



DEPARTMENT OF HEALTH & HUMAN SERVICES

Substance Abuse and Mental
Health Services Administration

Center for Mental Health Services
Center for Substance Abuse
Prevention
Center for Substance Abuse
Treatment
Rockville MD 20857

OCT 1 2006

Dear Tribal Leader:

I am pleased to enclose the second draft of the Substance Abuse and Mental Health Services Administration (SAMHSA) Tribal Consultation Policy (TCP) for your review and comment. This past spring, while participating in Regional Tribal Consultation Sessions hosted by the Department of Health and Human Services (HHS), I shared the first revised draft SAMHSA-TCP with you for comment. Some tribal recommendations and comments from the first review are now reflected in the enclosed second draft.

The second draft includes additional revisions made by a TCP Technical Team (comprised of tribal leaders, tribal representatives and key SAMHSA staff) and other revisions resulting from an internal review by the SAMHSA Executive Leadership Team (ELT).

We are respectfully requesting that you provide any comments on the enclosed second draft of the SAMHSA-TCP within a 90-day period that ends on December 31, 2006. When the comment period has ended, we will convene the TCP Technical Team to review the tribal comments and assist us in finalizing our policy. Our goal is to have the SAMHSA-TCP signed by February 2007.

There are two options for you to choose from in sending your comments back to us:

- (1) by posting them on the SAMHSA Web site at: <http://www.samhsa.gov/tribal/index.aspx>;
- or
- (2) by regular mail addressed to:

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Rockville, MD 20857

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I have made it a personal commitment to introduce a new tribal agenda at SAMHSA that includes improved access for Tribes to SAMHSA grants, establishing a TCP and involving more senior staff on tribal issues, including our newly hired Senior Advisor for Tribal Affairs. Making the necessary changes to the existing draft TCP in order for it to be more closely aligned with the Department-wide HHS-TCP is a good starting point. If you are interested in reviewing the HHS Tribal Consultation Policy, it can be found at <http://www.hhs.gov/ofta/docs/FnlCnsltPlcywl.pdf>.

I look forward to receiving your comments on this important Federal-Tribal Policy document and expect to transmit our final Tribal Consultation Policy to Tribal Leaders in 2007.

Sincerely,



Eric B. Broderick, D.D.S., M.P.H.
Acting Deputy Administrator
Assistant Surgeon General

Enclosure

1 **SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION**
2 **TRIBAL CONSULTATION POLICY (DRAFT)**
3

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21 **I. INTRODUCTION AND PURPOSE**

22 The Department of Health and Human Services Tribal Consultation Policy (HHS-TCP),
23 provides that consultation with Indian Tribes and Tribal Organizations occur to the extent
24 practicable and permitted by law before any action is taken that will significantly affect
25 Indian Tribes. In accordance with Section 16 of the HHS-TCP, effective January 14,
26 2005, this document establishes the Substance Abuse and Mental Health Services
27 Administration Tribal Consultation Policy (SAMHSA-TCP) regarding consultation with
28 Indian Tribes. The SAMHSA-TCP provides guidance for working effectively with
29 Indian Tribes to maximize access to services, programs and resources within SAMHSA.

30 The SAMHSA-TCP acknowledges and affirms common goals with other HHS Divisions,
31 Indian Tribes, Tribal Organizations, Indian Organizations, and Native Organizations to:
32 1) eliminate health and human services disparities faced by American Indians and Alaska
33 Natives (AI/AN); 2) maximize access to substance abuse and mental heath services; and
34 3) achieve health equity for all AI/AN people and communities.

35 **II. BACKGROUND**

36 Since the formation of the Union, the United States (U.S.) has recognized Indian Tribes
37 as sovereign nations. A unique government-to-government relationship exists between
38 Indian Tribes and the Federal Government. This relationship is grounded in numerous
39 treaties, statutes, and executive orders as well as political, legal, moral, and ethical
40 principles. This relationship is not based upon race, but rather, is derived from the
41 government-to-government relationship. The Federal Government has enacted numerous
42 regulations that establish and define a trust relationship with Indian Tribes.

1 An integral element of this government-to-government relationship is that consultation
2 occurs with Indian Tribes. This policy applies to all SAMHSA Centers and Offices.
3 SAMHSA shall provide an opportunity for Indian tribes to participate in policy
4 development to the greatest extent practicable and permitted by law. An Executive
5 Memorandum entitled “Government-to-Government Relationship with Tribal
6 Governments” reaffirmed this government-to-government relationship with Indian Tribes
7 on September 23, 2004. The implementation of this policy is in recognition of this
8 special relationship.

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

- 11 A. Older Americans Act, P.L. 89-73, as amended;
- 12 B. Indian Self-Determination and Education Assistance Act, P.L. 93-638, as
13 amended;
- 14 C. Native Americans Programs Act, P.L. 93-644, as amended;
- 15 D. Indian Health Care Improvement Act, P.L. 94-437, as amended;
- 16 E. Personal Responsibility and Work Opportunity Reconciliation Act of 1996,
17 P.L.104-193;
- 18 F. Presidential Executive Memorandum to the Heads of Executive Departments
19 dated April 29, 1994;
- 20 G. Presidential Executive Order (EO) 13175, Consultation and Coordination with
21 Indian Tribal Governments, November 6, 2000; and
- 22 H. Presidential Memorandum, Government-to-Government Relationship with
23 Tribal Governments, September 23, 2004
- 24 I. Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986,
25 as amended Sec. 4201 [26 U.S.C. 2401 note] SHORT TITLE.;
- 26 J. Indian Child Protection and Family Violence Prevention Act, P.L. 101-630.

27
28 SAMHSA adheres to the HHS-TCP which states that consultation is “an enhanced form
29 of communication which emphasizes trust, respect and shared responsibility. It is an
30 open and free exchange of information and opinion among parties which leads to mutual
31 understanding and comprehension. Consultation is integral to a deliberative process
32 which results in effective collaboration and informed decision-making.” The importance
33 of consultation with Indian Tribes was affirmed through Presidential Memoranda in 1994
34 and 2004, and Executive Order 13175 in November 2000.

35 SAMHSA recognizes its unique relationship with Indian Tribes. SAMHSA’s goal is to
36 assure meaningful involvement of Indian Tribes in decision-making on SAMHSA
37 policies that have tribal implications as defined in Section 16, Definition 19, of this
38 SAMHSA-TCP, including substance abuse and mental health services. SAMHSA
39 provides opportunities for Indian Tribes to interact with SAMHSA on relevant and
40 critical issues impacting the health and social well-being of AI/AN people. The
41 implementation of this policy is a critical component of SAMHSA’s commitment to
42 fulfill its role in assuring that Indian Tribes and AI/AN communities are safe and healthy.

1 SAMHSA abides by Presidential EOs and regulations the Federal Government has
2 enacted that establish and define a trust relationship with Indian Tribes.

3 **SAMHSA Statutes:**

- 4 • Public Health Service Act Section 506A authorizes the Secretary to make grants
5 to provide alcohol and drug prevention or treatment services for American Indians
6 and Native Alaskans.
- 7 • Section 506A of the Public Health Service Act Section 1933(d) of the Public
8 Health Service Act permits one American Indian tribe (Red Lake Indians of
9 Minnesota) to receive a direct grant under the Substance Abuse Prevention and
10 Treatment Block Grant.

11 **III. TRIBAL SOVEREIGNTY**

12 This policy does not waive any governmental rights of Indian Tribes, including treaty
13 rights, sovereign immunities or jurisdiction. Additionally, this policy does not diminish
14 any rights or protections which are afforded to other AI/AN persons or entities under
15 Federal law.

16 Our Nation, under the law of the U.S. and in accordance with treaties, statutes, EOs, and
17 judicial decisions, has recognized the right of Indian Tribes to self-government and self-
18 determination. Indian Tribes exercise inherent sovereign powers over their members and
19 territory. The U.S. continues to work with Indian Tribes on a government-to-
20 government basis to address issues concerning tribal self-government, tribal trust
21 resources, tribal treaties and other rights.

22 The constitutional relationship among sovereign governments is inherent in the very
23 structure of the Constitution, and is formalized in and protected by Article I, Section 8.
24 Increasingly, this special relationship has emphasized self-determination and meaningful
25 involvement for Indian Tribes in federal decision-making (consultation) where such
26 decisions affect Indian Tribes. The involvement of Indian Tribes in the development of
27 public health and human services policy allows for locally relevant and culturally
28 appropriate approaches.

29 Tribal self-government has been demonstrated to improve and perpetuate the
30 government-to-government relationship and strengthen tribal control over federal funding
31 that it receives, and its internal program management.

32 **IV. POLICY**

33 The SAMHSA-TCP adheres to all provisions in the HHS-TCP, as revised January 2005.
34 It is SAMHSA policy to honor the sovereignty of Indian Tribes, respect the inherent
35 rights of self-governance, work on a government-to-government basis, and uphold the
36 federal trust responsibility. Government-to-government consultation will be conducted
37 with tribal officials or their designated representatives. SAMHSA will actively confer

1 with Indian Tribes and appropriate Tribal Organizations before taking actions or making
2 decisions that affect them.

3 SAMHSA may consult with other non-governmental groups that serve Native
4 Americans. The special "Tribal-Federal" relationship is based on the government-to-
5 government relationship, however, other statutes and policies exist that allow for
6 consultation with American Indians, Alaska Natives, urban Indian Organizations, non-
7 federally recognized tribal groups, state-recognized tribes, other Indian Organizations,
8 Native Hawaiians, Native American Pacific Islanders (including American Samoan
9 Natives), other Native American groups and other Native Organizations (collectively
10 "AI/AN/NA"), that, by the sheer nature of their business, serve AI/AN/NAs and might be
11 negatively affected if excluded from the consultation process. Section 7.C. of the
12 SAMHSA-TCP describes when SAMHSA will consult with other non-governmental
13 groups.

14 Even though some organizations and groups do not represent federally-recognized Indian
15 Tribes, SAMHSA may consult with such groups individually. However, if SAMHSA
16 wants to include organizations which do not represent a specific federally-recognized
17 tribal government on advisory committees or workgroups then Federal Advisory
18 Committee Act (FACA) requirements must be followed.

19 Advisory bodies created by SAMHSA will provide a complementary venue wherein the
20 SAMHSA Administrator or designee will solicit advice and views about substance abuse
21 and mental health issues from AI/AN/NA representatives and discuss collaborative
22 solutions. Such advisory bodies will support and not supplant any other formal tribal
23 consultation.

24 Although this TCP creates an accountable process to ensure meaningful and timely input
25 by tribal officials in the development of policies that have tribal implications, this does
26 not waive any governmental rights of Indian Tribes, including treaty rights, sovereign
27 immunities or jurisdiction.

28 Nothing in this policy waives the Federal Government's deliberative process privilege.
29 For example, in instances where HHS is specifically requested by members of Congress
30 to respond to or report on proposed legislation, the development of such responses and of
31 related policy is a part of the Executive Branch's deliberative process privilege and
32 should remain confidential. In addition, in specified instances where Congress requires
33 HHS to work with Indian Tribes on the development of recommendations that may
34 require legislation, such reports, recommendations or other products are developed
35 independent of an HHS position, the development of which is governed by Office of
36 Management and Budget (OMB) Circular A-19.

37 In addition, in specified instances where Congress requires the Department to work with
38 Tribes on the development of recommendations that may require legislation, such reports,
39 recommendations or other products are developed independent of a Department position,
40 the development of which is governed by Office of Management and Budget (OMB)-
41 Circular A-19.

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- A. Each HHS Operating and Staff Division (Division) shall have an accountable process to ensure meaningful and timely input by Tribal officials in the development of policies that have Tribal implications.

 - B. To the extent practicable and permitted by law, no Division shall promulgate any regulation that has Tribal implications, 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 Tribal officials early and throughout 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 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
 - c) Made available to the Secretary 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 early and throughout 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

1 extent to which the concerns of Tribal officials have been met;
2 and

3
4 3. Made available to the Secretary any written communications
5 submitted to the Division by Tribal officials.
6

7 **D.** On issues relating to Tribal self-governance, Tribal self-determination,
8 Tribal trust resources, or Tribal treaty and other rights, SAMHSA should
9 explore, and where appropriate, use consensual mechanisms for developing
10 regulations, including negotiated rulemaking.

11 **V. PHILOSOPHY**

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

16 SAMHSA is committed to enhancing the collaboration with Indian Tribes to address
17 substance abuse and mental health issues by utilizing a holistic methodology, advancing
18 community-based approaches and solutions, and promoting the principle that SAMHSA
19 bears responsibility for addressing Indian Tribes' issues within the context of its mission.

20 The HHS Immediate Office of the Secretary – Office of Intergovernmental Affairs (IGA)
21 is identified as the responsible organization within HHS for monitoring compliance with
22 EO 13175 and the HHS-TCP. In addition, the Secretary has charged the HHS
23 Intradepartmental Council on Native American Affairs (ICNAA), of which SAMHSA is
24 a member, to meet semi-annually and to provide advice on all HHS policies and priorities
25 that relate to AI/AN/NA.

26 HHS national budget and regional consultation sessions have been developed as a
27 systematic method to regularly consult with Indian Tribes on HHS programs on a
28 national level and at field locations. The goal of these sessions is to require HHS to focus
29 on AI/AN issues, to continue to enhance the government-to-government relationship
30 between Indian Tribes and the U.S., as well as to make SAMHSA resources more readily
31 available to Indian Tribes.

32 SAMHSA will work with the ICNAA and IGA to facilitate any required consultation
33 forums, the level of consultation required, recording of meetings, evaluate the results,
34 determine whether additional consultation on policy items may be needed, and report to
35 the affected Indian Tribes and non governmental Indian and Native Organizations.

36 **VI. OBJECTIVES**

37 In fulfilling its TCP, SAMHSA shall focus on the following 15 objectives to develop
38 measures to evaluate and report.

- 1 A. To formalize the requirement of SAMHSA to seek consultation and the
2 participation of Indian Tribes in policy development and program activities to
3 ensure that health and human service priorities and goals regarding substance
4 abuse and mental health are recognized.

- 5 B. To establish SAMHSA requirements and expectations with respect to
6 consultation and participation.

- 7 C. To identify critical events at which Tribal consultation and participation will
8 be required for all levels of SAMHSA management.

- 9 D. To identify events and partnerships in which SAMHSA would participate with
10 appropriate Tribal, Indian and Native Organizations that will establish and
11 foster partnerships to complement and enhance consultation with Indian
12 Tribes.

- 13 E. To promote and develop holistic, culturally relevant, and innovative methods
14 of involving Indian Tribes in SAMHSA policy development and regulatory
15 processes.

- 16 F. To uphold the responsibility of SAMHSA to consult with Indian Tribes on
17 new and existing health and human service policies, programs, functions,
18 services and activities that have Tribal implications.

- 19 G. To hold SAMHSA accountable for the implementation of this policy.

- 20 H. To be responsive to an Indian Tribe's request for consultation and technical
21 assistance in obtaining SAMHSA resources and/or addressing policy matters.

- 22 I. To ensure that SAMHSA actively seeks to partner with Indian Tribes which
23 will include technical assistance, access to programs, and resources.

- 24 J. To provide a single point of contact within SAMHSA for Indian Tribes as the
25 Administrator's designee.

- 26 K. To participate, at a minimum, in all HHS annual, national and regional
27 consultation forums and sessions established in the HHS-TCP; and, to seek
28 additional forums or opportunities to formally consult on the needs of Indian
29 Tribes with regard to substance abuse and mental health.

- 30 L. To ensure the impact of SAMHSA activities on tribal trust resources are
31 adequately assessed and tribal interests considered before activities are
32 undertaken;

- 33 M. To remove SAMHSA procedural impediments that adversely affect working
34 directly with Indian Tribes.

- 35 N. To reduce any regulatory burdens by streamlining the SAMHSA application
36 process for and increase the availability of waivers to Indian Tribes; and,

- 37 O. To operate in a collaborative manner to accomplish the goals of EO 13175
38 and this policy.

