Module 4: Tribal Consultation

Module Objectives

Consultation with Indian tribes is an important part of the federal-tribal relationship. It requires knowledge about the legal requirements for consultation, as well as a basic understanding of tribal governments and the nuances in cross-cultural interaction with Indian tribes.

In this module, you will learn what consultation entails as well as the federal requirements for consultation. Finally, tips are provided to help you consult more effectively with Indian tribal governments.

- What is consultation?
- Federal responsibilities.
- Tips for effective consultation.

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What is Consultation?

Consultation is an enhanced form of communication that emphasizes trust, respect, and shared responsibility. It is an open and free exchange of information and opinions among parties which leads to mutual understanding and comprehension. Consultation is integral to a deliberative process that results in effective collaboration and informed decision-making.

What is Government-to-Government Consultation?

The government-to-government relationship, which is discussed in Module 2: Introduction to Tribal Concepts, is the basis for consultation. As you learned in Module 2, Indian tribes have a unique legal and political relationship with the federal government. One of the ways in which this unique relationship is expressed is through the process known as government-to-government consultation.

Government-to-government consultation takes place between two sovereigns, the federal government and an official representative of an Indian tribe. Government-to-government consultation, then, is a process of communication that provides Indian tribes an opportunity for meaningful and timely input before the federal government takes actions that have tribal implications.

How government-to-government consultation is carried out may vary from agency to agency. Any citizen may call a specific agency directly to determine whom to contact and how the agency arranges and conducts tribal consultation.

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Why We Consult?

Federal agencies are charged by federal law and policy with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of federal regulations, proposed legislation, and other policies or actions that have tribal implications.

Consultation is a critical component of a productive federal-tribal relationship. Furthermore, the courts have overturned federal decisions that affect Indian tribal governments made without adequate effort to engage tribes in consultation.

When We Consult

Consultation is needed at the early stages when policies, programs, or other activities that may affect Indian tribes are being considered by the federal government. Consultation is an ongoing process that may require repeated meetings or other forms of communications as the process continues.

Federal Statutes and Regulations

Many federal statutes and regulations require federal agencies to consult with Indian tribes. Some of these apply throughout the federal government while others apply only to activities within a specific unit of government.

Some of the important federal statutes and their implementing regulations that require consultation include:

- Indian Self-Determination and Education Assistance Act, Public Law 93-638, as amended (25 U.S.C. 450 et seq.)
- National Historic Preservation Act (NHPA) (16 U.S.C. 470 et seq.)
- Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001, et. seq.)

Executive Directives

Several presidents of the United States have issued directives reaffirming the government-to-government relationship and consultation between the federal government and Indian tribal governments.

Executive directives can be in the form of an executive order or a presidential memorandum. It is the responsibility of the federal agency to comply with and adhere to the principles outlined in the directive.

Directives that specify tribal consultation include:

- Presidential Memorandum: Tribal Consultation (November 5, 2009)
- Presidential Memorandum: Government to Government Relationship with Tribal Governments (September 23, 2004)
- Executive Order 13175: Consultation and Coordination with Indian Tribal Governments (November 6, 2000)
- Presidential Memorandum: Government-to-Government Relations with Native American Tribal Governments (April 29, 1994)
- Executive Order 13007: Sacred Sites (May 24, 1996)

As directed in the November 5, 2009, Presidential Memorandum, all federal agencies were required to develop plans for their compliance with Executive Order 13175, and to implement those plans. When questions arise regarding a possible consultation issue, federal employees should consult with their agency's tribal program director or tribal contact for further guidance on their agency's consultation policy.

Tips for Effective Consultation

Consultation is effective when the consulting governments are aware, and have a basic understanding, of cultural differences that the official representatives bring to the table. These tips are provided to help you during the consultation process but do not constitute a complete or exhaustive list of considerations.

Consultation

- Federal representatives need to ensure that they are consulting with the authorized representative of the tribal government.
- When a tribal government is consulted, it is neither required, nor expected that all of the tribe's issues can be resolved in its favor. However, the agency must listen and may not arbitrarily dismiss concerns of the tribal government. Rather, the agency must seriously consider and respond to all tribal concerns.
- Consultation must be an accountable process in order to ensure meaningful and timely input by tribal officials.
- Consultation is a dialogue between federal and tribal representatives which takes place before a decision is made. Simply making a presentation about what an agency plans to do is not consultation.
- If more than one tribe is participating in a consultation meeting, each tribe should be afforded the opportunity to privately caucus amongst their own delegation, with other tribal representatives, or with the federal agency.
- The government-to-government consultation process is exclusive to the federal and tribal representatives; non-federal entities may sometimes participate with prior permission.
- Agencies should strive to remove impediments to tribal participation in consultation whenever possible. Please keep in mind that tribes may be consulting with numerous federal agencies on various issues at the same time.
- Mutually agreed upon protocols should be developed with the consulting tribe for timely communication, cooperation, collaboration, and dispute resolution.

Tips for Effective Consultation (continued)

Communication

Communication is essential to effective consultation, but may require an understanding of tribal protocols. Tribal protocols are discussed in Module 5: Cultural Orientation and Working with Tribal Governments.

In addition to face-to-face meetings, communications may take place via emails, webinars, telephone calls, and letters.

Not all communications constitute consultation. The agency and the tribe should agree on protocols regarding how and when consultation will occur.

Information sharing is also part of effective communication.

Information

Tribes need pertinent information in order to determine whether they want to consult. If they choose to consult, the agency should ensure that they receive all relevant information generated throughout the consultation process.

Some examples of information that should be provided include:

- Background information explaining the subject matter or issue.
- Other agencies that may be involved or are necessary to the consultation.
- Relevant policies, regulations, statutes, and/or authorizing legislation.
- Funding and budget implications and constraints.
- Pertinent schedules and deadlines.
- Suggested meeting location, dates, and times for consultation.

Knowledge Check Introduction

Take a few minutes to check your understanding of some key concepts presented in this module.

Knowledge Check - Question 1

What is consultation? (Choose the best answer.)

A. An enhanced form of communication between the United States and federally recognized Indian tribes that emphasizes trust, respect, and shared responsibility.
B. A process in which the United States makes decisions affecting tribes prior to obtaining tribal input and then informs the tribes of its decisions.
C. An open and free exchange of information and opinions among parties, which leads to mutual understanding and comprehension prior to decision-making.
D. A, B, and C
E. A and C

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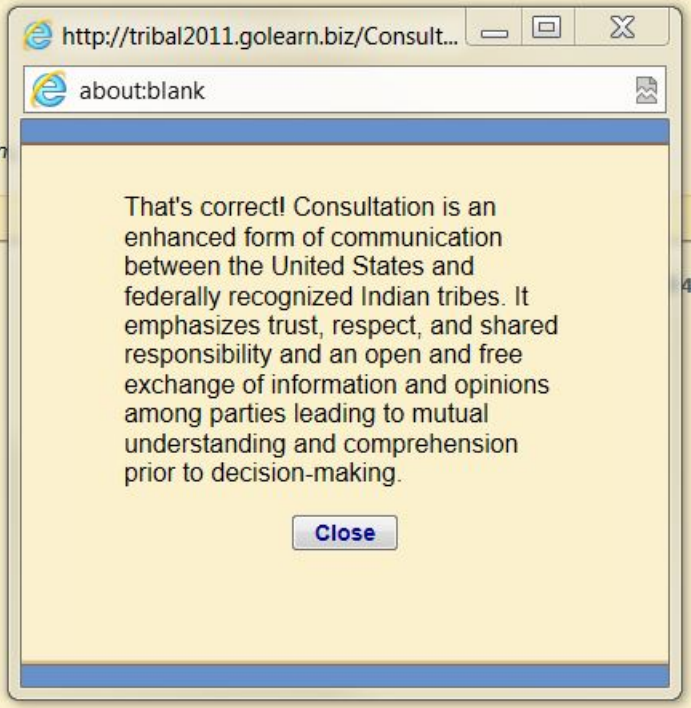
Select the correct answer. Then



Knowledge Check - Question 2

Federal representatives need to ensure that they are consulting with the authorized representative of the tribal government. (True or False)

A. True
B. False

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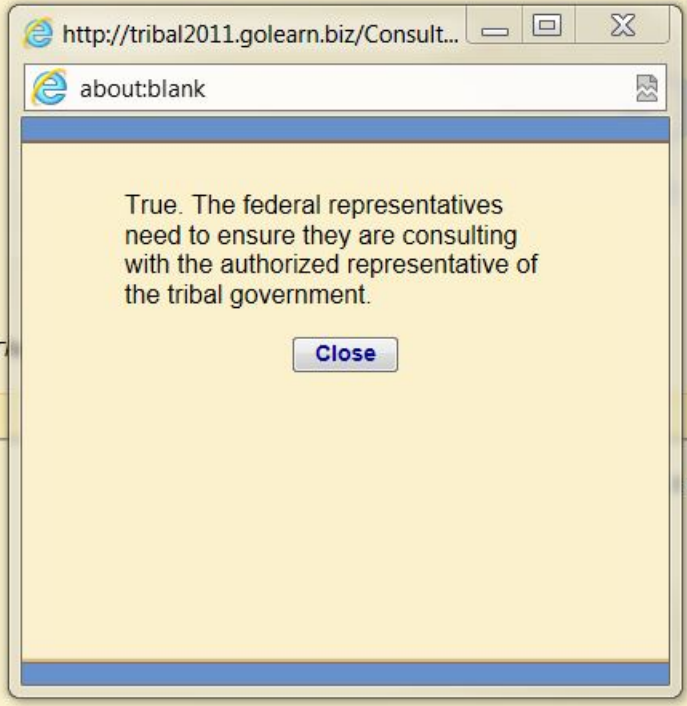

Select the correct answer. T

Knowledge Check - Question 3

When should government-to-government consultation between the United States and tribal governments occur? (Choose the best answer.)

A. At the late stages when policies, programs, or other activities of the United States that may affect Indian tribes are being considered for implementation.

B. At the early stages when policies, programs, or other activities of the United States that may affect Indian tribes are being considered for implementation.

C. When laws or policies require that the United States seek to consult with tribal governments.

D. A, B and C

E. B and C

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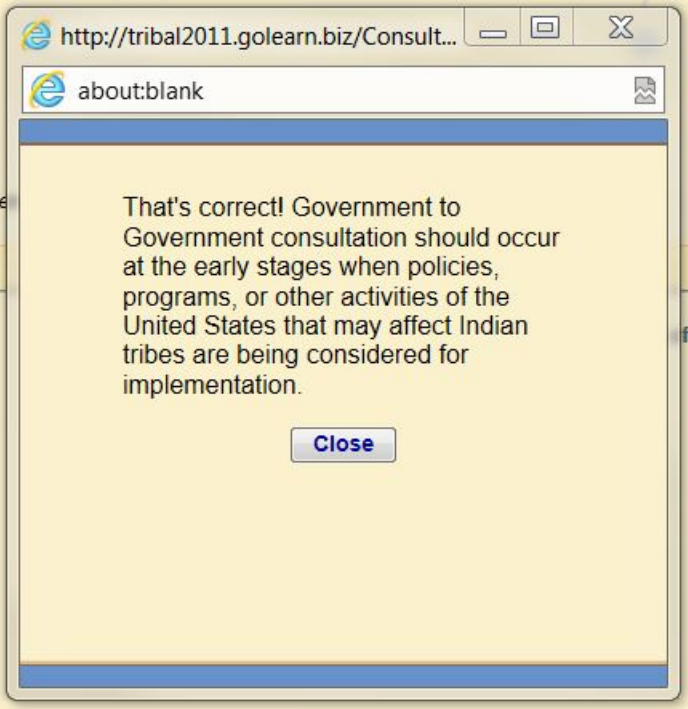

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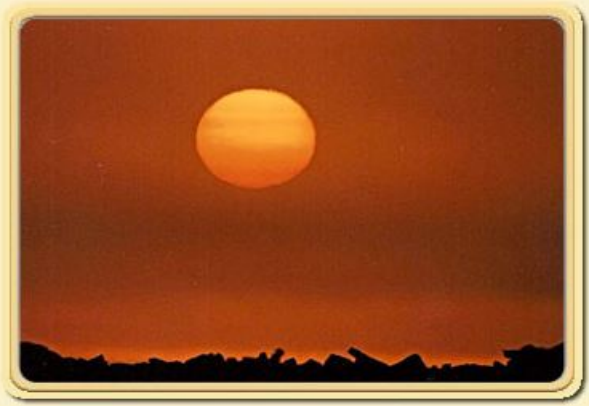
Summary

You will now begin the last module of this course.