



United States Department of the Interior

BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT
WASHINGTON, DC 20240-0001

INSTRUCTIONAL MEMORANDUM NO. IM-009

To: Chief, Office of Offshore Regulatory Programs
Chief, Oil Spill Preparedness Division
Chief, Environmental Compliance Division
Chief, Safety and Incident Investigations Division
Chief, Safety Enforcement Division
Regional Director, Alaska
Regional Director, Gulf of Mexico
Regional Director, Pacific

Approving Official: Scott A. Angelle, Director

Originating Office Location(s)

Headquarters

Alaska

Atlantic

Gulf of

Mexico

Pacific

Office(s) of Primary Responsibility: Alaska OCS Regional Office

Effective Date: Date of Signature

Title: BSEE Tribal Consultation Guidance

1. Purpose and Objectives

This memorandum conveys BSEE Tribal Consultation Guidance (“Guidance”), consistent with Department of the Interior policy and procedures. This Guidance establishes procedure for BSEE to use in organizing its internal review and decision-making process on consultation.

2. Background

BSEE Tribal consultation will occur consistent with DOI guiding principles for consultation as provided in the Department of the Interior Policy on Consultation with Indian Tribes and Department of the Interior Policy on Consultation with Alaska Native Claims Settlement Act (ANSCA) Corporations.

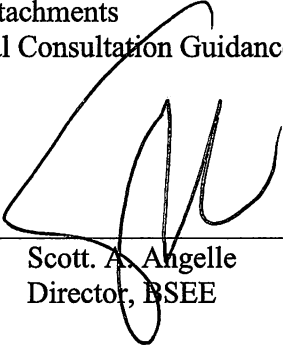
3. Action Required

This Guidance has been developed with the expectation that BSEE will invite Tribes and ANSCA Corporations to consult on it. This Guidance will be incorporated in the BSEE manual.

4. Point of Contact

Jack Lorrigan, Tribal Liaison Officer, 907-334-5357

5. Attachments
Tribal Consultation Guidance



Scott A. Angelle
Director, BSEE

8/20/19

Date



United States Department of the Interior
BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT

**BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT
TRIBAL CONSULTATION GUIDANCE**

1. Purpose.

This document provides guidance for Bureau of Safety and Environmental Enforcement (“BSEE”) consultation with Indian Tribes and Alaska Native Claims Settlement Act of 1971 corporations (“ANCSA Corporations”) concerning BSEE plans or actions with Tribal implications (“Guidance”).

2. Scope.

BSEE must undertake Tribal and ANCSA Corporation consultations whenever a bureau plan or action may have Tribal implications (described below in section 5).

3. Objective.

This Guidance establishes BSEE procedures for consultation with Tribes and ANCSA Corporations. The Guidance supplements the authorities listed below in section 4 (collectively “Consultation Authorities”), which primarily guide BSEE consultation with Tribes and ANCSA Corporations. BSEE 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. Executive Order 13175 of November 6, 2000. *Consultation and Coordination with Indian Tribal Governments*, 65 Fed. Reg. 67249 (November 9, 2000).
- B. Department of the Interior Policy on Consultation with Indian Tribes (December 1, 2011).
- C. Department of the Interior Policy on Consultation with Alaska Native Claims Settlement Act (ANCSA) Corporations (August 10, 2012).
- D. 512 DM 4, Departmental Manual, Department of the Interior, effective November 9, 2015.
- E. 512 DM 5, Departmental Manual, Department of the Interior, effective November 9, 2015.
- F. Secretary’s 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).

- G. Bureau Manual Chapter 550.1, National Environmental Compliance Policy (May 15, 2017).

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. 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].” BSEE actions that may have these implications include, but are not limited to, rulemaking, guidance, permitting and regulation of oil and gas activities on the Outer Continental Shelf (“OCS”), issuance of rights-of-way, requiring oil spill exercises, and applicable renewable energy activities on the OCS. BSEE cannot delegate its responsibility for determining Tribal implications to a Tribe, ANCSA Corporation, or other agency. However, BSEE 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, depending on the context, the BSEE Chief, Office of Offshore Regulatory Programs (“OORP”); Chief, Environmental Compliance Division (“ECD”); Chief, Oil Spill Preparedness Division (“OSPD”); Chief, Safety and Incident Investigations Division (“SIID”); or Chief, Safety and Enforcement Division (“SED”).
- E. Regional Director means the BSEE Regional Director, Gulf of Mexico Region; Regional Director, Alaska Region; or the Regional Director, Pacific Region.
- F. Tribal Liaison Officer (“TLO”) means the individual designated by the BSEE 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 BSEE Regional Director to assist the TLO and to carry out the responsibilities described in this Guidance on behalf of a BSEE regional office.

H. Tribal Working Group (“TWG”) means collectively the RTLOs, and any other BSEE staff designated to assist with Tribal matters.

6. Policy.

A. BSEE will consult with Tribes and ANCSA Corporations in accordance with the Consultation Authorities if a BSEE action may have a substantial direct effect on an Indian Tribe or ANCSA Corporation. DOI guiding principles for consultation are provided in the Department of the Interior Policy on Consultation with Indian Tribes (section 3.D. above) and Department of the Interior Policy on Consultation with ANCSA Corporations (section 3.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 Tribes and ANCSA Corporations are notified that BSEE 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. BSEE regions and programs must ensure that BSEE 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. BSEE Director. The Director will:

- 1. Represent BSEE in consultations and meetings with Tribes and ANCSA Corporations as circumstances warrant.
- 2. Designate the BSEE TLO.
- 3. Ensure that the other offices and officials addressed below have the resources necessary to carry out their responsibilities.
- 4. Comply with the requirements of the Consultation Authorities applicable to heads of Bureaus.

B. Tribal Liaison Officer. The BSEE TLO is designated by the BSEE Director and will:

- 1. Be BSEE's principal senior point of contact for Tribal consultation matters, represent BSEE leadership in consultations and meetings with Tribes and ANCSA Corporations as circumstances warrant, and be authorized to speak on behalf of BSEE in such circumstances.
- 2. Promote and facilitate consultation and collaboration between BSEE and Tribes and 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 BSEE'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 BSEE activities, including energy actions on the OCS. These activities include:
 - a. Determining whether there may be Tribal implications for any Tribe or ANCSA Corporation, considering all applicable laws, including but not limited to any treaty rights, and memorializing that determination in writing.

- b. Communicating with Tribes and ANSCA Corporations early in the development of programs or actions.
 - c. Inviting expressions of interest in consultation.
 - d. Conducting and memorializing consultation when undertaken.
 - e. Providing Tribes and ANSCA Corporations with follow up as indicated by consultations.
7. For rulemakings and formal agency guidance (e.g., notices to lessees and operators, and their equivalent) or other significant guidance documents, policies, or procedures affecting one or more BSEE regions or programs, make determinations on Tribal implications in accordance with the following procedures:
- a. The Office of Offshore Regulatory Programs (“OORP”) will notify the TLO of any proposals for new rulemakings or significant guidance documents; Program Managers will notify the TLO of revisions to policies or procedures for the TLO to determine whether the action may have Tribal implications. The TLO may determine based on the documents provided whether the action may have 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 and ANCSA 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, OORP. The TLO will assist OORP 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.

OORP will provide the TLO with the text of proposed and final rulemakings 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. OORP 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 BSEE rulemaking team and be responsible for keeping the TLO apprised of any potential Tribal implications as the rule is developed. The TLO will notify OORP 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 other significant guidance documents, policies, or procedures:

Tribal Implications: “BSEE strives to strengthen its government-to-government relationship with American Indian Tribes through a commitment to consultation with Tribes and recognition of their right to self-governance and Tribal sovereignty. BSEE 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 Tribes or ANCSA Corporations, as defined in 512 DM 4.3, and that consultation is required.” [Give the basis for the determination here.]

No Tribal Implications: “BSEE strives to strengthen its government-to-government relationship with American Indian Tribes through a commitment to consultation with Tribes and recognition of their right to self-governance and Tribal sovereignty. BSEE has evaluated this rule under applicable Federal policies for consultation and has determined that the rule could not have 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 Offshore Regulatory Programs (“OORP”). The Chief, OORP, will:

1. Designate an OORP 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, significant guidance documents, policies, or procedures; and provide relevant documentation.
3. Ensure OORP fulfillment of the responsibilities set out in section 7.B.7.c.

4. Provide expertise in the rulemaking process during consultations and meetings, as circumstances warrant, with Tribes and ANCSA Corporations that may be affected by rulemakings or other significant guidance documents, policies, or procedures.
5. Ensure that Tribal implications text approved by the TLO is included in the preamble to rulemakings whose issuance is coordinated by OORP.

D. Regional Directors. Each Regional Director will:

1. Represent BSEE in consultations and meetings with Tribes and ANCSA Corporations as circumstances warrant and be authorized to speak on behalf of BSEE in such circumstances.
2. Designate a BSEE RTLO.
3. Inform potentially affected Tribes and ANCSA Corporations early in the development of energy activities, including oil and gas and applicable renewable energy actions on the OCS, and invite expressions of interest in consultation.
4. Provide invitations to consult through appropriate individual communications to any potentially affected Tribes and ANCSA Corporations, in combination with public notices, as appropriate.
5. Notify the RTLO and the TLO if any Tribe or ANSCA Corporation requests consultation and ensure the RTLO and the TLO have the appropriate resources to proceed in accordance with the Consultation Authorities.
6. Provide Tribes and ANSCA Corporations with follow up as indicated by consultations.
7. Conduct the above Tribal consultation activities for oil and gas actions on the OCS in conjunction with the TLO (see 7.B.6).

E. Chief, Environmental Compliance Division. The Chief, ECD, in the case of any Headquarters-led programs and initiatives for OCS energy actions, will:

1. Represent BSEE in consultations and meetings with Tribes and ANCSA Corporations as circumstances warrant and be authorized to speak on behalf of BSEE in such circumstances.

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

1. Collaborate in carrying out responsibilities associated with the RTLOs and any other BSEE staff designated to assist with Tribal matters, including the responsibilities in section 7.B.7.b.
2. Identify and advance relationships and effective paths for communication with Tribes and ANCSA Corporations that may be affected by actions that the region or program plans to take.
3. Take steps to advance implementation of Secretary's 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 and ANCSA Corporations (phone, email, and written correspondence); and include or provide references to notes of meetings with Tribes and ANCSA Corporations.