including agency compliance with Section 204, "State, Local, and Tribal Government Input." Our request next year for a description of your UMRA Section 204 consultations will include a request for a summary of your progress in implementing the requirements of this Executive Order as well.

12. With whom should we consult when we have questions concerning E.O. 13175?

If your staff have questions concerning this Order, please contact Tammy Croote in OIRA (202-395-3258 and TCroote@omb.eop.gov).

APPENDIX A:

EXECUTIVE ORDER 13175

CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) "Policies that have tribal implications" refers to 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.

(b) "Indian tribe" means 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.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) 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.

(b) 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.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) 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.

Sec. 4. Special Requirements for Legislative Proposals. Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. Consultation. (a) 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. 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.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their

concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. Increasing Flexibility for Indian Tribal Waivers.

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. Accountability.

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. Independent Agencies. Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. General Provisions. (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

Sec. 10. Judicial Review. This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

/s/ WILLIAM J. CLINTON

THE WHITE HOUSE,
November 6, 2000.

APPENDIX B:

RECOMMENDED FORMAT FOR SECTION 7(a) CERTIFICATION

I certify that_____[agency]_____complied with the requirements of E.O. 13175 for the attached draft final regulation,_____[title, RIN #]_____.

_____[date]_____

_____[name]_____
[title]

APPENDIX C:

RECOMMENDED FORMAT FOR SECTION 7(b) CERTIFICATION

I certify that_____[agency]_____complied with the requirements of E.O. 13175 for the attached draft proposed legislation,_____[title]_____.

_____[date]_____ _____[name]_____
[title]