

## CONSULTATION POLICY

### Purpose

The purpose of this policy is to establish the standards, principles, and protocols required by the Ponca Tribe of Nebraska (“Tribe”) for outside entities, including federal agencies, state agencies, and private parties, engaging in consultations with the Tribe regardless of whether such consultations are mandated by applicable law, formal policy, or otherwise. This policy is designed to ensure that consultations are meaningful; collaborative; conducted in good faith; actually provide the Tribe with input on matters prior to measures, decisions, and actions being taken; actually incorporate the concerns and ideas of the Tribe into any final measure, decision, or action; and seek the free, prior, and informed agreement or consent of the Tribe to any measure, decision, or action.

### Scope

This policy applies to any and all consultations with the Tribe by outside individuals or entities, including, but not limited to, federal branches of government, federal agencies and officials, state agencies and officials, and private individuals and entities. This policy applies regardless of the source of the requirement of consultation and even when consultation is considered voluntary, including, but not limited to:

- § The enactment of legislation, promulgation of rules and regulations, and any other legislative or administrative measure;
- § “Undertakings” as defined by the regulations of the Advisory Council on Historic Preservation, 36 C.F.R. § 800.16(y);
- § “Policies that have tribal implications” as defined in Section 1(a) of Executive Order 13175 or any amendment thereto or subsequent Executive Order on the same matter;
- § The National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, including its implementing regulations at 40 C.F.R. Part 1500;
- § The National Historic Preservation Act (“NHPA”), 54 U.S.C. §§ 306108 *et seq.*, including its implementing regulations at 36 C.F.R. Part 800;
- § The Native American Graves Protection and Repatriation Act (“NAGPRA”), 25 U.S.C. §§ 3001 *et seq.*, and its implementing regulations at 43 C.F.R. Part 10;
- § The American Indian Religious Freedom Act (“AIRFA”), 42 U.S.C. § 1996 & § 1996a;
- § The Archaeological Resources Protection Act (“ARPA”), 16 U.S.C. §§ 470aa *et seq.*;
- § Executive Order 13175, *Consultation with Indian Tribal Governments*, or any amendment thereto or subsequent Executive Order on the same matter;
- § Executive Order 13084, *Consultation and Coordination with Indian Tribal Governments*, or any amendment thereto or subsequent Executive Order on the same matter;
- § Executive Order 13007, *Sacred Sites*, or any amendment thereto or subsequent Executive Order on the same matter;
- § Executive Order 12989, *Environmental Justice*, or any amendment thereto or subsequent Executive Order on the same matter;

- § Executive Order 12875, *Tribal Governance*, or any amendment thereto or subsequent Executive Order on the same matter;
- § The Executive Memorandum, *Government-to-Government Relations With Native American Tribal Governments*, or any amendment thereto or subsequent Executive Memorandum or Executive Order on the same matter;
- § Any other statutes, regulations, Executive Orders, and Executive Memoranda advising or requiring consultations with Indian tribes;
- § Any and all agency orders on government-to-government consultation with Indian tribes;
- § Any and all agency policies on government-to-government consultation with Indian tribes; and
- § Consultation required by the United Nations Declaration on the Rights of Indigenous Peoples, Convention 169 of the International Labor Organization, or other international declaration, convention, law, or standard.

## **Compliance**

All outside individuals and entities, including, but not limited to, federal branches of government, federal agencies and officials, state agencies and officials, and private individuals and entities shall comply with this policy and the protocols herein when engaging in consultation with the Tribe. If any party fails to comply with any part or provision of this policy or the protocols herein, the other party shall notify the non-compliant party of the violation and the parties shall mutually agree upon a resolution of the matter which restores balance, reduces or eliminates discord and damage to trust, and results in a mutual understanding to move forward in compliance with this policy and the protocols herein.

## **Principles**

The Ponca Tribe of Nebraska is a sovereign nation exercising rights of self-government and self-determination. It has jurisdiction and authority over its territory and its members. It is not a private entity and predates the United States and the states in existence by centuries. It is most close, in its relationship to the United States, to a foreign nation. It is due the respect and deference given any sovereign nation and government. This includes respecting and following the Tribe's laws, customs, traditions, policies, and protocols as well as the Tribe's rights of self-government and self-determination in interacting with the Tribe.

When outside entities, including federal agencies, state agencies, and private parties, come to the Tribe, they enter a sovereign territory and a different jurisdiction. This must be recognized and acknowledged. While the Tribe's territory may be geographically located within the exterior boundaries of states and the United States, the Tribe is not part of any state and it is separate and distinct from the United States. The Tribe has its own culture, its own traditions, its own government, and its own laws. Outside entities shall recognize the Tribe's rights to self-government and self-determination and its inherent sovereignty as well as acknowledge and abide by the treaties between the United States and the Tribe.

The United States has a trust responsibility to the Tribe which involves fiduciary duties and is to be judged by the most exacting fiduciary standards. Part of that trust responsibility is the

procedural duty to consult with the Tribe to determine what services are most needed by Tribal members, to understand how federal and state measures, decisions, and actions may be encroaching on the Tribe's sovereignty, and to analyze whether a measure, decision, or action will have an adverse effect on the Tribe and its resources. Failure to meaningfully consult with the Tribe before implementing any measure, decision, or action is a violation of the United States' trust responsibility.

The United Nations Declaration on the Rights of Indigenous Peoples also mandates that the federal government consult and cooperate in good faith with the Tribe through the Tribe's own representative institutions in order to obtain the Tribe's free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect it. It also mandates that the federal government must consult and cooperate in good faith with the Tribe through the Tribe's own representative institutions in order to obtain the Tribe's free and informed consent prior to the approval of any project affecting its land or territory and other resources. The principles of consultation, cooperation, good faith, and free, prior, and informed consent of the Tribe apply to all consultations with the Tribe regardless of the source of the requirement of consultation and even when consultation is considered voluntary.

Consultation means collaboration, working jointly, negotiation, mutual listening and involvement, interaction, and incorporation of input from the Tribe. Consultation occurs in good faith and is part of cooperation. It includes seeking advice from one another, substantive meetings, courteous regard, respect, and civility. Consultation is a two-way exchange of information and attempting to understand and genuinely consider each party's opinions, beliefs, and desired outcomes. The goal of consultation should be to achieve free, prior, and informed agreement or consent of the Tribe to a proposed measure, decision, or action.

Consultation occurs at the earliest stage possible, preferably when a measure, decision, or action is first being considered. Publication of a proposed measure, decision, or action is not consultation. Allowing the Tribe to comment on a proposed measure, decision, or action the same as members of the public at large is not consultation. Notification of a measure, decision, or action to be taken or already taken is not consultation. Dictating results and informing about a measure, decision, or action is not consultation.

## **Protocols**

### Respecting Tribal Sovereignty and Initiating Consultation

- § For federal and state agencies, all consultations and communications must occur in the context and with the protocol of one government to another government. For private entities and individuals, consultation and communication must occur in the context of the private entity or individual addressing a government.
- § Elected officials of the Tribe shall be addressed by their official titles unless specifically directed otherwise by the elected official. Addressing elected officials by their names shows a lack of respect and consideration of the sovereign status of the Tribe.

- § Outside entities and individuals shall not attempt to bypass the Tribe's chain of command or influence individual officials or members of the Tribe. The laws of the Tribe provide that the Chair is the chief spokesperson for the Tribe, represents the Tribe, and corresponds with other governments and entities on behalf of the Tribe. Agencies and private entities shall contact the Chair to notify the Tribe of any proposed measure, decision, or action and to initiate the consultation process. However, such notification does not constitute consultation, it merely initiates and proposes consultation.
- § After contacting the Chair to initiate consultation, preliminary information which includes an overview of the proposed measure, decision, or action and the potential impacts on the Tribe and its resources shall be provided to the Tribe prior to any consultation. Such information shall be provided either in writing or at a pre-consultation meeting. This information must be full and candid and provide sufficient detail to allow the Tribe an opportunity to fully engage in consultation and to ensure that consultation will be maximally effective and beneficial. At the same time information is provided, the outside entity will inform the Tribe of which body, officials, or other individuals will make the final decision with respect to the proposed measure, decision, or action. Providing such information does not constitute consultation, but is merely a part of initiating consultation.
- § Consultation should not occur via telephone or written correspondence unless expressly agreed by the Chair in writing. However, after receiving sufficient preliminary information, the Tribe may determine that consultation meetings are not required. In such cases, the Tribe will determine the manner of consultations most appropriate for the Tribe for the particular proposed measure, decision, or action and inform the agency or private entity of the designated manner of consultation in writing. Even if the Tribe determines that consultation meetings are not required, the principles of this policy shall apply to all interactions between the Tribe and the outside entity regardless of the manner of consultations designated by the Tribe. The Tribe and the agency or private entity may also enter into a consultation protocol agreement for a particular proposed measure, decision, or action, so long as it does not contravene this policy. Unless the Tribe states or agrees in writing that it has determined consultation meetings are not required and designates another manner of consultation for a particular proposed measure, decision, or action, consultation with the Tribe will not have been considered to have occurred without consultation meetings conducted in accordance with this policy.
- § Whenever possible, the Tribe should be made a cooperating agency under the NEPA or otherwise a full party to the consideration of the measure, decision, or action so that the Tribe may develop information and prepare analyses for environmental assessments or environmental impact statements.

#### Consultation Meetings

- § Public meetings or meetings including multiple tribes shall not constitute consultation unless expressly agreed by the Tribe in writing.

- § Consultation requires relationship building. Trust and respect for individuals requires time and must be earned. Relationships, trust, and respect cannot be built through letters or even just a single meeting.
- § All meetings shall be opened and closed with a prayer and may include or be followed by a meal as part of the relationship building.
- § Consultation meeting shall not designate an end time, but shall continue until all have had an opportunity to speak.
- § Consultation meetings shall be recorded. Outside entities may be required to provide the services of a court reporter and stenographer or the Tribe may record the meeting. If outside entities provide a court reporter, a transcript of the meeting shall be provided to the Tribe without charge within ten (10) days following the consultation meeting.
- § A meeting shall not be considered consultation unless the outside entity is represented at the meeting by a person with decision-making authority. This does not mean that other representatives of the outside entity should not also attend and, in many cases, representatives of outside entities who have already developed a relationship with the Tribe may be beneficial.
- § If multiple agencies or private entities or a combination thereof are involved in the matter subject to consultation, each agency and/or private entity shall be responsible for fulfilling consultation requirements for any matter or activity under its respective authority. A lead agency or entity may be appointed to coordinate and lead consultation on behalf of multiple entities, but all involved entities shall participate directly in consultation.
- § Decision shall not be made until consultation has concluded and sufficient information has been exchanged. No party shall unreasonably withhold consent to terminate consultation, but consultation shall continue until meaningful consultation has been achieved. While there is no set number of meetings required for consultation to be deemed sufficient, consultation shall not be considered complete until the parties are satisfied that all necessary information has been adequately exchanged or the free, prior, and informed consent of the Tribe has been obtained.
- § Consultation shall be completed before any funds are expended for the proposed measure, decision, or action; prior to the issuance of any draft or final environmental assessment, environmental impact statement, or similar report or document; before the issuance of any license or permit for the proposed measure, decision, or action; and prior to taking any measure, decision, or action.
- § The Tribe's views, concerns, and ideas shall be incorporated into and made a part of the basis of any final measure, decision, or action. In the case of federal agencies, any final measure, decision, or action shall reflect and be in accordance with the United States' trust

responsibility to the Tribe, the status of the Tribe as a sovereign, and the treaties between the Tribe and the United States.

- § Outside entities and individuals must recognize that the Tribe has a unique connection with its land, with its environment, and with all biota. This connection is foundational and elemental.
- § The Tribe has experience and knowledge, including historical knowledge, that makes it uniquely qualified to identify spiritual, cultural, historic, and environmental resources and interests. The Tribe's experience and knowledge is generational and far beyond any knowledge of outside entities and individuals. This experience and knowledge must be respected and acknowledged. No one but the Tribe can decide which resources are important; what constitutes a spiritual, cultural, historic, or environmental resource; or the effects and impacts of a measure, decision, or action on the Tribe and its resources. Outside entities and individuals do not "know better" about the Tribe and its interests. The Tribe's experience and knowledge should be utilized through Tribal surveys and studies of areas and resources that may be effected or impacted.

#### Conduct During Meetings

- § Outside entities and individuals must recognize and respect the Tribe's cultural practices and beliefs, including ensuring balance and recognizing the holistic relationship between all things.
- § Parties must show respect for each other and all participants, particularly elders, including respect and acknowledgment of each other's diversity. This includes speaking with respect, courtesy, dignity, care, and moderation to maintain an amicable atmosphere. It also includes not interrupting others or using disruptive gestures or actions.
- § Parties shall not use language which suggest dominance, superiority, and/or oppression. They shall not be dismissive of any statement made, but acknowledge and value all contributions and bring them into appropriate consideration in any decision.
- § Parties shall be permitted to contribute and express opinions with complete freedom. The views of others shall be examined and valid points accepted.