

# STATE-TRIBAL CONSULTATION IN MONTANA

STATE-TRIBAL RELATIONS COMMITTEE  
CASEY PALLISTER - APRIL 2024

## BACKGROUND

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At an October 2023 meeting, members of the State-Tribal Relations Committee requested information regarding consultation between Montana's state agencies and tribal governments. The primary questions were:

- What standards or guidelines are in place regarding tribal consultation at the federal level?
- Are Montana state agencies required to create tribal consultation policies?
- What standards or guidelines do Montana state agencies have to follow or choose to follow in relation to tribal consultation?
- What do agency policies look like? Are they universal? Are they specific to each agency? Do some agencies not have policies?
- How have other states addressed the issue of state-tribal consultation?

## WHAT GUIDANCE DOES THE FEDERAL GOVERNMENT PROVIDE?

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**Summary:** *Presidential orders since 2000 direct federal agencies to create detailed and uniform tribal consultation policies, designate personnel to carry out consultation practices, record and report on consultations, and develop staff trainings.*

Though states are allowed to create their own consultation policies, presidential executive orders and memorandums provide a model for consultation between federal agencies and tribal governments.<sup>1</sup> Over the past twenty-four years, presidential directives across administrations emphasize the importance of Indian self-government, sovereignty, and the need for the United States to work with tribes on a government-to-government basis.

For more than two decades, presidents from both parties continually emphasize the importance of Indian self-government, tribal sovereignty, and the need for the United States to work with tribes on a government-to-government basis.

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<sup>1</sup> Presidential executive orders and memorandums are declarations by the President that carry the force of law. They do not require the actions of Congress or a state legislature to take effect, though they are subject to judicial review.

## LAYING A FOUNDATION: EXECUTIVE ORDER 13175

Issued in 2000, [Executive Order 13175 \(Consultation and Coordination with Indian Tribal Governments\)](#) requires federal departments and agencies to "establish regular and meaningful consultation and collaboration with tribal officials" when considering policies that impact tribal communities.

The order required the head of each federal agency to:

- Create a consultation process; and
- Submit "tribal summary impact statements" that outlined consultation efforts, summarized tribal concerns and agency positions, and described the extent to which tribal concerns had been met.

## BUILDING A FRAMEWORK

In order to work toward more "complete and consistent implementation of Executive Order 13175," the [Presidential Memorandum of November 5, 2009 \(Tribal Consultation\)](#) required each agency to create and update a plan of action to carry out the requirements of Executive Order 13175. The plan had to be created in consultation with "Indian tribes and tribal officials." Each agency appointed an individual to implement the plan and prepare progress reports as well as any updates made to the plan.

A presidential memorandum in 2021 ([Tribal Consultation and Strengthening Nation-to-Nation Relationships](#)) reaffirmed the 2009 memorandum. All agencies subject to Executive Order 13175 submitted plans of action, including "over fifty agencies" that had not previously submitted a consultation plan.

In 2022, the President issued another memorandum ([Uniform Standards for Tribal Consultation](#)) to establish uniform minimum standards for all federal agencies involved with tribal consultations. The goal was to "improve and streamline the consultation process" and to "ensure more consistency" in the ways agencies carried out consultations.

The 2022 memorandum is still in effect and requires the head of each agency to:

- Designate at least one "primary point of contact for Tribal-consultation matters" who will advise agency staff and serve as the contact for tribal officials;
- Carry out analysis of whether tribal consultation is "required or appropriate," even if a tribal government has not requested consultation;
- Follow specific guidelines when inviting a tribe or tribes to consult;
- Prioritize tribal participation and carry out consultations with respect to tribal self-government, sovereignty, and cultural practices;
- Maintain a record of the consultation process that follows specific requirements; and
- Hold an annual training regarding tribal consultation for agency employees who work with tribal nations or on policies with tribal implications.

In addition, the 2022 memorandum charged the Secretary of Interior and Director of the Office of Personnel Management to work together with tribal nations to create training modules for agency employees. The modules

are required to explain the concepts of tribal sovereignty, the nation-to-nation relationship, and tribal consultation. These modules are in development and expected to be ready by mid-2024.<sup>2</sup>

\*\*\*In some cases, states are required to create consultation policies by federal agencies in order to receive federal funds. For example, to impose certain fees on Medicaid participants, the Centers for Medicare & Medicaid Services (CMS) [requires states to consult with tribes](#).\*\*\*

## WHAT ARE MONTANA'S STATE-TRIBAL CONSULTATION REQUIREMENTS?

**Summary:** *In Montana, two statutes related to tribal consultation provide guiding principles for state agencies to consider and require the governor to provide an annual training for state employees, hold an annual meeting between state agency and tribal representatives, and produce an annual report describing state agency-tribal activities. State agencies must submit an annual report to the governor that describes consultation efforts.*

### GUIDING PRINCIPLES FOR STATE AGENCIES

In 2003, [House Bill 608](#), now codified as [2-15-142, MCA](#), established guiding principles for state agencies that interacted with tribes: agencies "should consider" five principles in relation to the formulation or implementation of policies or rules that had direct tribal implications. A [2013 amendment](#) replaced "should consider" with "shall document its consideration of." The current statute states:

***A state agency shall document its consideration of the following principles:***

1. *A commitment to cooperation and collaboration*
2. *Mutual understanding and respect*
3. *Regular and early communication*
4. *A process of accountability for addressing issues*
5. *Preservation of the tribal-state relationship*

Montana's state agencies must annually report their efforts to ensure tribal consultation to the governor, but they are not required to create tribal consultation policies.

<sup>2</sup> A preview of a portion of a training module is located at: <https://www.youtube.com/watch?v=UVhWwL1jo-k>

## THREE ANNUAL REQUIREMENTS OF STATE AGENCIES AND THE GOVERNOR

House Bill 608 also established [2-15-143, MCA](#), which requires the governor to work with tribal governments to provide an annual training for certain state employees who interact with tribes. The governor is also required to hold an annual meeting between state agency and tribal government representatives and to produce a yearly report for tribal governments describing state agency-tribal activities. State agencies must provide the governor with a report on agency-tribal activities for that year.

### **1. Annual Training**

Created with tribal governments for "state agency managers and key employees who have regular communication with tribes." The training must include:

- The legal status of tribes;
- The legal rights of tribal members; and
- Social, economic, and cultural issues of concern to tribes

### **2. Annual Meeting**

Held in Helena between representatives of state agencies and tribal officials, including tribal presiding officers, to discuss:

- Tribal concerns with rules and policies that directly impact tribal government and tribal populations;
- Other issues of concern to either the state or the tribes; and
- Potential solutions to the concerns

### **3. Annual Reporting**

By August 15 of each year, state agencies must submit a report to the governor "describing the activities of the state agency relating to tribal government and tribal populations." The report must include four components:

- Any rule or policy changes that the state agency adopted as a result of discussions between that agency and tribal officials at the annual governor's meeting;
- The process the state agency has adopted to identify the activities of the state agency that affect tribes;
- The efforts of the state agency to promote communication and the government-to-government relationship between the state agency and the tribes;
- The efforts of the state agency to ensure tribal consultation and the use of American Indian data in the development and implementation of agency programs that directly affect tribes.

By September 15 of each year, the governor must provide a report to each tribal government that provides an overview of all state and tribal activities for the previous fiscal year, including any training. The report is published by the Governor's [Office of Indian Affairs and posted online](#).

State agency reports are used to create the final report issued by the Office of Indian Affairs.

## WHAT TRIBAL CONSULTATION POLICIES ARE IN PLACE AMONG MONTANA'S STATE AGENCIES?

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**Summary:** *State agencies in Montana are not required to create tribal-consultation policies. Some agencies have tribal consultation policies in writing and some do not. Not all agencies that interact with tribes have personnel dedicated to overseeing agency-tribal relations.*

Though state agencies are required by law to annually document how they follow the guiding principles of cooperation and collaboration with tribes, as well as to report to the governor the ways they ensure tribal consultation, there is no requirement that state agencies create tribal consultation policies. As a result, approaches are diverse. A survey of several state agencies that interact regularly with tribal governments in Montana revealed that:

- There is no universal tribal consultation policy or template that all state agencies follow or use;
- Some agencies have written consultation policies and some do not;
- Not all agencies employ a dedicated tribal liaison

## WHAT TRIBAL CONSULTATION POLICIES ARE IN PLACE IN OTHER STATES?

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**Summary:** *Some states created tribal consultation policies through executive orders, while some created them through legislative action. Many state policies have similar requirements: 1) requiring agencies to have tribal liaisons; 2) directing agencies to develop internal consultation policies; and 3) providing training opportunities for employees.*

Most states with significant Indian populations require agencies to employ tribal liaisons, create consultation policies, and develop trainings for their staff.

Research does not indicate that states neighboring Montana (Idaho, Wyoming, North Dakota, and South Dakota) have tribal consultation requirements across state agencies. Many states with significant tribal populations have consultation requirements for agencies, created by the executive orders of governors and legislative actions. Four examples are below.

**Arizona:** [Executive Order 2006-14](#) (2006) requires all executive branch agencies in Arizona to develop and implement consultation policies, designate staff to implement the policy, review the policy annually, and submit a yearly report to the governor. [The Department of Economic Security policy](#) includes designating points of contact (Tribal Relations Manager and division tribal liaisons), minimum annual consultation requirements, noticing and communication requirements, and reporting procedures.

**California:** [Executive Order B-10-11](#) (2011) established the position of Governor's Tribal Advisor and requires each state agency to create a tribal liaison position and tribal consultation policy. An example of a policy developed by the [Department of Consumer Affairs](#) details the role of the department and tribal liaison in the collaboration and communication process, education for employees and tribes, timely noticing and responses, and requirements for a tribal relations webpage on the department website.

**Washington:** [Washington state](#) law requires each state agency to develop a consultation process, employ a tribal liaison, and provide employee training. It also requires an annual meeting between the governor and other elected officials and leaders of Indian tribes. Certain agencies involved with environmental matters must consult tribes on specifically defined matters set in statute.

**Wisconsin:** [Executive Order 39](#) (2004) established the [State-Tribal Consultation Initiative](#). Multiple agencies developed policies following a uniform template. Each department's policy is [essentially the same](#), providing guiding principles and methods that include establishing agency tribal liaisons, meeting structures, workplan requirements prior to consultation meetings, and training opportunities.