



# United States Department of the Interior

BUREAU OF OCEAN ENERGY MANAGEMENT  
WASHINGTON, DC 20240-0001

**JUN 29 2018**

Memorandum

To: Chief, Office of Strategic Resources  
Chief, Office of Policy, Regulation and Analysis  
Program Manager, Office of Renewable Energy Programs  
Regional Director, Alaska  
Regional Director, Gulf of Mexico  
Regional Director, Pacific

Through: Walter D. Cruickshank *Walter D. Cruickshank*  
Acting Director

From: William Brown *W. Brown* 29 June 2018  
Chief Environmental Officer

Subject: BOEM Tribal Consultation Guidance

Effective immediately, the attachment to this memorandum replaces the BOEM tribal consultation guidance issued through a memorandum from me dated May 5, 2014.

This new tribal consultation guidance (Guidance) has been developed with the expectation that BOEM will invite tribes and ANSCA Corporations to consult on it, and that the Guidance will be codified in the BOEM manual. We still have those expectations. The new Guidance establishes a procedure for BOEM to use in organizing its internal review and decision-making process on consultation. We believe that the new Guidance is an improvement over the May 5, 2014, memorandum and is a better basis for considering any additional improvements that may arise through consultation. Hence, we are issuing the Guidance now in this form, with a view to incorporating it in the BOEM manual at a future date with appropriate revisions after any consultation.

Attachment

**BUREAU OF OCEAN ENERGY MANAGEMENT**  
**TRIBAL CONSULTATION GUIDANCE**  
**29 June 2018**

**1. Purpose.**

This document provides guidance for Bureau of Ocean Energy Management (“BOEM”) consultation with Tribes and Alaska Native Claims Settlement Act of 1971 corporations (“ANCSA Corporations”) concerning BOEM’s actions (“Guidance”).

**2. Scope.**

Tribal and ANCSA Corporation consultations may be required for actions with tribal implications as defined below in section 5.

**3. Objective.**

This Guidance establishes BOEM procedures for consultation with Tribes and ANCSA Corporations. The Guidance supplements the authorities listed below in section 4 (collectively “Consultation Authorities”), which primarily guide BOEM consultation with Tribes and ANCSA Corporations. BOEM recognizes the unique legal relationship of the United States with tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions.

**4. Consultation Authorities.**

- A. Outer Continental Shelf Lands Act (“OCSLA”), as amended, (43 U.S.C. §§ 1331 *et seq.*).
- B. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. II. § 161, 118 Stat. 3, 452 (2004) as amended by Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, Div. H., Title V. § 518, 118 Stat. 2809, 3267 (2004).
- C. Executive Order 13175 of November 6, 2000. *Consultation and Coordination with Indian Tribal Governments*. 65 Fed. Reg. 67249 (November 9, 2000).
- D. Department of the Interior Policy on Consultation with Indian Tribes (December 1, 2011).
- E. Department of the Interior Policy on Consultation with Alaska Native Claims Settlement Act (ANCSA) Corporations (August 10, 2012).
- F. 512 DM 4, Departmental Manual, Department of the Interior, effective November 9, 2015.
- G. 512 DM 5, Departmental Manual, Department of the Interior, effective November 9, 2015.
- H. Secretarial Order 3342, Identifying Opportunities for Cooperative and Collaborative Partnerships with Federally Recognized Indian Tribes in the Management of Federal Lands and Resources (October 16, 2016).

## 5. Definitions.

Terms used in this Guidance are defined as follows:

- A. Tribe. Any American 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.
- B. ANCSA Corporation. Any Alaska Native village corporation, urban corporation, or regional corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act, 43 U.S.C §§ 1601 *et seq.*
- C. Actions with tribal implications or ANCSA Corporation implications has the same meaning as in the Department of the Interior Policy on Consultation with Indian Tribes or the Department of the Interior Policy on Consultation with ANCSA Corporations, respectively. These policies define these terms, in part, as: “Any Departmental regulation, rulemaking, policy, guidance, legislative proposal, grant funding formula changes, or operational activity that may have substantial direct effects on an [Indian Tribe or ANCSA corporation].” BOEM actions that may fall within one or both of these categories include, but are not limited to, a rulemaking, a notice to lessees (NTL), a lease sale; or approval of an oil and gas exploration or development plan, a renewable energy plan, a permit for a seismic airgun survey, a right-of-way, a right-of-use and easement, or a non-energy mineral lease or agreement. BOEM cannot delegate its responsibility for determining tribal implications to a Tribe, ANCSA Corporation, or other agency. However, BOEM will give close and respectful consideration to any opinions a Tribe or ANCSA corporation expresses about whether an action has tribal implications and the reasons given in support.
- D. Program Manager means the BOEM Chief, Office of Strategic Resources (“OSR”); Chief Environmental Officer (“CEO”), who is also Chief, Office of Environmental Programs (“OEP”); or the Chief, Office of Renewable Energy Programs (“OREP”).
- E. Regional Director means the BOEM Regional Director, Gulf of Mexico Region; Regional Director, Alaska Region; or the Regional Director, Pacific Region.
- F. Tribal Liaison Officer (“TLO”) means the CEO unless another individual is designated by the BOEM Director to carry out the responsibilities described in this Guidance for that position.
- G. Regional Tribal Liaison Officer (“RTLO”) means an individual designated by a BOEM Regional Director to carry out the responsibilities described in this Guidance on behalf of a BOEM regional office.

- H. Program Tribal Liaison Officer (“PTLO”) means an individual designated by a BOEM Program Manager to carry out the responsibilities described in this Guidance on behalf of a BOEM program office.
- I. Tribal Working Group (“TWG”) means collectively the RTLOs, PTLOs, and any other BOEM staff designated to assist with tribal matters.

**6. Policy.**

- A. BOEM will consult with Tribes or ANCSA Corporations in accordance with the Consultation Authorities if a BOEM action has tribal implications. DOI guiding principles for consultation are provided in Department of the Interior Policy on Consultation with Indian Tribes (section 4.D. above) and Department of the Interior Policy on Consultation with ANCSA Corporations (section 4.E. above) and quoted below:

- 1. Tribes. “This Policy broadly defines provisions for enhancing the Department’s consultation processes with Indian Tribes [defined in the policy to include Alaska Native tribes]. This Policy shall complement, not supersede, any existing laws, rules, statutes, or regulations that guide consultation processes with Indian Tribes.

This Policy requires a government-to-government consultation between appropriate Tribal Officials and Departmental officials. The appropriate Departmental officials are those individuals who are knowledgeable about the matters at hand, are authorized to speak for the Department, and exercise delegated authority in the disposition and implementation of an agency action. Departmental officials will identify appropriate Tribal consulting parties early in the planning process and provide Indian Tribes a meaningful opportunity to participate in the consultation process as described in Section VII of this Policy. Departmental officials will participate in the consultation process in a manner that demonstrates a meaningful commitment and ensures continuity in the process. The Policy thus honors the government-to-government relationship between the United States and Indian Tribes, and complies with the Presidential Memorandum of November 5, 2009, which affirms this relationship and obligates the Department to meet the spirit and intent of EO 13175.

Consultation is a deliberative process that aims to create effective collaboration and informed Federal decision-making. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility. Communication will be open and transparent without compromising the rights of Indian Tribes or the government-to-government consultation process. Federal consultation conducted in a meaningful and good-faith manner further facilitates effective Department operations and governance practices. To that end, Bureaus and Offices will seek and promote cooperation, participation, and efficiencies between agencies with

overlapping jurisdiction, special expertise, or related responsibilities regarding a Departmental Action with Tribal Implications. Efficiencies derived from the inclusion of Indian Tribes in the Department's decision-making processes through Tribal consultation will help ensure that future Federal action is achievable, comprehensive, long-lasting, and reflective of Tribal input." Department of the Interior Policy on Consultation with Indian Tribes (December 1, 2011).

2. ANCSA Corporations. "This Policy broadly defines provisions for improving the Department's consultation processes with ANCSA Corporations and shall complement, not supersede any existing laws, rules, statutes, or regulations that guide consultation with Indian Tribes [defined in the policy to include Alaska Native tribes]. The Department recognizes and respects the distinct, unique, and individual cultural traditions and values of Alaska Native peoples and the statutory relationship between ANCSA Corporations and the Federal Government. To the extent that concerns expressed by Indian Tribes and ANCSA Corporations substantively differ, Departmental officials shall give due consideration to the right of sovereignty and self-governance of federally recognized Tribes.

Consultation between the Department and ANCSA Corporations will involve appropriate Departmental officials and appropriate ANCSA Corporation officials on Departmental Actions with ANCSA Corporation implications. The appropriate officials are those individuals who are knowledgeable about the matters at hand, are authorized to speak for the Department, and exercise delegated authority in the disposition and implementation of an agency action. Departmental officials will identify consulting parties early in the planning process and provide a meaningful opportunity for ANCSA Corporations to participate in the consultation policy as described in Section VII of this Policy. Department officials will endeavor to fully participate in the consultation process, ensure continuity, and demonstrate commitment to the process.

Consultation is a deliberative process that aims to create effective collaboration and informed Federal decision-making. This Policy creates an opportunity for input from all affected ANCSA Corporations. Federal consultation conducted in a meaningful and good-faith manner further facilitates effective Department operations and governance practices. To that end, Bureaus and Offices will seek and promote cooperation, participation, and efficiencies between agencies with overlapping jurisdiction, special expertise, or related responsibilities regarding a Departmental Action with ANCSA Corporation Implications. Efficiencies that derive from including ANCSA Corporations in the Department's decision-making processes through consultation will help to ensure that future Federal action is achievable, comprehensive, long-lasting, and reflective of ANCSA Corporation input." Department of the Interior Policy on Consultation with Alaska Native Claims Settlement Act (ANCSA) Corporations (August 10, 2012)



- B. Consultations for actions that may have tribal implications may, where appropriate, be addressed programmatically and may be integrated with notices, scoping, and comment opportunities provided under the National Environmental Policy Act (NEPA), so long as tribal officials and ANCSA Corporations are notified that BOEM intends to integrate these activities with these NEPA procedures and are fully afforded the early, meaningful, and individualized consultation contemplated by the Consultation Authorities.
- C. BOEM regions and programs must ensure that BOEM representatives whose responsibilities include consultation with tribal officials have training, education or equivalent experience providing an adequate level of knowledge for that purpose before conducting any consultations.

**7. Responsibilities.**

- A. BOEM Director.** The Director will represent BOEM in consultations and meetings with Tribes and ANCSA Corporations as circumstances warrant.
- B. Tribal Liaison Officer.** The BOEM CEO will serve as the TLO unless another individual is designated by the BOEM Director and will:
  - 1. Be BOEM's principal senior point of contact for tribal consultation matters and represent BOEM leadership in consultations and meetings with Tribes and ANCSA Corporations as circumstances warrant.
  - 2. Promote and facilitate consultation and collaboration between BOEM and Tribes or ANCSA Corporations.
  - 3. Designate alternate or supporting headquarters bureau tribal liaison staff as needed, and appoint a TWG Coordinator.
  - 4. Ensure compliance with the responsibilities set forth in the Consultation Authorities, including oversight and guidance on legal and policy requirements (including tribal treaty rights) developed in coordination with the Office of the Solicitor; and compliance with training, reporting, and other requirements.
  - 5. Submit BOEM's tribal consultation annual reports to the DOI Tribal Governance Officer as specified in 512 DM 4, Appendix.
  - 6. Guide and participate in tribal consultation activities for oil and gas and non-energy mineral actions on the Atlantic Outer Continental Shelf (OCS), in conjunction with the BOEM Regional Director, Gulf of Mexico, in the case of oil and gas, and with the Chief, OSR, in the case of non-energy minerals. These activities include:

- a. Determining whether there are tribal implications for any Tribe or ANSCA Corporation, considering all applicable laws, including but not limited to any treaty rights, and memorializing that determination in writing.
  - b. Communicating with Tribes or ANSCA Corporations early in the development of programs, plans or actions.
  - c. Inviting expressions of interest in consultation.
  - d. Conducting and memorializing consultation when undertaken.
  - e. Providing Tribes or ANSCA Corporations with follow up as indicated by consultations.
7. For rulemakings and for interpretive rules (e.g., NTLs and their equivalent) or other significant guidance documents, policies, or procedures affecting one or more BOEM regions or programs, make determinations on tribal implications in accordance with the following procedures:
- a. The Office of Policy, Regulation, and Analysis (“OPRA”) will notify the TLO of any proposals for new rulemakings, interpretive rules, or significant guidance documents, policies or procedures for the TLO to determine whether the action has tribal implications. The TLO may determine based on the documents provided whether the action has tribal implications and requires consultation under this Guidance. If the TLO believes that additional review is warranted before a decision is made, the TLO will distribute the documents to the TWG for review.
  - b. The TWG will review those proposed actions for which review is requested, in concert with the individual TWG members’ regional or program management, and will make a written recommendation on tribal implications to the TLO, with reasons for the recommendation, before documentation to implement the action is advanced for approval. The TWG review may include discussions with Tribes or ANSCA Corporations that may be affected. If the TWG members disagree, they will present their differing recommendations in writing to the TLO. These recommendations and supporting documentation will be retained as part of the administrative record for the action and included for review in the process for approving the action.
  - c. The TLO will review recommendations from the TWG and will forward these and the TLO’s determination on tribal implications to the Chief, OPRA, and the Assistant Solicitor, Branch of Offshore Resources. The TLO will assist OPRA in the preparation of summaries of the determinations in connection

with the development of briefing materials, Regulatory Identification Number (RIN) request forms, and other documents required by the Department of the Interior.

OPRA will provide the TLO with the text of proposed and final rulemakings, interpretive rules, and significant guidance documents, policies or procedures before they are issued for the TLO to determine whether the initial determination on tribal implications remains correct in light of any changes in the planned content of the actions or other new information. OPRA will ensure that the materials are forwarded early enough in the review process so that the TLO has time to perform an adequate review before the action is approved. For rulemakings, the TLO will assign staff to serve as a member of the BOEM rulemaking team and be responsible for keeping the TLO apprised of any potential tribal implications as the rule is developed. The TLO will notify OPRA of any revised determinations and any associated actions promptly and early enough so that the rulemaking schedule can be accommodated.

- d. Unless circumstances warrant otherwise, the following text will be used as a template for providing determinations on tribal implications in the preamble to rulemakings and, with revision to fit the action addressed, to interpretive rules or other significant guidance documents, policies or procedures:

**Tribal Implications:** “BOEM strives to strengthen its government-to-government relationship with American Indian and Alaska Native Tribes through a commitment to consultation with the Tribes and recognition of their right to self-governance and tribal sovereignty. We are also respectful of our responsibilities for consultation with corporations established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C.1601 et seq. (“ANCSA”). BOEM has evaluated this rule under applicable Federal policies for consultation and has determined that the rule may have a substantial direct effect on one or more federally recognized Tribe or ANCSA Corporation, as defined in 512 DM 4.3, and that consultation is required.” [Give the basis for the determination here.]

**No Tribal Implications:** “BOEM strives to strengthen its government-to-government relationship with American Indian and Alaska Native Tribes through a commitment to consultation with the Tribes and recognition of their right to self-governance and tribal sovereignty. We are also respectful of our responsibilities for consultation with corporations established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C.1601 et seq. (“ANCSA”). BOEM has evaluated this rule under applicable Federal policies for consultation and has determined that the rule has no substantial direct effects on any federally recognized Tribe or ANCSA Corporation, as defined in 512 DM 4.3, and that consultation is not required.” [Give the basis for the determination here.]



**C. Chief, Office of Policy, Regulation and Analysis.** The Chief, OPRA, will:

1. Designate an OPRA point of contact for tribal reviews.
2. As specified in section 7.B.7.a. above, notify the TLO and the Regional Director or Program Manager of any affected region or program of any proposals for new rulemakings, RIN Requests or other memoranda related to the development of rulemakings, interpretive rules, significant guidance documents, policies or procedures; and provide relevant documentation.
3. Represent BOEM in consultations and meetings, as circumstances warrant, with Tribes or ANCSA Corporations that may be affected by rulemakings, interpretive rules or other significant guidance documents, policies or procedures.
4. Ensure that tribal implications text approved by the TLO is included in the preamble to rulemakings and in documents promulgating interpretive rules, other significant guidance documents, policies or procedures whose issuance is coordinated by OPRA.

**D. Regional Directors; Chief, OREP; and Chief, OSR.** Each Regional Director; the Chief, OREP, in the case of Atlantic OCS renewable energy actions; and the Chief, OSR, for Atlantic marine minerals will:

1. Represent BOEM in consultations and meetings with Tribes and ANCSA Corporations as circumstances warrant.
2. Designate a BOEM RTLO or, in the case of OREP and OSR, a PTLO.
3. Inform potentially affected Tribes and ANCSA Corporations early in the development of individual oil and gas or renewable lease sales, marine mineral leasing, study profiles on the national studies list (“NSL”), or other actions by BOEM within the region that may have tribal implications, and invite expressions of interest in consultation.
4. Provide invitations to consult through appropriate individual communications to any potentially affected Tribes or ANCSA Corporations, in combination with public notices, as appropriate.
5. If any Tribe or ANCSA Corporation requests consultation, determine whether the action has tribal implications, with advice as appropriate from regional and program tribal liaison staff; proceed in accordance with the Consultation Authorities, considering all applicable laws, including but not limited to any treaty rights; and memorialize the determination in writing.

6. Provide Tribes and ANCSA Corporations with follow up as indicated by consultations.
7. The above tribal consultation activities for oil and gas and non-energy mineral actions on the Atlantic OCS will be done in conjunction with the TLO (see 7.B.6).

**E. Tribal Working Group.** The TWG, facilitated by the TWG Coordinator, shall:

1. Collaborate in carrying out responsibilities associated with those positions, including the responsibilities in section 7.B.7.b.
2. Identify and advance relationships and effective paths for communication with federally recognized Tribes or ANCSA Corporations that may be affected by actions that the region or program plans to take.
3. Take steps to advance implementation of Secretarial Order 3342.
4. Prepare fiscal year annual reports in accordance with the reporting provisions of 512 DM 4 and 512 DM 5 that address planning and progress. The reports should document decisions regarding tribal implications; document efforts to contact Tribes or ANCSA Corporations (phone, email, and written correspondence); and include or provide references to notes of meetings with Tribes or ANCSA Corporations.