# U. S DEPARTMENT OF HEALTH AND HUMAN SERVICES TRIBAL CONSULTATION POLICY


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## 1. PURPOSE

The U. S. Department of Health and Human Services (HHS) and Indian Tribes share the goal to establish clear policies to further 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 affirmed through Presidential Memoranda in 1994, 2004 and 2009, and an Executive Order (EO) in 2000.

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

This policy applies to all Divisions of the Department and shall serve as a guide for Tribes to participate in all Department and Division policy development to the greatest extent practicable and permitted by law.

## 2. BACKGROUND

Since the formation of the Union, the United States (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 that consultation occurs with Indian Tribes. The Executive Memorandum titled "Tribal Consultation" reaffirmed this government-to-government relationship with Indian Tribes on November 5, 2009. The implementation of this policy is in recognition of this special relationship.

This special relationship is affirmed in statutes and various Presidential Executive Orders including, but not limited to:

- Older Americans Act, P.L. 89-73, as amended;
- Indian Self-Determination and Education Assistance Act, P.L. 93-638, as amended;
- Native American Programs Act, P.L. 93-644, as amended;
- Indian Health Care Improvement Act, P.L. 94-437, as amended;
- Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L.104-193;
- Presidential Executive Memorandum to the Heads of Executive Departments dated April 29, 1994;
- Presidential Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, November 6, 2000; and
- Presidential Memorandum, Government-to-Government Relationship with Tribal Governments, September 23, 2004
- Presidential Memorandum, Tribal Consultation, November 5, 2009
- American Recovery and Reinvestment Act of 2009, P.L. 111-5, 123 Stat. 115 (Feb. 17, 2009).
- Children's Health Insurance Program Reauthorization Act of 2009, P.L. 111-3, 123 Stat. 8 (Feb. 4, 2009).
- Patient Protection and Affordable Care Act of 2010, P.L. 111-148, 124 Stat. 119 (Mar. 23, 2010).

## 3. TRIBAL SOVEREIGNTY

This policy does not waive any Tribal Governmental rights and authority, including treaty rights, sovereign immunities or jurisdiction. Additionally, this policy does not diminish any rights or protections afforded other American Indians or Alaskan Natives (AI/AN) or entities under Federal law.

The special government-to-government relationship between the Federal Government and Indian Tribes, established in 1787, is based on the Constitution, and has been given form and substance by numerous treaties, laws, Supreme Court decisions, and Executive Orders, and reaffirms the right of Indian Tribes to self-government and self-determination. Indian Tribes exercise inherent sovereign powers 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 Tribal self-government, Tribal trust resources, Tribal treaties and other rights.

Tribal self-government has been demonstrated to improve and perpetuate the government-to-government relationship and strengthen Tribal control over Federal funding that it receives, and its internal program management. Indian Tribes participation in the development of public health and human services policy ensures locally relevant and culturally appropriate approaches to public issues.

## 4. 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.

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 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 Operating and Staff Division (Division) shall have an accountable process as defined in Sections 8 and 9 of 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, the Office of Intergovernmental Affairs (IGA) 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 to 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.

## 5. PHILOSOPHY

Indian Tribes have an inalienable and inherent right to self-government. Self-government means government in which decisions are made by the people who are most directly affected by the decisions. As sovereign nations, Indian Tribes exercise inherent sovereign powers over their members, territory and lands.

HHS has a long-standing commitment to working on a government-to-government basis with Indian Tribes and to work in partnership with AI/ANs. Also, HHS is committed to enhancing the collaboration among its Divisions to address Tribal issues and promoting the principle that each Division bears responsibility for addressing Tribal issues within the context of their mission.

IGA is identified as the responsible HHS entity, located in the Immediate Office of the Secretary (IOS) for monitoring compliance with EO 13175 and the Department Tribal Consultation Policy. In addition, the Secretary has charged the Intradepartmental Council on Native American Affairs (ICNAA) to meet regularly and no less then 2 times a year and

to provide advice on all HHS policies that relate to Indian Tribes as well as instances where HHS activities relate to Native Americans. Regional consultation sessions have been developed as a systematic method to regularly consult with Indian Tribes on HHS programs at field locations. The goal of these efforts is to focus HHS on Tribal issues, to continue to enhance the government-to-government relationship between Indian Tribes and the U.S., as well as to make resources of HHS more readily available to Indian Tribes.

## 6. OBJECTIVES

1. To formalize the Administration's policy that HHS seek consultation and the participation of Indian Tribes in the development of policies and program activities that impact Indian Tribes.

2. To establish a minimum set of requirements and expectations with respect to consultation and participation throughout HHS management, the Office of the Secretary (OS) Division, and Regional levels.

3. The need to consult may be identified by the Department or by an Indian Tribe(s). Any time the Tribe(s) or the Department identifies a critical event the Department may initiate any necessary consultation in accordance with this policy.

4. To identify events and partnerships that HHS would participate with Indian Tribe(s) and Tribal/Indian Organizations that establish and foster partnerships with HHS which complement and enhance consultation with Indian Tribes.

5. To promote and develop innovative consultation methods with Indian Tribes in the development of HHS policy and regulatory processes.

6. To uphold the responsibility of HHS to consult with Indian Tribes on new and existing health and human service policies, programs, functions, services and activities that have Tribal implications.

7. To charge and hold accountable each of the HHS Operating Division Heads for the implementation of this policy.

8. To be responsive to requests by an Indian Tribe(s) request for consultation and technical assistance in obtaining HHS resources.

9. To charge the HHS Operating Divisions with the responsibility for enhancing partnerships with Indian Tribes which will include, requests for technical assistance, access to programs and resources, as well as collaborating with Tribal subject matter expertise.

10. To provide a single point of contact within HHS and its Operating Divisions for Indian Tribes at the highest level which would have access to the IOS, the Deputy Secretary, and Operating Division Heads. The Principal Advisor for Tribal Affairs and the Division Tribal points of contact will be responsible for compliance with this policy and ensuring timeframes identified in section 9 are met.

## 7. CONSULTATION PARTICIPANTS AND ROLES

1. **Indian Tribes**: The government-to-government relationship between the U.S. and Federally recognized Indian Tribes dictates that the principal focus for HHS consultation is Indian Tribes, individually or collectively.

2. **Indian Organizations:** At times it is useful that the HHS 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 organizations represent the interest of Indian Tribes when authorized by those Tribes These organizations by the sheer nature of their business serve and advocate Indian Tribes issues and concerns that might be negatively affected if these organizations were excluded from the process.

3. **Office of Intergovernmental Affairs (IGA)**: IGA is responsible for Department-wide implementation and monitoring of EO 13175 for HHS Tribal consultation. IGA serves as the Department's point of contact in accessing department-wide information. The single point of contact within the IGA for Indian Tribes and other Tribal/Indian organizations, at a level with access to all HHS Divisions, is the Principal Advisor for Tribal Affairs. As a part of the IOS, IGA's mission is to facilitate communication regarding HHS initiatives as they relate to Tribal, State, and local governments. IGA is the Departmental liaison to States and Indian Tribes, and serves the dual role of representing the States and Tribal perspective in the Federal policymaking process, as well as, clarifying the Federal perspective to States and Indian Tribes, including Tribal consultation.

4. **Assistant Secretary for Finance and Resources (ASFR)**: ASFR is the lead office for budget consultation for the overall departmental budget request.

5. **HHS Divisions**: The Department has numerous Staff Divisions and Operating Divisions under its purview. Each of the these Divisions share in the Department-wide responsibility to coordinate, communicate and consult with Indian Tribes on issues that affect these governments. All Operating Divisions shall establish a Tribal consultation policy to comply with the HHS Policy. All Divisions are responsible for conducting Tribal consultation to the extent practicable and permitted by law on policies that have Tribal implications.

6. **Intradepartmental Council on Native American Affairs(ICNAA)**: The ICNAA is charged with: (1) develop and promote an HHS policy to provide greater access and quality services for AI/AN/NAs throughout the Department; (2) promote implementation of HHS policy and Division plans on consultation with Indian Tribes in accordance with statutes and EOs; (3) promote an effective, meaningful AI/AN/NA policy to improve health and human services for AI/AN/NAs; (4) develop a comprehensive Departmental strategy that promotes self-sufficiency and self-determination for all Indian Tribes and AI/AN/NA people; (5) promote the Tribal/Federal Government-to-government relationship on an HHS-wide basis in

accordance with EO 13175; and (6) operate in accordance with policy and timeframes identified within ICNAA charter and as directed by the Secretary and the ICNAA Executive Leadership.

7. **Regional Offices**: The ten (10) HHS Regional Offices share in the Department-wide responsibility to consult, coordinate and communicate with Indian Tribes on issues that affect Indian Tribes and HHS programs, services and resources available to Indian Tribes through States. The Regional Directors are the Secretary's immediate representatives in the field for the HHS. Each of the Regional Office(s) shall conduct an annual regional Tribal consultation meeting with Indian Tribes in their respective regions. Additional meetings may be conducted if requested by the Regional Director or an Indian Tribe(s) within the Region. Further, the Regional Directors will work closely with the respective Indian Tribes and State Governments to assure continuous coordination and communication between Tribes and States. The Regional Office Directors will promote and comply with this policy and its timeframes identified in Section 9.

## 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 utilized 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
    b) Teleconference
    c) Face-to-Face Meetings at the Local, Regional and National levels between the HHS and Indian Tribes.
    d) Roundtables
    e) Annual HHS Tribal Budget and Policy Consultation Sessions.
    f) Other regular or special HHS Division or program level consultation sessions.

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. These methods include but are not limited to the following:

1. *Correspondence:* Written 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 HHS 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, IOS/IGA 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 utilized 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 HHS form of notice used for consultation.

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.

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 on the critical event, whether in person, by teleconference, and/or in writing and shall solicit the advice and assistance of the Principal Advisor for Tribal Affairs, IOS/IGA.

5. *Reporting of Outcome*: The Division shall report on the outcomes of the consultation within 90 calendar days of final consultation. For ongoing issues identified during the consultation, the Division shall provide status reports throughout the year to IOS/IGA and Indian Tribe(s).

A. **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: HHS and/or Divisions shall provide acknowledgement to Indian Tribes within 15 working days of receipt.
3. Official Response to an identified critical event: HHS shall provide an official response to Indian Tribes that includes: the Division head 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.

B. **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. HHS Divisions may request technical assistance from IGA for the Tribal consultation process.

C. **Schedule for Consultation:** Divisions must establish and adhere to a formal schedule of meetings 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 IGA to avoid duplications or conflicts with other national Tribal events. HHS Divisions should make every effort to schedule their consultations in conjunction with the Annual Regional Tribal Consultation Sessions.

## 9. CONSULTATION PROCEDURES AND RESPONSIBLITIES

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:**
1. When the HHS Secretary/Deputy Secretary, or their designee, 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 concerning either party.

2. When an HHS Division Head, or their designee, meets or exchanges written correspondence with an Indian Tribal representative designated by an elected/appointed Tribal leader to discuss issues or concerns of either party.

3. When an HHS Regional Director, who is the Secretary's representative in the field, meets or exchanges written correspondence with an elected/appointed Indian Tribal Leader, or their designee to discuss issues or concerns of either party.

4. When the Secretary/Deputy Secretary/HHS Division Head, or their designee, meets or exchanges written correspondence with a Tribal representative designated by an elected/appointed Indian Tribal leader to discuss issues or concern 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 and roundtables.
   a. An Indian Tribe(s) has the ability to initiate consultation, i.e. meet one-on-one with an HHS Division Head or designated representative to consult on issues specific to that Indian Tribe.
   b. HHS Division Heads will initiate consultation to solicit official Indian Tribe(s)' comments and recommendations on policy and budget matters affecting Indian Tribe(s). These sessions at roundtables, forums and meetings will provide the opportunity for meaningful dialogue and effective participation by Indian Tribe(s).
   c. National/Regional Inter-Tribal Forums: Other types of meetings and/or conferences occur which may not be considered consultation sessions, but these meetings may provide opportunities to share information, conduct workshops, and provide 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 and roundtables. HHS has various organizational avenues in which Tribal issues and concerns are addressed. These avenues include the OS, the ICNAA, Regional Offices, and Divisions.

   1. *Office of the Secretary*
      a. The HHS National Tribal Consultation Sessions are designed to solicit Indian Tribes' health and human services priorities and program needs. The Sessions provide 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 90 calendar days.

   2. *ICNAA*
      a. The ICNAA represents the internal HHS team providing consistent direction across the Divisions for AI/AN/NA issues. One of the primary responsibilities of ICNAA is to solicit Tribal input in establishing Tribal policy and budget priorities and recommendations for Divisions.

The health and human service priorities established by Indian Tribes are used to inform the development of the Divisions' annual performance goals and measures for improving health and human services, which are linked to their budget requests.

3. *Regional Offices*
   a. Regional Offices will work with the 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 consultation sessions. HHS Divisions have various geographic coverage, however all HHS Divisions, regardless of geographic location, are intended to serve Indian Tribe(s) in their respective locations.

   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 Consultation Sessions are held to solicit Indian Tribe(s)' priorities and needs on health and human services. The sessions also provide Indian Tribes with a regional perspective and shall be held, at least but not limited to, annually with status reports to Indian Tribe(s) as appropriate throughout the year, or at least biannually.
      1. Regional Consultations will occur between February and April of every year.
      2. Regional Consultations shall be utilized 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 the planning of the session. This will ensure inclusion of all perspectives and issues for the session.
      4. Protocol will ensure that the highest ranking official present from each respective Indian Tribe is given the opportunity to address the session 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 must be presented to Regional Director before the session begins.
      5. Regional Offices/Directors will seek the assistance of Tribal Leaders to assist with moderating the annual regional consultation session.

6. The official record of every regional session will be left open for 30 calendar days after the conclusion of the session for submission of additional comments/materials from Indian Tribe(s)
7. Regional Offices/Directors will provide a summary no later than 45 calendar days after the consultation of the session.

4. *HHS Divisions*
   a. Divisions will work collaboratively with the Indian Tribes on the development of consultation meetings, one-on-one meetings, roundtables, teleconferences and annual sessions.
   b. Divisions will work collaboratively with Indian Tribes on developing and implementing their respective Tribal Consultation Policy or Plan.
   c. Divisions will coordinate with IGA on their respective consultation activities in order to ensure that HHS and its Divisions are conducting Tribal consultation coordinating in a manner that is feasible and conducive to the needs of Indian Tribes.
   d. Divisions will participate in both the Annual Tribal Budget and Policy Consultation Session 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.

3. **States:** In some instances the authority and program funding for HHS programs is administered by the States on behalf of Indian Tribes. The 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 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.

   The Division shall also 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 since Tribal members are citizens of

the State(s). 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.

## 11. HHS BUDGET FORMULATION

HHS 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.

A. **HHS Annual Tribal Budget and Policy Consultation Session (ATBPCS):** A Department-wide Tribal budget and policy consultation session will be conducted annually to give Indian Tribes the opportunity to present their budget and policy priorities and recommendations to the Department as HHS prepares to receive the budget requests of its Divisions. The session is convened in March 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 ATBPCS 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 no later than March each year.
2. HHS will notify Tribes of the date of the consultation no later than 90 days prior to the session.
3. The session will not exceed two days.
4. Each Operating Division Head/Deputy and budget officer will attend their agency's appropriate session(s).
5. Each Operating Division Head/Deputy will participate in other portions of the ATBPCS that affect their respective division.
6. IGA/ASFR will provide a summary of the session to Indian Tribes no later than 30 calendar days after the session has concluded.
7. Within 90 calendar days IGA shall post the transcript of the ATBPCS with a summary of the Indian Tribes' issues/concerns presented at the session.
8. HHS will seek the assistance of Indian Tribal Leaders to assist with moderating the ATBPCS. HHS will also contact Indian Organizations in the planning of the session in order to ensure inclusion of all perspectives and issues.
9. Presentation protocol will ensure that the highest ranking official from each respective Tribe is given the opportunity to address the session first, followed by

other elected officials, those designated by their elected official to represent their respective Indian Tribes and representatives of Indian/Tribal Organizations.

i. Official letter from the Indian Tribe designating a representative must be presented to IGA before the session begins.

B. **Performance Budget Formulation:** HHS IGA will ensure the active participation of Indian Tribes and Indian Organizations in the formulation and throughout the HHS performance budget request as it pertains to Indian Tribes to the greatest extent practicable and permitted by law.

C. **Budget Information Disclosure:** HHS provides Indian Tribes the HHS budget related information on an annual basis: appropriations, allocation, expenditures, and funding levels for programs, services, functions, and activities.

## 12. TRIBAL CONSULTATION PERFORMANCE AND ACCOUNTABILITY

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.

Parts of the HHS mission and performance objectives are designed to address the health and well-being of AI/ANs by providing for effective health and human services and by fostering strong, sustained advances in the sciences underlying medicine, public health and social services.

The Divisions shall utilize the Tribal Consultation Policy to address HHS's mission and performance objectives with respect to AI/ANs. HHS and its Divisions will follow the goals and objectives of the seated Secretary and Administration.

Divisions and Indian Tribes will also 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, RECORDING OF MEETINGS AND REPORTING

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

1. Divisions should develop and utilize appropriate evaluation measures to assess Indian Tribes' responses to Department consultation conducted during a specific period to determine if the intended purpose of the consultation was achieved and to receive recommendations to improve the consultation process.

a. The Divisions will maintain a record of the consultation, evaluate whether the intended results were achieved, and report back to the affected Indian tribe(s) on the status or outcome, including, but not limited to, the annual sessions conducted below.

2. At a minimum, HHS Regional Directors will conduct an Annual Regional Tribal Consultation to consult with Indian Tribes.
   a. These sessions shall provide an opportunity to receive the Indian Tribe's priorities for budget, regulation, legislation, and other policy matters.
   b. Consultation Sessions shall include evaluation components for receipt of verbal and written comments from participating Indian Tribes, HHS Divisions, and other invited participants to obtain immediate feedback on the consultation process for the session conducted.
   c. The Divisions and the Regional Directors will report at each regional Tribal consultation session regarding what substantive and procedural actions were taken as a result of the previous Tribal consultation session and describe how HHS addressed the consultation evaluation comments provided received by participants.
   d. All national and regional consultation meetings and recommended actions shall be formally recorded and made available to Indian Tribes.
   e. Once the consultation process is complete, and any policy decision is finalized, all recommended follow-up actions adopted shall be implemented and tracked by the appropriate Regions and/or Divisions and reported to the Indian Tribes in the IGA Annual Tribal Consultation Report.
   f. Unless otherwise specified, the IGA Annual Consultation Report shall provide an annual reporting mechanism for this purpose and all HHS Divisions are required to participate in providing information for this report.

3. IGA will seek Tribal feedback to assist in measuring and evaluating the implementation and effectiveness of this Policy. IGA will assess the Department Tribal Consultation Policy on an ongoing basis and utilize comments from Indian Tribes and Federal participants to determine whether amendment to the Policy may be required. If amendment is needed, IGA will convene a Tribal-Federal workgroup.

4. Divisions are required to submit to IGA their fiscal year Tribal consultation information within 90 calendar days from the end of the fiscal year. IGA shall compile the Division submissions, and publish and distribute the information to the Indian Tribes within 60 calendar days from receipt of the Division reports. The IGA, Regional Directors and Divisions shall also report the Department's views on the level of attendance and response from Tribal leaders during the Annual Tribal Budget and Policy Consultation Session and the Annual Regional Tribal Consultation Sessions, including evaluative comments, and provide advice and recommendations regarding the Tribal consultation process. The IGA shall post on the HHS website, the IGA Annual Tribal Consultation Report, including the evaluation results.

## 14. CONFLICT RESOLUTION

The intent of this policy is to promote 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 clearly defined conflict resolution process under which Indian Tribes bring forward concerns which have a substantial direct effect. 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 or separate 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

Divisions shall review and streamline the processes under which 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. Each Division shall, to the extent practicable and permitted by law, 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. EFFECTIVE DATE

This policy is effective on the date of the signature by the Secretary of Health and Human Services.

This policy replaces the Tribal Consultation Policy signed on February 1, 2008, and it applies to all Operating Divisions and Staff Divisions. Operating Divisions shall complete necessary revisions to their existing Division consultation policy/plan to conform to the revised Department Tribal Consultation Policy. Operating Divisions without a consultation policy shall utilize the guidance of the OS policy until the development of their respective policy.

## 17. DEFINITIONS

1. **Agency** – Any authority of the United States that is an "agency" under 44 USC 3502(1) other than those considered to be independent regulatory agencies, as defined in 44 USC 3502 (5).

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

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

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

5. **Critical Events** – Planned or an unplanned event that has or may have a substantial impact on Indian Tribe(s), e.g., issues, polices, or budgets which may come from any level within HHS.

6. **Deliberative Process Privilege** – Is a privilege exempting the government from disclosure of government agency materials containing opinions, recommendations, and other communications that are part of the decision-making process within the agency.

7. **Executive Order** – An order issued by the Government's executive on the basis of authority specifically granted to the executive branch (as by the U.S. Constitution or a Congressional Act).

8. **Federally Recognized Tribal governments** – Indian Tribes with whom the Federal Government maintains an official government-to-government relationship; usually established by a Federal treaty, statute, executive order, court order, or a Federal Administrative Action. The Bureau of Indian Affairs (BIA) maintains and regularly publishes the list of Federally recognized Indian Tribes.

9. **HHS Tribal Liaisons** – HHS staff designated by the head of an HHS Division that are knowledgeable about the Division's programs and budgets, and have ready access to senior HHS Division leadership, and are empowered to speak on behalf of that Division for AI/AN/NA programs, services, issues, and concerns.

10. **Indian** – Indian means a person who is a member of an Indian tribe as defined in 25 U.S.C. 479a. Throughout this policy, Indian is synonymous with American Indian/Alaska Native.

11. **Indian Organizations**: 1). Those Federally recognized tribally constituted entities that have been designated by their governing body to facilitate DHHS communications and consultation activities. 2). Any regional or national organizations whose board is comprised of Federally recognized Tribes and elected/appointed Tribal leaders. The government does not participate in government-to-government consultation with these entities; rather these organizations represent the interests of Tribes when authorized by those Tribes.

12. **Indian Tribe** –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. 479a."

13. **Intradepartmental Council on Native American Affairs (ICNAA)** – Authorized by the Native American Programs Act of 1974 (NAPA), as amended. The ICNAA serves primarily to perform functions and develop recommendations for short, intermediate, or long-term solutions to improve AI/AN/NA policies and programs as well as provide recommendations on how HHS should be organized to administer services to the AI/AN/NA population.

14. **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 and/or concern.

15. **Native American (NA)** – Broadly describes the people considered indigenous to North America.

16. **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.

17. **Self Government** – Government in which the people who are most directly affected by the decisions make decisions.

18. **Sovereignty** – The ultimate source of political power from which all specific political powers are derived.

19. **Substantial Direct Compliance Costs** – Those costs incurred directly from implementation of changes necessary to meet the requirements of a Federal regulation. Because of the large variation in Tribes, "substantial costs" is also variable by Indian Tribe. Each Indian Tribe and the Secretary shall mutually determine the level of costs that represent "substantial costs" in the context of the Indian Tribe's resource base.

20. **To the Extent Practicable and Permitted by Law** – Refers to situations where the opportunity for consultation is limited because of constraints of time, budget, legal authority, etc.

21. **Treaty** – A legally binding and written agreement that affirms the government-to-government relationship between two or more nations.

22. **Tribal Government** – An American Indian or Alaska Native Tribe, Band, Nation, Pueblo, Village or Community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 USC 479a.

23. **Tribal Officials** – Elected or duly appointed officials of Indian Tribes or authorized inter-Tribal organizations.

24. **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. **Tribal Resolution** – A formal expression of the opinion or will of an official Tribal governing body which is adopted by vote of the Tribal governing body.

26. **Tribal Self–Governance** – The governmental actions of Tribes exercising self-government and self-determination.

## 18. ACRONYMS

| | |
|---|---|
| **AI/AN:** | American Indian/Alaska Native |
| **AI/AN/NA:** | American Indian/Alaska Native/Native American |
| **ASFR:** | Assistant Secretary for Finance and Resources |
| **BIA:** | Bureau of Indian Affairs |
| **Division:** | Staff Division and/or Operating Division |
| **EO:** | Executive Order |
| **FACA:** | Federal Advisory Committee Act |
| **FR:** | *Federal Register* |
| **HHS:** | U.S. Department of Health and Human Services |
| **ICNAA:** | Intradepartmental Council on Native American Affairs |
| **IGA:** | Office of Intergovernmental Affairs |
| **IOS:** | Immediate Office of the Secretary |
| **NPRM:** | Notice of Proposed Rule Making |
| **OMB:** | Office of Management and Budget |
| **OS:** | Office of the Secretary |
| **U.S.:** | United States |
| **U.S.C.:** | United States Code |

Kathleen Sebelius

December 14, 2010

**Kathleen Sebelius**
**Secretary**
**U.S. Department of Health and Human Services**

**Date**

## 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) compliant unless exempt.

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 IGA 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. HHS staff may serve in a technical advisory capacity.

A. Participation:
   1. Membership Notices: HHS shall seek nominations from Indian Tribes to participate in taskforces and/or workgroups. The Secretary shall select workgroup 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. Appointment of Alternates: Each primary representative may appoint an alternate by written notification. In cases where an elected Tribal Leader (primary representative) appoints an alternate who is not an elected official, and the primary member can not attend a workgroup meeting, the alternate is permitted to represent the primary member and will have the same voting rights as the primary member.

   3. 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 FACA requirements will be adhered to at meetings unless exempt

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

3. Process for decision-making (consensus based or otherwise)

4. 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. The workgroup may develop recommendations for the final workgroup charge for the approval of the HHS Secretary, the IGA Director or the Division head.

C. 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 informally to Indian Tribes and Indian Organizations for review and comment and to allow for maximum possible informal 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 considered to be substantially 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 informal consultation again at the initial step above.

6. If the proposed policy is generally acceptable to the HHS Secretary, final processing of the policy by the workgroup will be accomplished.

D. 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.