

# U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

## TRIBAL CONSULTATION POLICY

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### 1. PURPOSE

The United States (U.S.) Department of Health and Human Services (HHS or Department) and Indian Tribes share the goal to establish clear policies to execute the government-to-government relationship between the Federal Government and Indian Tribes. True and effective consultation shall result in information exchange, mutual understanding, and informed decision-making on behalf of the Tribal governments involved and the Federal Government. The importance of consultation with Indian Tribes was recognized in Executive Order (EO) 13175 (Consultation and Coordination with Indian Tribal Governments) in 2000 and reaffirmed through Presidential Memoranda in 2004, 2009, 2021, and 2022. This policy implements the requirements of EO 13175, the Memorandum on Uniform Standards for Tribal Consultation, signed November 30, 2022, and serves to further strengthen HHS's consultation practices with Indian Tribes.

The goal of this policy includes, but is not limited to, eliminating health and human service disparities of American Indians and Alaska Natives (AI/AN), ensuring that access to critical health and human services is maximized, and to advance or enhance the social, physical, economic, and health status of Indians. To achieve this goal, and to the extent practicable and permitted by law, it is essential that Indian Tribes and HHS engage in open, continuous, and meaningful consultation.

This policy applies to all Operating and Staff Divisions of the Department (Divisions),

and shall serve as a guide for Indian Tribes to participate in all Department and Division policy development to the greatest extent practicable and permitted by law. All Division policies shall be consistent with this policy.

## **2. OBJECTIVES**

- To formalize the Administration's policy that HHS conduct consultation and seek Tribal input regarding the development and implementation of policies, regulations, and program activities that impact Indian Tribes.
- To establish requirements and expectations with respect to meaningful consultation and participation throughout HHS, including political and career leadership and staff.
- To ensure the requirement to consult may be identified by the Department or by an Indian Tribe(s) in accordance with this policy.
- To uphold the responsibility of HHS to consult with Indian Tribes on new and existing policies, programs, functions, services, and activities that have Tribal implications.
- To charge and hold HHS accountable for the implementation of this policy.
- To respond to Tribal requests including consultation, technical assistance, access to programs, data, resources, and collaborating with Tribal subject matter experts.
- To provide a single point of contact within HHS and its Divisions for Indian Tribes to consult with the Immediate Office of the Secretary (IOS), the Deputy Secretary, and Operating Division Principals. The Principal Advisor for Tribal Affairs, Office of Intergovernmental and External Affairs (IEA), and the Division Tribal points of contact will be responsible for compliance with this policy and ensuring timeframes identified in Section 9 are met.

## **3. BACKGROUND**

Since the formation of the Union, the U.S. has recognized Indian Tribes as sovereign nations. A unique government-to-government relationship exists between Indian Tribes and the Federal Government. This relationship is grounded in the U.S. Constitution, numerous treaties, statutes, Federal case law, regulations and executive orders that establish and define a trust relationship with Indian Tribes. This relationship is derived from the political and legal relationship that Indian Tribes have with the Federal Government and is not based upon race.

An integral element of this government-to-government relationship is Tribal consultation. The implementation of this policy is in recognition of this unique legal and political relationship, as affirmed in statutes and Presidential Orders/Memoranda, including but not limited to:

- Older Americans Act of 1965, Pub. L. 89-73, as amended
- Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, as amended
- Native American Programs Act, Pub. L. 93-644, as amended
- Indian Health Care Improvement Act, Pub. L. 94-437, as amended
- Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193
- Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, 25 U.S.C. §§ 5130-5131
- Presidential Memorandum for the Heads of Executive Departments and Agencies (April 29, 1994)
- Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (November 6, 2000)
- Presidential Memorandum on Government-to-Government Relationship with Tribal Governments (September 23, 2004)
- Presidential Memorandum on Tribal Consultation (November 5, 2009)
- Executive Order 13647, Establishing the White House Council on Native American Affairs (June 26, 2013)
- Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (January 26, 2021)
- Presidential Memorandum on Uniform Standards for Tribal Consultation (November 30, 2022)
- American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115 (February 17, 2009)
- Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. 111-3, 123 Stat. 8 (February 4, 2009)
- Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, 124 Stat. 119 (March 23, 2010)

#### **4. TRIBAL SOVEREIGNTY**

The inherent sovereignty of Indian Tribes was recognized by the Federal Government in the U.S. Constitution in 1787, establishing the government-to-government relationship. This relationship has been given form and substance by numerous treaties, laws, Federal case law, and executive orders, and reaffirms the right of Indian Tribes to self-govern and self-determination. These inherent sovereign powers are the basis for Indian Tribes' jurisdiction over their citizens and territory. The U.S. shall continue to work with Indian Tribes on a government-to-government basis to address issues concerning self-government, trust resources, treaties, reserved rights, and other rights.

This policy does not waive any Tribal government's rights and authority, including treaty rights, sovereign immunity, or jurisdiction. Additionally, this policy does not diminish any rights or protections afforded to AI/ANs. Indian Tribes' participation early and often in the development of programs, policies, regulations, and initiatives ensures relevant and culturally appropriate approaches to health and human services.

## **5. PHILOSOPHY**

The Department has a long-standing commitment to working on a government-to-government basis with Indian Tribes and understands their unique legal and political relationship with the United States. The Department is committed to strengthening the collaboration among its Divisions to address Tribal issues and promoting the principle that each Division and its political and career leadership bears responsibility for addressing Tribal issues, including consideration for Tribal treaty rights, reserved rights, and other rights, within the context of this policy.

The Department also recognizes that Tribal governance—and by extension the government-to-government relationship—is intrinsically informed by Indigenous knowledge, which is inclusive of relevant cultural norms and practices. HHS respects and strives to elevate Indigenous knowledge in its interactions with Tribal governments and through the Tribal consultation process.

## **6. POLICY**

Before any action is taken that will significantly affect Indian Tribes it is the HHS policy that, to the extent practicable and permitted by law, consultation with Indian Tribes will occur. Such actions refer to policies that:

1. Have Tribal implications, and
2. Have substantial direct effects on one or more Indian Tribes, or
3. On the relationship between the Federal Government and Indian Tribes, or
4. On the distribution of power and responsibilities between the Federal Government and Indian Tribes.

A Tribal government may also request consultation with a Division(s). When such request is received, the Division shall conduct an analysis, as soon as possible, to determine whether consultation is appropriate. If the request for consultation has Tribal implications, consistent with the definition in EO 13175, the Division shall follow the applicable requirements for consultation. The Division shall respond to the Indian Tribe within a reasonable time period.

Divisions may still engage in Tribal consultation even if they determine that a policy will not have Tribal implications, and should consider doing so, to the extent practicable and permitted by law, if they determine that a policy is of interest to a Tribe or Tribes.

Nothing in this policy waives the Government's deliberative process privilege. Examples of the government's deliberative process privilege are as follows:

1. The Department is specifically requested by members of Congress to respond to or report on proposed legislation, the development of such responses and of related policy is a part of the Executive Branch's deliberative process privilege and should remain confidential.

2. In specified instances where Congress requires the Department to work with Indian Tribes on the development of recommendations that may require legislation, such reports, recommendations or other products are developed independent of a Department position, the development of which is governed by Office of Management and Budget (OMB) Circular A-19.
  - A. Each HHS Division shall have an accountable process as defined in Sections 8 and 9 that will complement this policy to ensure meaningful and timely input by Indian Tribes in the development of policies that have Tribal implications. If Divisions require technical assistance in implementing these sections, IEA can provide and/or coordinate assistance.
  - B. To the extent practicable and permitted by law, no Division shall promulgate any regulation that has Tribal implications, or that imposes substantial direct compliance costs on Indian Tribes, or that is not required by statute, unless:
    1. Funds necessary to pay the direct costs incurred by the Indian Tribe in complying with the regulation are provided by the Federal Government; or
    2. The Division, prior to the formal promulgation of the regulation:
      - a. Consulted with Indian Tribes throughout all stages of the process of developing the proposed regulation;
      - b. Provided a Tribal summary impact statement in a separately identified portion of the preamble to the regulation as it is to be issued in the *Federal Register* (FR), which consists of a description of the extent of the Division's prior consultation with Indian Tribes, a summary of the nature of their concerns and the Division's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of Tribal officials have been met; and
      - c. Made available to the Secretary and the Director of OMB any written communications submitted to the Division by Tribal officials.
  - C. To the extent practicable and permitted by law, no Division shall promulgate any regulation that has Tribal implications and that preempts Tribal law unless the Division, prior to the formal promulgation of the regulation,
    1. Consulted with Tribal officials throughout all stages of the process of developing the proposed regulation;
    2. Provided a Tribal summary impact statement in a separately identified portion of the preamble to the regulation as it is to be issued in the FR, which consists of a description of the extent of the Division's prior consultation with Tribal officials, a summary of the nature of their

concerns and the Division's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of Tribal officials have been met; and

3. Made available to the Secretary any written communications submitted to the Division by Tribal officials.

- D. On issues relating to Tribal self-governance, Tribal self-determination, Tribal trust resources, or Tribal treaty and other rights, each Division shall make all practicable attempts where appropriate to use consensual mechanisms for developing regulations, including negotiated rulemaking.

## 7. CONSULTATION PARTICIPANTS AND ROLES

- **HHS Divisions:** The Department has numerous Divisions under its purview. Each of these Divisions share in the Department-wide responsibility to coordinate, communicate, and consult with Indian Tribes. All Divisions shall comply with this policy and develop and implement their own Tribal consultation policy, to the extent practicable and permitted by law.
- **HHS Division Principal(s):** The lead Federal officials of an HHS Division
- **Indian Organization:** It is useful for HHS to communicate with Indian Organizations to solicit Indian Tribe(s) advice and recommendations. The government does not participate in government-to-government consultations with these entities; rather these entities represent the interest of Indian Tribes when authorized by those Indian Tribes. These organizations by the sheer nature of their business serve and advocate Indian Tribal issues.
- **Indian Tribes:** The government-to-government relationship between the United States and Indian Tribes dictates that the principal focus for HHS consultation is Indian Tribes, individually and/or collectively. HHS, and its Divisions, will conduct Tribal consultations in a manner that prioritizes participation of official Tribal government leaders.
- **Office of Intergovernmental and External Affairs (IEA):** The IEA, in the Office of the Secretary, is responsible for Department-wide implementation and monitoring of EO 13175 for HHS Tribal consultation, including Regional Offices. The IEA serves as the Department's point of contact in accessing Department-wide information. It is IEA's mission is to facilitate communication regarding HHS initiatives as they relate to Tribal, State, and local governments. The IEA serves as the executive federal lead of the Secretary's Tribal Advisory Committee. The IEA will encourage the active participation of Indian Tribes in Tribal Consultation to the greatest extent practicable and permitted by law. In addition, IEA is the designated point of contact for the Department on consultation and coordination with the White House and the White House Council on Native American Affairs.

- **Secretary:** The Secretary is the lead Federal official for HHS and is responsible for implementing EO 13175 and this policy.
- **Secretary's Tribal Advisory Committee (STAC):** The STAC's primary purpose is to seek consensus, exchange views, share information, provide advice and/or recommendations, and facilitate any other interaction related to intergovernmental responsibilities or administration of HHS programs, including those that arise explicitly or implicitly under statute, policy, regulation, or EO. The role of STAC does not substitute for Tribal consultation.

## 8. TRIBAL CONSULTATION PROCESS

An effective consultation between HHS and Indian Tribes requires trust between all parties, which is an indispensable element in establishing a good consultative relationship. The degree and extent of consultation will depend on the identified critical event. A critical event may be identified by HHS and/or an Indian Tribe(s). Upon identification of an event significantly affecting one or more Indian Tribe(s), HHS will initiate consultation regarding the event. In order to initiate and conduct consultation, the following serves as a guideline to be used by HHS and Indian Tribes:

1. Identify the Critical Event: Complexity, implications, time constraints, and issue(s) (including policy, funding/budget development, programs, services, functions, and activities).
  2. Identify affected/potentially affected Indian Tribe(s).
  3. Determine Consultation Mechanism: The most useful and appropriate consultation mechanisms can be determined by HHS and/or Indian Tribe(s) after considering the critical event and Indian Tribe(s) affected/potentially affected. Consultation mechanisms include but are not limited to one or more of the following:
    - a. Mailings (formal notification including but not limited to Dear Tribal Leader Letters, e-mail alerts, and updates)
    - b. Teleconference and/or virtual sessions
    - c. Face-to-face meetings at the local, regional and national levels between the HHS and Indian Tribes
    - d. Roundtables
    - e. HHS Tribal Budget Consultations
    - f. Other regular or special HHS Division or program level consultation
- A. Communication Methods:** The determination of the critical event and the level of consultation mechanism to be used shall be communicated to affected/potentially affected Indian Tribe(s) using all appropriate methods and with as much advance notice as practicable. Generally, every effort will be made to provide at least 30 days' notice prior to a scheduled consultation. If exceptional circumstances or factors beyond the Department's control warrant a shorter period of advance notice, the reason why the standard notice or written comment period

could not be provided will be explained in communications to Indian Tribe(s). Communication methods include but are not limited to the following:

1. *Correspondence:* Written or electronic communications shall be issued within 30 calendar days of an identified critical event. The communication should clearly provide affected/potentially affected Indian Tribe(s) with detail of the critical event, the manner and timeframe in which to provide comment. The Department frequently uses a "Dear Tribal Leader Letter" (DTLL) format to notify individual Indian Tribes of consultation activities. Divisions should work closely with the Principal Advisor for Tribal Affairs, IEA, if technical assistance is required for proper format and protocols, current mailing lists, and content.
2. *Official Notification:* Within 30 calendar days, and upon the determination the consultation mechanism, proper notice of the critical event and the consultation mechanism used shall be communicated to affected/potentially affected Indian Tribe(s) using all appropriate methods including mailing, broadcast e-mail, FR, and other outlets. The FR is the most formal method of notice used by HHS for communication and/or consultation. Divisions should also communicate with HHS officials who may be knowledgeable about affected/potentially affected Indian Tribes and the location(s) affected by an action with Tribal implications, such as the Principal Advisor for Tribal Affairs, IEA, to ensure notification efforts are appropriately inclusive. At a minimum, the notice of consultation shall include:
  - a. Sufficient information on the topic to be discussed, in an accessible language and format, and context for the consultation topic;
  - b. Date, time, and location (including if virtual) of the consultation;
  - c. If consulting telephonically or virtually, phone numbers and links to join or register in advance;
  - d. Explanation of any time constraints known to the Division at that time, such as statutory deadlines;
  - e. Deadlines for any written comments on the topic;
  - f. Names and contact information for Division staff who can provide more information;
  - g. Appropriate available information related to the subject of consultation including, where consistent with applicable federal law, a proposed agenda, framing paper, and/or other relevant materials to assist in the consultation process.

Written comments will be accepted, and absent exceptional circumstances, the written comment period should be open for at least 30 days following the consultation. Upon the request of an Indian Tribe(s), or where it would serve Tribal interests, Divisions should consider adjusting deadlines for notice of consultations and/or accepting written comments.

3. *Meeting(s):* The Division shall convene a meeting, within 60 calendar days of



official notification, with affected/potentially affected Indian Tribe(s) to discuss all pertinent issues in a national, regional, and/or local forum, or as appropriate, to the extent practicable and permitted by law, when the critical event is determined to have substantial impact. The Division shall ensure that their leadership and/or their designee(s) or representative(s) with appropriate knowledge and, to the extent practicable, decision-making authority are present at the consultation.

4. *Receipt of Tribal Comment(s)*: The Division shall develop and use all appropriate methods to communicate clear and explicit instructions on the means and time frames for Indian Tribe(s) to submit comments and/or recommendations on the critical event, whether in person, by teleconference, virtual, and/or in writing and shall solicit the advice and assistance of the Principal Advisor for Tribal Affairs, IEA.
5. *Record of the Consultation*: The Division shall maintain a consultation record that includes: (i) a summary of the Tribal input received; (ii) a general explanation of how the Tribal input received influenced or was incorporated into the Department's decision resulting from the consultation; and (iii) if relevant, the general reasoning for why Tribal suggestions were not incorporated into the Department's decision or why consensus could not be attained.
6. *Reporting of Outcome*: The Division shall timely report to the affected Tribe(s) the outcome of the consultation within 90 calendar days of final consultation and decisions made as a result of the consultation. For ongoing issues identified during the consultation, the Division shall provide status reports throughout the year to IEA and Indian Tribe(s). To the extent permitted by applicable law, HHS and its Divisions shall seek to ensure that information designated as sensitive by a Tribal government is not publicly disclosed. The HHS and its Divisions will strive to obtain advance informed consent from Indian Tribe(s) for the use of sensitive information provided by the Indian Tribe, and shall inform Tribal leaders that certain Federal laws, including the Freedom of Information Act, may require disclosure of such information. For national and regional consultations, or if otherwise appropriate, Divisions should also consider publicly posting the consultation record to websites, dashboards, and other platforms to foster ease of reference and use by other agencies, employees, and processes, and to minimize burdens on Indian Tribes to provide similar input in multiple consultations. Decisions regarding whether to publicly post a record of consultation should be made with Tribal input.
7. *Division Point of Contact*: Each Division shall designate a primary point of contact for Tribal consultation matters who is responsible for advising Division leadership and staff on all matters pertaining to Tribal consultation. This individual will serve as the primary point of contact for Tribal officials

seeking to consult with the Division. The primary point of contact will coordinate consultation responsibilities with necessary and appropriate programs within that Division. The designated Division points of contact shall be maintained with IEA and shared appropriately.

8. *HHS Point of Contact*: The IEA serves as the designated primary point of contact for Department-level consultations and for the coordination and facilitation of Division-led consultations. The IEA is responsible for advising on Tribal consultation matters and coordinating consultation responsibilities within the Department as needed. Tribal officials may contact IEA with Tribal consultation questions.

**B. HHS Response to Official Tribal Correspondence:** Official correspondence from an Indian Tribe may come in various forms, but a resolution is the most formal declaration of an Indian Tribe's position for the purpose of Tribal consultation. In some instances, Indian Tribes will submit official correspondence from the highest elected and/or appointed official(s) of the Tribe. HHS will give equal consideration to these types of correspondence. Once HHS receives an official Indian Tribe correspondence and/or resolution, the Secretary/Deputy Secretary and/or their designee should respond appropriately. The process for official correspondence to Indian Tribes is described below:

1. Correspondence Submitted by Indian Tribes to HHS: Shall be officially entered into HHS correspondence control tracking system and referred to the appropriate Division(s).
2. Acknowledgement of Correspondence: The HHS and/or Divisions shall provide acknowledgement to Indian Tribes within 15 working days of receipt.
3. Official Response to an Identified Critical Event: The HHS shall provide an official response to Indian Tribes that includes the Division responsible for follow up, the process for resolution of the critical event, and timeline for resolution.
  - a. If an identified critical event is national in scope the Department shall to the extent practicable respond to the request within 60 working days or less.
  - b. If a critical event is specific to a single Indian Tribe the Department shall to the extent practicable respond to the request within 45 working days or less.

**C. Policy Development through Tribal Consultation Process:** The need to consult on the development or revision of a policy may be identified from within HHS, an HHS Division or may be identified by Indian Tribes. This need may result from external forces such as Executive, Judicial, or Legislative Branch actions or otherwise. Once the need to consult on development or revision of a policy is identified the consultation process must begin in accordance with critical events and consultation mechanisms described above. Divisions may request technical

assistance from IEA for the Tribal consultation process.

**D. Schedule for Consultation:** Divisions must establish and adhere to a formal schedule of meetings (please see section 8(A)(3)) to consult with Indian Tribes and their representatives concerning the planning, conduct, and administration of applicable activities. Divisions must involve Tribal representatives in meetings at every practicable opportunity. Divisions are encouraged to establish additional forums for Tribal consultation and participation, and for information sharing with Tribal leadership. Consultation schedules should be coordinated with IEA to avoid duplications or conflicts with other national Tribal events. Divisions should make every effort to schedule their consultations in conjunction with the annual Regional Tribal consultations.

## 9. **CONSULTATION PROCEDURES AND RESPONSIBILITIES**

The HHS Tribal consultative process shall consist of direct communications with Indian Tribes, and Indian Organizations as applicable, in various ways:

### A. **Consultation Parties and Mechanisms**

Consultation occurs when:

1. The Secretary/Deputy Secretary, or their designee(s), meets and/or exchanges written correspondence with a Tribal President, Chair, Governor, Chief, Principal Chief and/or elected/appointed Indian Tribal leader, or their designee to discuss issues or policy concerning either party.
2. A Division Principal, or their designee(s), meets or exchanges written correspondence with an Indian Tribal representative designated by an elected/appointed Tribal leader to discuss issues, concerns, or policy of either party.
3. The Secretary/Deputy Secretary/Division, or their designee(s), meets or exchanges written correspondence with a Tribal representative designated by an elected/appointed Indian Tribal leader to discuss issues, concerns, or policy of either party.

### B. **Consultation Procedures**

1. **Tribal:** Specific consultation mechanisms that will be used to consult with an Indian Tribe(s) include but are not limited to mailings, meetings, teleconference, virtual sessions, and roundtables.
  - a. An Indian Tribe(s) can initiate consultation, i.e., meet one-on-one with a Division to consult on issues specific to that Indian Tribe.
  - b. Divisions will initiate consultation to solicit official Indian Tribe(s)' comments and recommendations on policy and budget matters affecting Indian Tribe(s). These consultations at roundtables, forums, and meetings will provide the opportunity for meaningful dialogue and effective participation by Indian Tribe(s).

- c. Other types of national, regional, and intertribal meetings and/or conferences occur which may not be considered consultation, but these meetings may provide opportunities to gather input, to share information; including listening sessions, conducting workshops, and providing technical assistance to Indian Tribes.
2. **HHS:** Consultation mechanisms that will be used to consult with Indian Tribe(s) include but are not limited to mailings, meetings, teleconferences, virtual sessions, and roundtables. The HHS has various organizational avenues in which Tribal issues and concerns are addressed. These avenues include the IEA, Regional Offices, and Divisions.
- 1. *Office of Intergovernmental and External Affairs*
    - a. The HHS's Tribal Budget Consultation is designed to solicit Indian Tribes' health and human services priorities and program needs. The consultation provides an opportunity for Indian Tribes to articulate their recommendations on budgets, regulations, policies, and legislation.
      - i. Upon completion of consultation, HHS will document and notify Indian Tribes on the proceedings, noting positions and following-up on all issues raised that would benefit from ongoing consultation with Indian Tribe(s) within 45 calendar days.
  - 2. *Regional Offices*
    - a. Regional Offices will work with Indian Tribes and Indian Organizations within their respective regional area in facilitating the Tribal perspective with HHS programs, services, functions, activities and planning Tribal regional consultations. Divisions have various geographic coverage, however all Divisions, regardless of geographic location, are intended to serve Indian Tribe(s) in their respective regions.
    - b. Regional Offices/Directors will work collaboratively with the HHS Division lead regional representative in communicating and coordinating on issues and concerns of Indian Tribes in those respective regions or areas.
    - c. Regional Offices/Directors will work collaboratively to facilitate Tribal- State relations as they affect Indian Tribes in the delivery of HHS programs and services.
    - d. Regional Tribal consultations are held to solicit Indian Tribes' priorities and needs on health and human services. The consultations also provide Indian Tribes with a regional perspective and shall be held, at least but not limited to, annually or biannually with status reports to Indian Tribe(s) as appropriate throughout the year.

1. Annual Regional Tribal consultations will occur between May and September of every year. These consultations shall provide an opportunity to receive the Indian Tribes' priorities for budget, regulation, legislation, and other policy matters.
2. Regional consultations shall be used as a venue for Divisions to coordinate their consultation responsibilities in a manner that is feasible and convenient for Indian Tribes.
3. Regional Offices/Directors will contact Indian Tribes and Indian Organizations in their respective regions to assist in consultation planning. This will ensure inclusion of all perspectives and issues for the consultation, which shall include evaluation components for receipt of verbal and written comments from participating Indian Tribes, Divisions, and other invited participants to obtain immediate feedback on the consultation process.
4. Protocol will ensure that the highest-ranking official present from each respective Indian Tribe is given the opportunity to address the consultation first, followed by other elected officials, those designated by official letter to represent their respective Indian Tribe and representatives of Indian Organizations.
  - a. Official letter from the Indian Tribe designating a representative(s) must be presented to Regional Director before the consultation begins.
5. Regional Offices/Directors will seek the assistance of Tribal leaders to assist with moderating the consultation.
6. Regional Offices/Directors will report at each regional Tribal consultation regarding what substantive and procedural actions were taken as a result of the previous year's Tribal consultation and describe how HHS addressed the consultation evaluation comments received previously by participants. The Region shall include, to the extent possible, senior HHS leadership.
7. Tribal recommendations received therein shall be formally recorded and made available to Indian Tribes. The official record of every regional consultation will be left open for 30 calendar days after the conclusion of the in-person/virtual/telephonic consultation portion for submission of additional comments/materials from Indian Tribe(s).
8. Regional Offices/Directors will provide a summary no later than 45 calendar days after the conclusion of the consultation.
9. Once the consultation is complete, all recommended follow-up actions shall be tracked and reported, quarterly, to the region's Indian Tribes, and included in HHS's Annual Tribal Affairs Report.

#### 4. *HHS Divisions*

- a. Divisions will work collaboratively with the Indian Tribes on the development of consultations, one-on-one meetings, roundtables, teleconferences, virtual meetings, and annual consultations.
- b. Divisions will work collaboratively with Indian Tribes on developing and implementing their respective Tribal consultation policy or plan.
- c. Divisions will coordinate with IEA on their respective consultation activities to ensure that HHS and its Divisions are conducting Tribal consultation and coordinating in a manner that is feasible and conducive to the needs of Indian Tribes.
- d. Divisions will participate in the HHS Tribal Budget Consultation and annual Regional Tribal consultations with Indian Tribes.
- e. Divisions will work collaboratively to facilitate Tribal-State relations as they affect Indian Tribes and AI/ANs in the delivery of HHS programs and services.
- f. Divisions will provide staff and supervisors with training or communication concerning tribal consultation requirements
- g. Once a Division consultation is complete, all recommended follow-up actions shall be tracked and reported to Indian Tribes and included in HHS's Annual Tribal Affairs Report.

3. **States:** In some instances, the authority and program funding for HHS programs is administered by the States on behalf of Indian Tribes. Divisions will consult with the Office of the General Counsel to determine whether these arrangements are based on statutes, regulations, or policy decisions. If there is no clear regulatory or statutory basis mandating that States administer the program on behalf of the Indian Tribe(s), the Division will consult with the affected Indian Tribe(s) as soon as practicable to review alternate options.

If there is a statutory basis mandating that the State administer the program and associated funding on behalf of the Indian Tribe(s) the Division will examine the permissibility of encouraging or mandating a term requiring Tribal consultation as a condition of the State's receipt of program funds. If such a term may be mandated regarding State administered programs affecting Indian Tribes, it should be incorporated. If it is not permissible, the Division shall facilitate consultation between the State and affected Tribe(s).

In addition, whenever practicable and permitted by law, the Division shall notify Indian Tribes of funds administered by the State that the Division believes should be allocated to Indian Tribes. HHS shall explore legal mechanisms to directly fund Indian Tribes.

The Division shall encourage the State to recognize that Indian Tribal members are entitled to benefits provided to all State citizens and should be provided the same access to State administered or funded services. To the

extent possible, data shall be collected and reported about the number of Tribal members served by the State with federal resources.

**10. ESTABLISHMENT OF JOINT TRIBAL/FEDERAL WORKGROUPS AND/OR TASKFORCES**

The need to develop or revise a policy may be identified from within the Division or by an Indian Tribe(s). When new or revised national policy, regulations or legislation affects an Indian Tribe(s), an Indian Tribe(s) or HHS may recommend the establishment of a workgroup and/or task force. In response, HHS may establish such a workgroup and/or task force to develop recommendations on various technical, legal, regulatory, or policy issues. In such cases, see ADDENDUM 1, which outlines the process for establishing such aforementioned workgroups and/or task forces.

All final recommendations made by the taskforce or workgroup should be presented to the Secretary. Before any final policy decisions are adopted within HHS, the proposed policy shall be widely publicized and circulated for review and comment to Indian Tribes and within HHS. Once the consultation process is complete and a proposed policy is approved and issued, the final policy shall be broadly distributed to all Indian Tribes.

**11. HHS BUDGET FORMULATION**

The Department shall consult with Indian Tribes throughout the development of the HHS budget formulation process to the greatest extent practicable and permitted by law. The Secretary shall require the Divisions to include a process in their Tribal consultation policy/plan that assures Tribal priorities and needs and requests are identified and considered in the formulation of the HHS budget.

- **Annual Tribal Budget Consultation (ATBC):** A Department-wide Tribal budget and policy consultation will be conducted annually to give Indian Tribes the opportunity to present their budget and policy priorities and recommendations to the Department in preparing to receive the budget requests of its Divisions. The consultation is convened no later than April of each year as a means for final input in the development of the Department's budget submission to OMB.
  1. At a minimum, HHS conducts annually one ATBC to ensure the active participation of Indian Tribes in the formulation of the HHS performance budget request as it pertains to Indian Tribes, which will be held at the HHS Headquarters in Washington, DC or virtually no later than April each year.
  2. HHS will notify Indian Tribes of the date of the consultation no later than 90 days prior to the consultation.
  3. The consultation will not exceed two days.
  4. Each Division Principal and budget officer will attend their Division's appropriate consultation(s).
  5. Each Division will participate in other portions of the ATBC that affect their respective Division.
  6. The IEA will provide a transcript of the consultation to Indian Tribes no later than 30 calendar days after the consultation has concluded.

7. Within 90 calendar days IEA will provide Indian Tribes a summary of the ATBC, including a summary of the Indian Tribes' issues/concerns presented at the consultation.
8. The HHS will seek the assistance of Tribal leaders to assist with moderating the ATBC. The HHS will also contact Indian Organizations in the consultation planning to ensure inclusion of all perspectives and issues.
9. Presentation protocol will ensure that the highest ranking official from each respective Indian Tribe is given the opportunity to address the consultation first, followed by other elected officials, those designated by their elected official to represent their respective Indian Tribes and representatives of Tribal and Indian Organizations.
  - a. Official letter from the Indian Tribe designating a representative must be presented to IEA before the consultation begins.

## **12. TRIBAL CONSULTATION PERFORMANCE AND ACCOUNTABILITY**

The HHS and its Divisions will measure and report results and outcomes of their Tribal consultation performance to fulfill the government-to-government relationship with Indian Tribes consistent with section 8 and section 13.

The HHS mission, performance objectives, and delivery of services are designed to address the health and well-being of AI/ANs. Divisions' policies shall be consistent with this purpose.

Divisions and Indian Tribes will promote a collaborative atmosphere to gather, share, and collect data and other information to demonstrate the effective use of Federal resources in a manner that is consistent with OMB performance measures and requirements.

Divisions shall consult, to the greatest extent practicable and permitted by law, with Indian Tribes before taking actions that substantially affect Indian Tribes, including regulatory practices on Federal matters and unfunded mandates.

## **13. EVALUATION AND REPORTING**

The consultation process and activities conducted within this policy should result in a meaningful outcome for the Department and Indian Tribes. To effectively evaluate the results of a consultation activity and the Department's ability to incorporate Indian Tribes' consultation input, the Department shall measure, on an annual basis, the level of satisfaction of the Indian Tribes.

The Department, in collaboration with Indian Tribes, shall develop and use appropriate evaluation measures to assess consultation processes.

The IEA will seek Tribal feedback to assist in measuring and evaluating the implementation and effectiveness of this policy. The IEA will assess the HHS Tribal Consultation Policy on an ongoing basis and use comments and/or recommendations from Indian Tribes and Federal participants to determine whether amendment to the



policy may be required. If amendment is needed, IEA will convene a workgroup of the STAC.

Each year, IEA shall develop the Department's Annual Tribal Affairs Report. Divisions and HHS Regions are required to submit their calendar year Tribal consultation information to the IEA within 90 calendar days from the end of the calendar year. IEA shall compile the submissions and distribute the information to Indian Tribes within 60 calendar days from receipt of the reports. The IEA, Regional Directors, and Divisions shall report the Department's views on the level of participation of Tribal leaders during the ATBC, Regional Tribal consultations, and other consultations from that year. The report shall include evaluative comments and provide advice and recommendations regarding the Tribal consultation process. The IEA shall post on the HHS website, the Department's Annual Tribal Affairs Report, including the evaluation results.

#### **14. CONFLICT RESOLUTION**

The intent of this policy is to promote respectful partnership with Indian Tribes that enhance the Department's ability to address issues, needs and problem resolution. Agencies shall consult with Indian Tribes to establish a resolution process under which Indian Tribes bring forward concerns regarding implementation of this policy. However, Indian Tribes and HHS may not always agree and inherent in the government-to-government relationship, Indian Tribes may elevate an issue of importance to a higher decision-making authority.

Nothing in the policy creates a right of action against the Department for failure to comply with this policy.

#### **15. TRIBAL WAIVER**

The Department and Divisions shall establish, review, and streamline the processes under which an Indian Tribe may apply for waivers of statutory, regulatory, policy, or procedural requirements.

Each Division shall, to the extent practicable and permitted by law;

- Consider any application by an Indian Tribe for a waiver with a general view toward increasing opportunities for utilizing flexible approaches at the Indian Tribal level when the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate; and
- Render a decision upon a complete application for a waiver within 120 calendar days of receipt, or as otherwise provided by law or regulation. If the application for waiver is not granted, the Division shall provide the applicant with timely written notice of the decision and the reasons therefore.

Waiver requests for statutory or regulatory requirements apply only to statutory or regulatory requirements that are discretionary and subject to waiver by the Division.

#### **16. HHS EMPLOYEE TRAINING**

HHS requires Department employees to complete annual Tribal consultation training. This training shall include, at minimum, review of EO 13175, the President's Memorandum on Uniform Standards for Tribal Consultation, and this policy. Tribal consultation training modules established by the Secretary of the U.S. Department of the Interior and Director of the U.S. Office of Personnel Management may also be used to satisfy the annual training requirement.

## 17. **EFFECTIVE DATE**

This policy is effective on the date of the signature by the Secretary of HHS.

This policy replaces the HHS Tribal Consultation Policy signed on December 14, 2010, and it applies to all Divisions. Divisions shall complete necessary revisions to their existing Division consultation policy/plan to conform to the revised HHS Tribal Consultation Policy. Divisions without a consultation policy shall use the guidance of this policy until the development of their respective policy.

## 18. **DEFINITIONS**

- **Agency** – Any authority of the United States that is an "agency" under 44 U.S.C. § 3502(1) other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. § 3502(5).
- **Communication** – The exchange of ideas, messages, or information, by speech, writing, virtual or electronic means.
- **Consultation** – Consultation is a formal and meaningful government-to-government process involving communication, which emphasizes trust, respect, and shared responsibility. It is an open and free exchange of information, ideas, and positions among parties, which leads to mutual understanding and comprehension. Consultation is integral to a deliberative and timely process, which results in effective collaboration and informed decision making with the ultimate goal of reaching consensus on issues and policies affecting Indian Tribes.
- **Coordination and Collaboration** – Working and communicating together in a meaningful government-to-government effort to create a positive outcome.
- **Critical Events** – Planned or an unplanned event(s) that has or may have Tribal implication(s), e.g., statutory requirements, regulations, issues, policies, or budgets which may come from any level within HHS.
- **Deliberative Process Privilege** – Is a privilege exempting the government from disclosure of government materials containing opinions, recommendations, and other communications that are part of the decision-making process within the Department.
- **Executive Order and Presidential Memorandum** – An order or memorandum

issued by the government's executive on the basis of authority specifically granted to the executive branch (as by the U.S. Constitution or Congressional Act).

- **Indian** – Indian means a person who is a member or citizen as defined by an Indian Tribe pursuant to 25 U.S.C. § 5130-5131. Throughout this policy, Indian is synonymous with American Indian/Alaska Native.
- **Indian Organizations** – Any national or regional organization whose board is comprised of Federally recognized Indian Tribes and/or elected/appointed Tribal leaders, and the organization's purpose is to advocate for its members. The Federal government does not participate in government-to-government consultation with these entities; rather these organizations advocate the interests of Indian Tribes when authorized by those Indian Tribes.
- **Indian Tribe/Tribal Government** – An 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. §§ 5130-5131.
- **Joint Tribal/Federal Workgroups and/or Task Forces** – A group composed of individuals who are elected Tribal officials, appointed by Federally recognized Tribal governments and/or Federal agencies to represent their interests while working on a particular policy, practice, issue, initiative, and/or concern.
- **Policies with Tribal Implications** – Refers to regulations, statutes, 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.
- **Tribal Sovereignty** – The ultimate source of political power from which all specific political powers are derived.
- **To the Extent Practicable and Permitted by Law** – Refers to situations where the opportunity for consultation is limited because of constraints outside of the authority and resources of the government.
- **Treaty** – A legally binding and written agreement that affirms the government-to-government relationship between two or more nations and is the supreme law of the land in Article VI of the U.S. Constitution.
- **Tribal Officials** – Elected or duly appointed officials of Indian Tribal governments or authorized intertribal organizations.
- **Tribal Organization** – The recognized governing body of any Indian Tribe; any

legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: Provided, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian Tribe shall be a prerequisite to the letting or making of such contract or grant. 25 U.S.C. § 5304(l).

- **Tribal Resolution** – A formal expression or will of an official Tribal governing body.

## 19. ACRONYMS

|                  |  |
|------------------|--|
| <b>AI/AN:</b>    | American Indian/Alaska Native                    |
| <b>ASFR:</b>     | Assistant Secretary for Finance and Resources    |
| <b>Division:</b> | Staff Division and/or Operating Division         |
| <b>EO:</b>       | Executive Order                                  |
| <b>FACA:</b>     | Federal Advisory Committee Act                   |
| <b>FR:</b>       | <i>Federal Register</i>                          |
| <b>HHS:</b>      | U.S. Department of Health and Human Services     |
| <b>IEA:</b>      | Office of Intergovernmental and External Affairs |
| <b>NPRM:</b>     | Notice of Proposed Rule Making                   |
| <b>OMB:</b>      | Office of Management and Budget                  |
| <b>U.S.:</b>     | United States                                    |
| <b>U.S.C.:</b>   | United States Code                               |

/ Xavier Becerra /

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Xavier Becerra, Secretary  
U.S. Department of Health and Human Services

Date

9/12/23

## ADDENDUM 1

### **Establishing Joint Tribal/Federal Workgroups and/or Tasks Forces:**

Although the special "Tribal-Federal" relationship is based in part on the government-to-government relationship, it is frequently necessary for HHS to establish Joint Tribal/Federal Workgroups and/or Task Forces to complete work needed to develop new policies, practices, issues, and/or concerns and/or modify existing policies, practices, issues, and/or concerns. These Joint Tribal/Federal Workgroups and/or Task Forces do not take the place of Tribal consultation, but offer an enhancement by gathering individuals with extensive knowledge of a particular policy, practice, issue and/or concern to work collaboratively and offer recommendations for consideration by Federally recognized Indian Tribes and Federal agencies. The subsequent work products and/or outcomes developed by the Joint Tribal/Federal Workgroup and/or Task Forces will be handled in accordance with this policy. These Workgroups will be Federal Advisory Committee Act (FACA), 5 U.S.C. App., Pub. L. 92-463, section 2, Oct. 6, 1972, 86 Stat. 770, compliant unless exempt in accordance with section 204(b) of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, approved March 22, 1995, 109 Stat. 48)).

1. Meeting Notices: The purpose, preliminary charge, time frame, and other specific tasks shall be clearly identified in the notice. All meetings should be open and widely publicized ideally through IEA or the Division initiating the policy.
2. Workgroups: Membership should be selected based on the responses received from prospective HHS Regions/Indian Health Service Areas as a result of the notice, and if possible, should represent a cross-section of affected parties. The HHS staff may serve in a technical advisory capacity.

### **A. Participation**

1. Membership Notices: The HHS shall seek nominations from Indian Tribes to participate in taskforces and/or workgroups. The Secretary or designee shall select workgroup primary and alternate members that represent various regions and/or views of Indian Country. Membership of these workgroups shall be in compliance with FACA unless the workgroup is exempt.
2. Attendance at Meetings: Workgroup members must make a good faith effort to attend all meetings. Other individuals may accompany workgroup members, as that member believes is appropriate to represent his/her interest, however the FACA requirements will be adhered to at meetings unless exempt. Consistent lack of attendance can be cause for removal.

### **B. Workgroup Protocols**

The workgroup may establish protocols to govern the meetings. Such protocols will include, but are not limited to the following:

1. Selection of workgroup co-chairs, if applicable

2. Role of workgroup members and other attendees, including technical/legal advisors
3. Process for decision-making (consensus based or otherwise)

### **C. Developing a Workgroup Charge**

Prior to the workgroup formulation, the HHS will develop an initial workgroup charge in enough detail to define the policy concept and workgroup purpose. The workgroup may develop recommendations for the final workgroup charge for the approval of the HHS Secretary, the IEA Director, or the Division Principal.

### **D. Process for Workgroup Final Products**

Once a final draft of the work product has been created by the workgroup the following process will be used to facilitate Tribal consultation on the draft work product:

1. Upon completion, the draft documents will be distributed to Indian Tribes and Indian Organizations for review and comment and to allow for maximum possible review.
2. Comments will be returned to the workgroup, which will meet in a timely manner to discuss the comments and determine the next course of action.
3. At the point that the proposed draft policy is complete as written, the workgroup will forward the draft document to the HHS Secretary as final recommendation for consideration.
4. The workgroup will also recognize any contrary comment(s) in its final report and explain the reasoning for not accepting the comment(s).
5. If it is determined that the policy should be rewritten, the workgroup will rewrite and begin consultation again at the initial step above.
6. If the proposed draft policy is generally acceptable to the HHS Secretary, final processing of the policy by the workgroup will be accomplished.

### **E. Recommendations and Policy Implementation**

All final recommendations made by the workgroup should be presented to the Secretary. Before any final policy decisions are adopted within HHS, the proposed policy shall be widely publicized and circulated for review and comment to Indian Tribes, Indian Organizations, and within HHS. Once the consultation process is complete and a proposed policy is approved and issued, the final policy shall be broadly distributed to all Indian Tribes.