

National Endowment for the Arts
Tribal Consultation Policy
DRAFT V1

Section I. Overview and Purpose

On January 26, 2021, President Biden issued a Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships. The Memorandum required all Federal agencies to submit to the Office of Management and Budget “a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175.” As a result of the memorandum, the National Endowment for the Arts (NEA) has developed this document in consultation with Tribal Nations and Tribal officials as defined in Executive Order 13175.

The NEA hereby establishes a consultation policy with federally recognized tribes. The purpose of the NEA Tribal Consultation Policy is to build meaningful relationships with federally recognized tribes by engaging in open, continuous, and meaningful consultation. It is the NEA’s goal that effective consultation will lead to information exchange, mutual understanding, and informed decision-making among all parties.

In addition to the January 26, 2021 Presidential Memorandum, the NEA Consultation Policy document was developed based upon:

1. Executive Memorandum “Tribal Consultation,” November 5, 2009;
2. Executive Order 13175, originally issued November 6, 2000 and reaffirmed in 2009;
3. Input from elected and appointed Tribal officials during the NEA’s Tribal Consultation Sessions held on April 7, 2021, and August 10, 2021

Section II. Background on Tribal Consultation Policies

The United States (U.S.) has a long history of recognizing Indian tribes as sovereign nations with the authority to self-govern. A unique government-to-government relationship exists between American Indian and Alaska Native (AI/AN) tribes and the Federal government. This relationship is grounded in the U.S. Constitution and is reaffirmed in numerous treaties, statutes, Federal case law, regulations, and executive orders. This relationship is derived from the political relationship that Indian tribes have with the Federal government.

Examples of recognition of this relationship include:

- Article 1, Section 8, U.S. Constitution, “The Congress shall have the power to...regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”
- The Indian Self-Determination and Education Assistance Act of 1975 and related amendments.
- Presidential Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, November 6, 2000.

- Presidential Memoranda, Government-to-Government Relationship with Tribal Governments, September 23, 2004; Tribal Consultation, November 5, 2009; and Tribal Consultation and Strengthening Nation-to-Nation Relationships, January 26, 2021.

Section III. Background of the National Endowment for the Arts

The NEA is an independent federal agency that funds, promotes, and strengthens the creative capacity of our communities by providing all Americans with diverse opportunities for arts participation. Established in 1965, the NEA received an appropriation of \$167.5 million in FY 2021 in the Consolidated Appropriations Act, 2021. This funding is largely devoted to project and partnership grants, special initiatives, and honorific fellowships to affirm and celebrate America's rich and diverse cultural heritage, support arts learning, and to extend and promote equal access to the arts in every community.

The NEA's Programs & Partnerships Division manages its grantmaking opportunities, through Grants for Arts Projects (our principal grant program for nonprofit organizations, units of government, and federally recognized tribes), Our Town (creative placemaking grants), Challenge America (support for projects that extend the reach of the arts to underserved), Partnerships (grants for state & territorial arts agencies and regional arts organizations), Research Awards (Research Grants in the Arts and NEA Research Labs funding categories), Creative Writing Fellowships (grants in prose and poetry for published creative writers), Translation Projects (Support for the translation of works of prose, poetry, or drama into English), National Heritage Fellowships (lifetime recognition in Folk & Traditional Arts), and Jazz Masters (lifetime recognition in Jazz).

The NEA recognizes the critical role that lifeways and cultural fluency play in the health and vitality of Native youth and tribal nations, as well as the important place the arts hold in tribal economies. After a five-year listening tour with Native American, Alaska Native, and Native Hawaiian leaders, organizations, Tribal Colleges and Universities (TCUs), and cultural practitioners, the NEA – in partnership with the National Endowment for the Humanities (NEH) and the Native Arts & Cultures Foundation – co-hosted a national convening of Native cultural arts leaders in Washington, DC, on February 14, 2020. The purpose of the convening was to showcase innovative cultural work, discuss common challenges, and to articulate needs and goals broadly held by Native arts and cultural practitioners, communities, and organizations. A summary report of the 2020 convening, including key recommendations for future action, was published in March 2021 and provides an important foundation that will help to inform the NEA's service to Native peoples and communities.

On April 7, 2021, the NEA held a formal Tribal Consultation session, the first of its kind, in accordance with the President's January 26, 2021, Memorandum. Elected and appointed tribal officials, and their authorized representatives, were invited to provide comments on how the NEA could support arts in AI/AN communities, prioritize respect for tribal sovereignty and self-governance, fulfill Federal trust and treaty responsibilities, engage in meaningful and robust consultations with tribal nations, and on what to include in a Tribal Consultation Policy.

On May 18, 2021, the NEA co-hosted “Sustaining and Advancing Indigenous Cultures: Native Artists Summit,” with the Association of Tribal Archives, Libraries, and Museums (ATALM). The virtual summit illuminated the needs of Native artists, identified issues and common challenges, and assisted ATALM in developing a forthcoming summary report and prioritized action plan for Native arts. This virtual summit deepened the conversations begun at the 2020 convening.

Section IV. Consultation Process

It is the goal of the NEA to strengthen and improve the relationship the agency has with tribal nations through increased communication and collaboration, facilitated by the NEA consultation process. The NEA policy is to conduct timely, respectful, meaningful, and effective two-way communication and consultation with tribes wherein elected/appointed officials and other authorized representatives of the tribal governments provide input prior to any action that the NEA determines has or may have a substantial direct effect on one or more Indian tribes, and before any such action or further action is taken. The NEA will consult, as defined in this document and as practicable and permitted by law, with Indian tribes before taking actions that will significantly affect Indian tribes. The following sets forth the process of the implementation of the NEA policy.

1. Notice

The NEA will notify all affected and potentially affected tribes of the consultation session no less than 30 calendar days prior to the scheduled consultation.

The NEA will notify tribes of the consultation session by utilizing at least one of the following methods, as appropriate:

- Email sent to the Tribal Leader using an updated email list serv
- Notice in the Federal Register
- Letter sent to the Tribal Leader and signed by the NEA Chair

The consultation notice shall identify the following information:

- Location/format, date, and time of the consultation session,
- Subject issue for consultation,
- Applicable program(s), policy, rule, regulation, statute, and authorizing legislation,
- Related concerns, and
- Affected or potentially affected Indian tribes.

Federally recognized tribes may request that the NEA initiate consultation under this policy. If one or more tribes is requesting consultation, the request(s) shall be addressed to the Chair of the NEA and shall include all of the information required in a consultation notice, except the location, date, and time of the consultation session. The NEA shall acknowledge receipt of all tribal consultation

request(s) within 14 calendar days after receipt of the request(s). The NEA shall contact the tribe/s requesting the consultation within 14 calendar days to determine a mutually agreeable location/format, date, and time for the consultation session.

2. Format

Consultation may occur through a combination of one or more methods. The following are examples of methods of consultation:

A. Meetings

Meetings may be in-person, virtual, or by teleconference. A consultation meeting may be stand-alone, in a national or regional forum, or in conjunction with other consultations as appropriate. The NEA recognizes that there may be instances where more than one meeting is necessary to resolve an issue identified for consultation. In-person meetings are the preferred method of consultation, and the NEA will make every effort to conduct consultations using this method when feasible. Unless other arrangements are made, the costs of attending any in person meetings shall be borne by the respective parties incurring such costs.

B. Federal Register

When meetings are not practicable and/or appropriate, notices in the Federal Register may be used as the method of consultation to provide information and solicit comments from tribes. Notices listed in the Federal Register will include clear and explicit instructions for the submission of comments that provide adequate time – a minimum of 30 days – for tribal responses. When an in-person meeting is not possible, the NEA will make every effort to hold a virtual consultation in addition to the Federal Register solicitation for comments.

3. Parties

Consultation parties are:

- A. The Chair of the NEA, or their designee; and
- B. Tribal President, Tribal Chair, or Tribal Governor, or an elected or appointed Tribal Leader or their authorized representative.

Each party will identify their authorized representatives with delegated authorities to negotiate on their behalf.

4. Initiation

An action that triggers consultation is any

- Legislative proposal,
- New rule adoption, or
- Other policy change

that the NEA determines may significantly affect Indian tribes.

The NEA, with or without tribal input, may determine that an action may significantly affect one or more Indian tribes and may initiate consultation through appropriate notice. An action is considered to significantly affect tribes if there exists a reasonable presumption that it has or may have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and tribes, or on the delivery of the NEA program/grant services to one or more tribes.

5. Frequency

To ensure that the NEA receives input on a regular and consistent basis from tribal nations, the NEA will, at a minimum, conduct an annual agency-wide consultation each year. When feasible and appropriate, the NEA will consider coordinating with other Federal agency consultation sessions to maximize the efficiency of tribal leader resources, travel, and time.

6. Location

When planning in-person consultation meetings, the NEA will consider and make efforts to coordinate with existing tribal venues, tribal conferences, national calendars, and timelines when feasible and appropriate. The NEA understands and appreciates the opportunity to visit AI/AN communities, as well as the need to have the appropriate officials and decision-makers participate in the consultation sessions.

Section V. Reports

After each consultation session, the NEA will prepare and disseminate a written report within 60 calendar days of the conclusion of the session. The NEA will keep the record open for 21 calendar days after each consultation meeting to allow for tribes to submit written testimony and/or additional comments for the record.

Each consultation report will contain a summary of all of the topics and issues, a summary of the tribal comments provided, and a summary of the discussion during the consultation session. Included in the report will be the NEA's responses to any issues or questions raised, recommendations, and items identified for follow up or additional action.

The NEA will post the consultation reports on the NEA website within 14 calendar days of the final report completion. The NEA will also make a transcript of consultation meetings available to tribes when requested.

Section VI. Role of Internal Workgroup

The NEA Internal Workgroup

The NEA intends to continue to convene an internal workgroup as made up of staff representatives from various program offices. This internal workgroup will support the Chair of the NEA and all program offices of the NEA that provide services to Native Americans by serving as a resource to share information and coordinate activities. The internal working group will meet regularly, and specific roles and responsibilities of the internal working group will include:

1. Coordinating the annual tribal consultation session.
2. Coordinating tribal convenings, workshops, trainings, agency-wide outreach, and related activities.
3. Updating the Native Arts and Cultural Heritage Federal Resource Guide on an annual basis.
4. Promoting AI/AN visibility within the NEA and consistent with the NEA's mission.
5. Other activities as designated by the Chair.

For policies that impact more than federally recognized tribes, the internal workgroup will develop forums to provide opportunities for input and dialogue for state-recognized tribes, Native American organizations, Native Hawaiians and Pacific Islanders, urban Indian centers, tribal colleges and universities (TCUs), and others as identified by the internal workgroup. These forums will be outside of tribal consultation, will not be considered part of tribal consultation sessions, and will not take the place of tribal consultation. The NEA recognizes that while these groups are not federally recognized tribes, they may be eligible to receive funding for certain grants of the NEA that serve AI/AN individuals and communities.

Section VII. Convenings

Meeting regularly with AI/AN grantees and potential grantees to exchange information, share best practices, and provide training opportunities is important for strengthening the government-to-government relationship and building capacity in the arts for AI/AN communities. When feasible, the NEA will coordinate and collaborate with Federal agencies that have similar purposes related to arts, culture, and native languages to host convenings on a bi-annual basis for AI/AN grantees and potential grantees. The NEA will work with other Federal partners, to determine the theme, focus, priorities, and expected outcomes of convenings.

Section VIII. Outreach and Resources

Working with Native-led national service organizations and an interagency federal working group, the NEA has carried out strategic outreach to Native communities and artists since 2016. Outreach includes nation-to-nation work with tribal governments in Washington, DC, reservation communities, TCUs, and at conferences and convenings of indigenous leaders and organizations. Outreach also includes steady recruitment of Native artists and community leaders to participate as panelists to review grant applications.

The NEA is committed to a continuation of the listening tour it has conducted since 2016, visiting tribes, tribal communities, and TCUs, attending cultural events significant within AI/AN

communities, and participating in convenings focused on AI/AN arts, culture, native languages, and related topics where the NEA provides support or funding.

The NEA recognizes the importance of providing opportunities for tribes and AI/AN grantees to learn about federal programs, grants, and services offered by the NEA. The NEA, in partnership with Federal partners, developed and published the [Federal Resources for Native Arts and Cultural Activities guide](#) in 2020. This resource guide is a consolidation of opportunities offered by Federal agencies for organizations looking for funding and other resources to support Native arts and culture activities. The contents of this resource guide are a reflection of the cultural components of the United States government's trust relationship with tribal communities. The NEA will continue to update the resource guide on an annual basis and make it available on the Native Arts and Culture section of the NEA website.

Section IX. Definitions

Action- Any legislative proposal, new rule adoption, or policy change that either the NEA or a tribe(s) determines may significantly affect an Indian tribe(s).

Communication- The exchange of ideas, messages, or information by speech, signals, writing, or other means.

Consultation- An enhanced form of communication, which emphasizes trust, respect, and shared responsibility. It is an open and free exchange of information and opinion among parties, which leads to mutual understanding and comprehension. Consultation is integral to a deliberative process, which results in effective collaboration and informed decision-making with the ultimate goal of reaching consensus on issues.

Coordination and Collaboration- Working and communicating together in a meaningful government-to-government effort to create a positive outcome.

Federally recognized tribal governments- Indian tribes with whom the Federal government maintains an official government-to-government relationship, usually established by a Federal treaty, statute, executive order, court order, or a Federal Administrative Action. BIA maintains and regularly publishes the list of federally recognized Indian tribes.

Indian tribe- An Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, or regional or village corporation, as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) (43 U.S.C. 1601 et seq.) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. 450b(e)).

Native American- Broadly describes the people considered indigenous to North America.

Native Hawaiian- Any individual whose ancestors were natives of the area, which consists of the Hawaiian Islands prior to 1778 (42 U.S.C. 3057k).

Policies that have tribal implications- Refers to regulations, 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.

State recognized tribes- Tribes that maintain a special relationship with the State government and whose lands and rights are usually recognized by the State. State-recognized tribes may or may not be federally recognized.

To the extent practicable and permitted by law- Refers to situations where the opportunity for consultation is limited because of constraints of time, budget, legal authority, etc.

Tribal officials- Elected or duly appointed officials of Indian tribes or authorized Indian organizations.

X. Policy Review

The NEA, working with the TAC, will review, and if necessary, revise its Tribal Consultation Policy no less than every 3 years.

XI. Retention of Executive Branch Authorities

Nothing in this policy waives the Government's deliberative process privilege, including when the NEA is specifically requested by Members of Congress to respond to or report on proposed legislation. The development of such responses and related policy documents is a part of the deliberative process by the Executive Branch and should remain confidential.

Nothing in this document creates a right of action against the NEA for failure to comply with this Policy nor creates any right, substantive or procedural, enforceable at law by a party against the United States, its agencies or any individual.

XII. Effective Date

This policy is effective on the date of the signature by the Chair of the NEA and shall apply across the agency.