

Workers' Compensation Administration

State-Tribal Consultation, Collaboration and Communication Policy

Section I. Background

- A. In 2003, the Governor of the State of New Mexico and 21 of the 22 Indian Tribes, Nations and Pueblos of New Mexico adopted the *2003 Statement of Policy and Process* (Statement), to “establish and promote a relationship of cooperation, coordination, open communication and good will, and [to] work in good faith to amicably and fairly resolve issues and differences.” The Statement directs State agencies to interact with the Tribal governments and provides that such interaction “shall be based on a government-to-government relationship” aimed at furthering the purposes of meaningful government-to-government consultation.
- B. In 2005, Governor Bill Richardson issued Executive Order 2005-004 mandating that the Executive State agencies adopt pilot tribal consultation plans with the input of the 22 New Mexico Tribes.
- C. In 2007, Governor Bill Richardson issued the Goals of the “Promoting and Growing New Mexico, Performance and Accountability Contract”. This document identified the process New Mexico is taking toward competitiveness in the regional, national and global economies. This process includes attracting high-skill wage industries, cutting taxes, investing in innovation, providing access to capital and investing infrastructure. The four goals for promoting and growing New Mexico include:
- *Goal 1. Improve New Mexico's Economic Base and Expand Targeted Industries*
 - *Goal 2. Strategically Invest in the Workforce and Infrastructure to Support Economic Growth*
 - *Goal 3. Expand Domestic and International Trade*
 - *Goal 4. Develop and Promote Media Arts and Cultural Assets*
- D. Several Executive Agencies were identified as the lead agencies to accomplish the Promoting and Growing New Mexico initiative. These agencies are: Department of Cultural Affairs, Department of Transportation, Department of Tourism, Department of Workforce Solutions, Economic Development Department, and the State Investment Council.
- E. On March 19, 2009, Governor Bill Richardson signed SB 196, the State Tribal Collaboration Act (hereinafter “STCA”) into law. The STCA reflects a statutory commitment of the state to work with Tribes on a government-to-government basis. The STCA establishes in state statute the intergovernmental relationship through several interdependent components and provides a consistent approach through

which the State and Tribes can work to better collaborate and communicate on issues of mutual concern.

- F. In Fall 2009, the Agencies charged with the Promote and Grow New Mexico initiative met with representatives from the Tribes to develop an overarching Policy that, pursuant to the STCA:
- a. Promotes effective collaboration and communication between the Agency and Tribes;
 - b. Promotes positive government-to-government relations between the State and Tribes;
 - c. Promotes cultural competence in providing effective services to American Indians/Alaska Natives; and
 - d. Establishes a method for notifying employees of the Agency of the provisions of the STCA and the Policy that the Agency adopts.
 - e. The Policy meets the intent of the STCA and defines the Agency's commitment to collaborate and communicate with Tribes.

Section II. Purpose

Through this Policy, the Agency will seek to foster and facilitate positive government-to-government relations between the Agency and the federally recognized Indian Nations, Tribes or Pueblos located wholly or partially within the boundaries of New Mexico, hereinafter referred to as "Tribes". The purpose of the Policy is to develop, improve, or maintain partnerships with Tribes by using agreed-upon processes when the Agency develops, changes or implements policies, programs or services that directly affect Tribes.

Section III. Principles

- A. Confidentiality - The Agency will protect and exhibit a high degree of respect and sensitivity regarding confidential information provided by Tribal Governments and staff, and shall ensure confidentiality to the extent provided by State and Federal law.
- B. Recognize and Respect Sovereignty – The State and Tribes are sovereign governments. The recognition and respect of sovereignty is the basis for government-to-government relations and this Policy. Sovereignty must be respected and recognized in government-to-government consultation and collaboration between the Agency and Tribes. The Agency recognizes and acknowledges the trust responsibility of the Federal Government to federally-recognized Tribes.

- C. Government-to-Government Relations – The Agency recognizes the importance of collaboration, communication and cooperation with Tribes. The Agency further recognizes that Agency policies, programs and/or services may directly or indirectly affect Tribes. Accordingly, the Agency recognizes the value of dialogue between Tribes and the Agency with specific regard to those policies, programs and/or services.
- D. Efficiently Addressing Tribal Issues and Concerns – The Agency recognizes the value of Tribes’ input regarding Agency policies, programs and/or services. Thus, it is important that Tribes’ interests are reviewed and considered by the Agency in its policy, program and/or service development process.
- E. Collaboration and Mutual Resolution – The Agency recognizes that good faith, mutual respect, and trust are fundamental to meaningful collaboration and communication policies. As they arise, the Agency shall strive to address and mutually resolve concerns with impacted Tribes.
- F. Communication and Positive Relations – The Agency shall strive to promote positive government-to-government relations with Tribes by: (1) interacting with Tribes in a spirit of mutual respect; (2) seeking to understand the varying Tribes’ perspectives; (3) facilitating communication, understanding and appropriate dispute resolution with Tribes; and (4) working through the government-to-government process towards a shared vision in areas of mutual interest.
- G. Informal Communication – The Agency recognizes that formal consultation may not be required in all situations or interactions. The Agency may seek to communicate with and/or respond to Tribes outside the consultation process. These communications do not negate the authority of the Agency and Tribes to pursue formal consultation.
- H. Economic Development Access – Providing the opportunity for economic development is a real need in the Native American communities and these communities often do not have the capacity to address this unmet need. Therefore, the Agency will inform the tribes of opportunities related to Economic Development and will provide resources and assistance to enhance the development of the tribal communities. For example, Infrastructure related to Transportation, Water and Waste Water, Solid Waste Systems, etc.

Section IV. Protocol

When working with tribal governments it is important to understand the unique relationship between American Indians and the United States government. It is a political relationship – not race based. Under both federal and common law, Native American tribes are sovereign governments with recognized powers of self-government. The status of tribes as governments means that tribes possess

the inherent right to develop their own forms of government, to determine their own citizenship and to make their own laws, civil and criminal, and to be governed by them in their own judicial systems. New Mexico is home to 22 federally recognized Indian Nations, Tribes and Pueblos—each with its own history, culture, and language. Thus it is important not to assume that one tribe or one leader speaks for all.

The Agency recognizes the unique sovereign status of the 22 Indian Nations, Tribes and Pueblos within the state. To promote effective communication and collaboration between the Agency and the Tribes relating to this Policy, the Agency shall endeavor to understand the protocols for interacting with each Indian Nation, Tribe or Pueblo. As protocol relationships are developed they will be incorporated herein as attachments.

Section V. Definitions

A. The following definitions shall apply to this Policy:

1. American Indian/Alaska Native – Pursuant the STCA, this means:
 - a) Individuals who are members of any federally recognized Indian tribe, nation or pueblo;
 - b) Individuals who would meet the definition of "Indian" pursuant to 18 USC 1153; or
 - c) Individuals who have been deemed eligible for services and programs provided to American Indians and Alaska Natives by the United States public health service, the bureau of Indian affairs or other federal programs.
2. Collaboration – Collaboration is a recursive process in which two or more parties work together to achieve a common set of goals. Collaboration may occur between the Agency and Tribes, their respective agencies or departments, and may involve Indian organizations, if needed. Collaboration is the timely communication and joint effort that lays the groundwork for mutually beneficial relations, including identifying issues and problems, generating improvements and solutions, and providing follow-up as needed.
3. Communication – Verbal, electronic or written exchange of information between the Agency and Tribes.
4. Consensus – Consensus serves as a decision making method for reaching agreement through a participatory process that: (a) involves the Agency and Tribes through their official representatives; (b) actively solicits input and participation by the Agency and Tribes; and (c) encourages cooperation in reaching agreement on the best possible decision for those affected.

The Agency shall endeavor to conduct deliberations with Tribes in good faith and in accordance with the processes outlined in this Policy. Within this process it is understood that consensus, while a goal, may not always be achieved.

5. Consultation – Consultation operates as an enhanced form of communication that emphasizes trust and respect. It is a shared responsibility that allows an open and free exchange of information and opinion among parties that, in turn, may lead to mutual understanding and comprehension.

Consultation with Tribes is uniquely a government-to-government process with two main goals: (a) to reach consensus in decision-making; and (b) whether or not consensus is reached, to afford any party the opportunity to issue a dissenting opinion for the record, and more importantly to have honored each other's sovereignty.

6. Cultural Competence – Refers to an ability to interact effectively with people of different cultures. Cultural competence comprises four components: (a) awareness of one's own cultural worldview, (b) appreciation of cultural differences, (c) knowledge of different cultural practices and worldviews, and (d) honing cross-cultural skills. Developing cultural competence improves one's ability to understand, communicate with, and effectively interact with people across cultures.
7. Culturally Relevant – Describes a condition where programs or services are provided according to the clients' cultural backgrounds.
8. Environmental resources - Environmental media listed in the Environment Improvement Act, NMSA, 1978, sec. 74-1-7A
9. Government-to-Government – Describes the relationship between the State, Tribes and the Federal government.
10. Indian Organizations –Organizations, predominantly operated by American Indians/Alaska Natives, that represent or provide services to American Indians and/or Alaska Natives living on and/or off tribal lands and/or in urban areas.
11. Internal Agency Operation Exemption – Refers to certain internal agency operations and processes not subject to this Policy. The Agency has the authority and discretion to determine what internal operations and processes are exempt from this Policy.
12. Internal Tribal Government Operations Exemption – Refers to certain internal tribal government operations not subject to this Policy. Each Tribe has the authority and discretion to determine what internal operations and processes are exempt from this Policy.

13. Linguistic Competency – Refers to one’s capacity to communicate effectively and convey information in a manner that is easily understood by culturally diverse audiences.
14. Participation – Describes an ongoing activity that allows interested parties to engage one another through negotiation, compromise and problem solving to reach a desired outcome.
15. Tribal Advisory Body – A duly appointed group of individuals established and organized to provide advice and recommendations on matters relative to Agency policies, programs and services.
16. Tribal Government - The governing structure of a sovereign, federally recognized government of an Indian Nation, Tribe, or Pueblo, within the United States.
17. Tribal Implications – Refers to State legislation, regulations and other policy statements or actions that have substantial direct effects on American Indians/Alaska Natives, Tribes, or on the relationship between the State and Tribes.
18. State Agency Tribal Liaison – Refers to an individual designated by the Agency, who reports directly to the Office of the Secretary or to the Head of the Agency, to:
 - a) Assist with developing and ensuring the implementation of this Policy;
 - b) Serve as a contact person responsible for maintaining ongoing communication between the Agency and affected Tribes; and
 - c) Ensure that training is provided to staff of the Agency as set forth in Subsection B of Section 4 of the STCA.
19. Tribal Officials – Elected or duly appointed officials of Tribes or authorized intertribal organizations.
20. Tribes – Means any federally recognized Indian Nation, Tribe or Pueblo located wholly or partially within the boundaries of the State of New Mexico.
21. Work Groups – Formal advisory bodies and task forces established through joint effort by the Agency and Tribes. Work Groups can be established to address or develop more technical aspects of policies or programs separate or in conjunction with the formal consultation process. Work groups shall, to the extent possible, consist of members from the Agency and participating Tribes.

Section VI. General Provisions

A. Collaboration and Communication

To promote effective collaboration and communication between the Agency and Tribes relating to this Policy, and to promote cultural competence, the Agency will utilize, as appropriate: Tribal Liaisons, Tribal Advisory Bodies, Work Groups and Informal Communication.

1. The Agency will make a good-faith effort to review all proposed plans, policies, rulemakings, permitting actions, or other aspects of Programmatic Actions that may have impacts on Tribal resources, and determine whether Tribal consultation or collaboration may assist in Programmatic Actions. If a proposed Programmatic Action may impact Tribal resources, the Agency will notify Tribal Governments and inquire whether Tribal consultation should occur. Tribal Officials have the discretion whether to engage in the consultation process. Consultation will be initiated by formal request
2. The Role of Tribal Liaisons. To promote State-Tribe interactions, enhance communication and resolve potential issues concerning the delivery of Agency services to Americans Indians/Alaska Natives, Tribal Liaisons will work with Tribal Officials and Agency staff and their programs to develop policies or implement program changes. Tribal Liaisons communicate with Tribal Officials through both formal and informal methods of communication to assess:
 - a) Issues or areas of tribal interest relating to the Agency's policies, programs and/or services; and
 - b) Tribal interest in pursuing collaborative or cooperative opportunities with the Agency; and
 - c) The Agency's promotion of cultural competence in its development or maintenance of policies, programs and/or services.
3. The Role of Tribal Advisory Bodies. The Agency may solicit advice and recommendations from duly appointed advisory organizations or committees to collaborate with Tribes in matters of policy development prior to engaging in consultation, as contained in this Policy. The Agency may convene such advisory organizations/committees to provide advice and recommendations on departmental policies, programs and/or service matters that have tribal impacts. Input derived from such activities is not defined as this Policy's consultation process.
4. The Role of Work Groups. The Agency Head, in consultation with recognized Tribal officials, may appoint an agency-tribal work group to

develop recommendations and provide input on Agency policies, programs and/or services as they might impact Tribes and American Indians/Alaska Natives. The Agency or the Work Group may develop procedures for the organization and implementation of work group functions. (See, e.g., the sample set of procedures at Attachment A.)

5. Informal Communication.

- a) Informal Communication with Tribes. The Agency recognizes that consultation meetings may not be required in all situations or interactions involving State-Tribal relations. The Agency recognizes that Tribal Officials may communicate with appropriate Agency employees outside the consultation process, including with Tribal Liaisons and Program Managers, in order to ensure programs and services are delivered to their constituents. While less formal mechanisms of communication may be more effective at times, this does not negate the Agency's or the Tribe's ability to pursue formal consultation on a particular issue or policy.
- b) Informal Communication with Indian Organizations. The State-Tribal relationship is based on a government-to-government relationship. However, Indian organizations, such as those representing or providing services to urban and/or off-reservation American Indians/Alaska Natives, serve to benefit and assist the State, as well. Through this Policy, the Agency recognizes that it may solicit recommendations, or otherwise collaborate and communicate with these organizations.

B. Consultation

Consultation shall be between the Cabinet Secretary/Agency Head and Tribal Officials or their delegated representatives who possess authority to negotiate on their behalf.

1. Applicability – Tribal consultation is most effective and meaningful when conducted before taking action that impacts Tribes and American Indians/Alaska Natives. The Agency acknowledges that a best case scenario may not always exist, and that the Agency and Tribes may not have sufficient time or resources to fully consult on a relevant issue. If a process appropriate for consultation has not already begun, through this Policy, the Agency seeks to initiate consultation as soon as possible thereafter. (Refer to applicable "Protocol" agreement)
2. Focus – The principle focus for government-to-government consultation is with Tribes through their Tribal Officials. Nothing herein shall restrict or prohibit the ability or willingness of Tribal Officials and the Agency Head to

meet directly on matters that require direct consultation. The Agency recognizes that the principle of intergovernmental collaboration, communication and cooperation is a first step in government-to-government consultation, and is in accordance with the STCA.

3. Areas of Consultation – The Agency, through reviewing proposed plans, policies, rules, or other pending and proposed programmatic actions, recognizes the need to assess whether such actions may impact American Indians/Alaska Natives and/or Tribes, as well as whether consultation should be implemented prior to making its decision or implementing its action. To such ends, the Agency strives to notify relevant Tribal Officials and pursue government-to-government consultation, provided that Tribal Officials also have the discretion to decide whether to pursue and/or engage in the consultation process.
4. Initiation – Written notification requesting consultation by an Agency or Tribe shall serve to initiate the consultation process. Written notification, at the very least, should:
 - a) Identify the proposed action to be consulted upon.
 - b) Identify personnel who are authorized to consult on behalf of the Agency or Tribe.
5. Process – The Agency, in order to engage in consultation, may utilize duly-appointed work groups, as set forth in the previous section, or otherwise the Agency Head or a duly-appointed representative may meet directly with Tribal Officials, or set forth other means of consulting with impacted Tribes as the situation warrants.
 - a) Consultation will be between the Agency Head and Tribal Officials or their delegated representatives with authority to negotiate on their behalf.
 - b) The Agency will make a good faith effort to invite for consultation all perceived impacted Tribes.
6. Limitations on Consultation –
 - a) This Policy will not diminish any administrative or legal remedies otherwise available by law to the Agency or Tribe.
 - b) The Policy does not prevent the Agency and Tribes from entering into Memoranda of Understanding, Intergovernmental Agreements, Joint Powers Agreements, professional service contracts, or other established administrative procedures and practices mandated by Federal, State or Tribal laws or regulations.

- c) The Agency retains the final decision making authority with respect to actions undertaken by the Agency and within Agency jurisdiction. In no way should this Policy impede the Agency's ability to manage its operations.
- d) Consultation with the Tribes is uniquely a government-to-government process with two main goals: (a) to reach consensus in decision-making; and (b) whether or not consensus is reached, to afford any party the opportunity to issue a dissenting opinion for the record, and more importantly to have honored each other's sovereignty.

Section VI. Dissemination of Policy

Upon adoption of this Policy, the Agency shall determine the appropriate method to distribute the Policy to all its employees.

Section VII. Amendments and Review of Policy

The Agency will meet periodically with Tribes to evaluate the effectiveness of this Policy, including the Agency's promotion of cultural competence. This Policy is a working document and may be revised as needed

Section VIII. Effective Date

This Policy shall become effective upon the date signed by the Department Secretary or the Agency Head.

Section IX. Sovereign Immunity

The Policy shall not be construed to waive the sovereign immunity of the State of New Mexico or any Tribe, or to create a right of action by or against the State of New Mexico or a Tribe, or any State or Tribal official, for failing to comply with this Policy

Section XI. Closing Statement/ Signatures

The Workers' Compensation Administration hereby adopts the State-Tribal Consultation, Collaboration and Communication Policy



Glenn R. Smith, Director
Workers' Compensation Administration

12/18/2009
Date

ATTACHMENT A

Sample Procedures for State-Tribal Work Groups

DISCLAIMER: The following illustration serves only as sample procedures for State-Tribal Work Groups. The inclusion of this Attachment does not mandate the adoption of these procedures by a work group. Whether these, or alternative procedures, are adopted remains the sole discretion of the Agency Head and/or as duly-delegated to the Work Group.

- A. **Membership** – The Work Group should be composed of members duly appointed by the Agency and as appropriate, participating Tribes, for specified purpose(s) set forth upon the Work Group’s conception. Continued membership and replacements to Work Group participants may be subject to protocol developed by the Work Group, or otherwise by the designating authority or authorities.

- B. **Operating Responsibility** – The Work Group should determine lines of authority, responsibilities, definition of issues, delineation of negotiable and non-negotiable points, and the scope of recommendations it is to disseminate to the Agency and Tribes to review, if such matters have not been established by the delegating authority or authorities.

- C. **Meeting Notices** – Written notices announcing meetings should identify the purpose or agenda, the Work Group, operating responsibility, time frame and other relevant tasks. All meetings should be open and publicized by the respective Agency and Tribal offices.

- D. **Work Group Procedures** – The Work Group may establish procedures to govern meetings. Such procedures can include, but are not limited to:
 - 1. Selecting Tribal and Agency co-chairs to serve as representatives and lead coordinators, and to monitor whether the State-Tribal Consultation, Collaboration and Communication Policy is followed;
 - 2. Defining roles and responsibilities of individual Work Group members;
 - 3. Defining the process for decision-making,
 - 4. Drafting and dissemination of final Work Group products;
 - 5. Defining appropriate timelines; and
 - 6. Attending and calling to order Work Group meetings.

- E. Work Group Products – Once the Work Group has created its final draft recommendations, the Work Group should establish a process that serves to facilitate implementation or justify additional consultation. Included in its process, the Work Group should recognize the following:
1. Distribution – The draft recommendation is subjected for review and comment by the Agency, through its Agency Head, Tribal Liaison, and/or other delegated representatives, and participating Tribes, through their Tribal Officials.
 2. Comment – The Agency and participating Tribes are encouraged to return comments in a timely fashion to the Work Group, which will then meet to discuss the comments and determine the next course of action. For example:
 - a) If the Work Group considers the policy to be substantially complete as written, the Work Group can forward the proposed policy to the Agency and participating Tribes for finalization.
 - b) If based on the comments, the Work Group determines that the policy should be rewritten, it can reinitiate the consultation process to redraft the policy.
 - c) If the Agency and participating Tribes accept the policy as is, the Work Group can accomplish the final processing of the policy.
- F. Implementation – Once the collaboration or consultation process is complete and the Agency and Tribes have participated in, or have been provided the opportunity to participate in, the review of the Work Group’s draft recommendations, the Work Group may finalize its recommendations. The Work Group co-chairs should distribute the Work Group’s final recommendations to the Agency, through its delegated representatives, and participating Tribal Officials. The Work Group should record with its final recommendation any contrary comments, disagreements and/or dissention, and whether its final recommendation be to facilitate implementation or pursue additional consultation.
- G. Evaluation – At the conclusion of the Work Group collaboration or consultation process, Work Group participants should evaluate the work group collaboration or consultation process. This evaluation should be intended to demonstrate and assess cultural competence of the Agency, the Work Group, and/or the process itself. The evaluation should aid in measuring outcomes and making recommendations for improving future work group collaboration or consultation processes. The results should be shared with the Agency, through its delegated representatives, and participating Tribal Officials.

