

**NEW MEXICO HEALTH AND HUMAN SERVICES
DEPARTMENTS**

STATE – TRIBAL CONSULTATION PROTOCOL

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NEW MEXICO HEALTH AND HUMAN SERVICES DEPARTMENTS

STATE – TRIBAL CONSULTATION PROTOCOL

I. BACKGROUND

- A. In 2003 the Governor of the State of New Mexico and 21 Indian Tribes of New Mexico adopted the *2003 Statement of Policy and Process* (Statement), to “establish and promote a relationship of cooperation, coordination, open communication and good will, and [to] work in good faith to amicably and fairly resolve issues and differences.” The Statement directs State agencies to interact with the Tribal governments and provides that such interaction “shall be based on a government-to-government relationship” aimed at furthering the purposes of meaningful government-to-government consultation.
- B. In 2005, Governor Bill Richardson issued Executive Order 2005-004 mandating that the Executive State agencies adopt pilot tribal consultation plans with the input of the 22 New Mexico Tribes.
- C. The New Mexico Health and Human Services Tribal Consultation meeting was held on November 17-18, 2005 to carry out Governor Richardson’s Executive Order 2005-004 calling for a statewide adoption of pilot tribal consultation plans to be implemented with the 22 Tribes within the State of New Mexico. This meeting was a joint endeavor of the five executive state agencies comprised of the Aging and Long-Term Services Department, the Children, Youth and Families Department, the Department of Health, the Human Services Department and the Indian Affairs Department. A State-Tribal Work Plan was developed and sent out to the Tribes on June 7, 2006 for review pursuant to the Tribal Consultation meeting.
- D. The development of this State-Tribal Consultation Protocol meets the intent of the November 17-18, 2005 Tribal-State HHS Consultation Session work plan.

II. PURPOSE

The purpose of this endeavor is for HHS departments to consult, cooperate and interact with Tribal governments in developing an HHS Tribal Consultation Protocol (herein Protocol) in accordance with the spirit and intent of the 2003 Statement and Executive Order 2005-004. The purpose of the Protocol is to use the agreed-upon consultation process when the HHS departments develop or change policies, programs or activities that have tribal implications.

III. PRINCIPLES

The following principles agreed upon by state and tribal leaders, at the November 2005 HHS Tribal Consultation Meeting, will be used to guide the discussions of any and all HHS-Tribal Consultation

meetings. For purposes of this Protocol, the following principles remain unchanged since their adoption.

1. ***Recognize and Respect Tribal Sovereignty:*** Tribal sovereignty must be respected and recognized in all discussions and interactions between the Tribes, state and federal governments. It is important to recognize Tribes as distinct sovereign, political entities that have the inherent authority to govern their own internal affairs. This recognition will form the basis for the government-to-government relationship. The State of New Mexico recognizes and acknowledges the trust responsibility of the federal government to federally-recognized American Indian and Alaska Native Tribes.
2. ***Government-to-Government Relationship:*** The State Health and Human Services Departments and the New Mexico Indian Tribes and Pueblos recognize the importance of full and open communication, collaboration, and cooperation on health and human services for the benefit of Native American peoples.
3. ***Health Care Delivery and Access:*** Providing access to health care is an essential public health responsibility and is crucial in improving the health status of all New Mexicans, including Native Americans in rural and urban areas. Native Americans often do not have access to programs dedicated to their specific health needs due to factors, including lack of resources, geographic isolation, and the health disparities that is prevalent among Native Americans. The State Health and Human Services Departments and the New Mexico Indian Tribes and Pueblos must work collaboratively to ensure adequate and quality health service delivery in all tribal communities, including individual Native Americans in urban areas.
4. ***Distinctive Needs of Native Americans:*** Compared with other Americans, Native Americans experience an overall lower health status and rank at, or near, the bottom of other social, educational and economic indicators. Native Americans life expectancy is four years less than the overall U.S. population and die at higher rates due to a variety of diseases including diabetes, alcoholism, cervical cancer, suicide, heart disease, and tuberculosis. They also experience higher rates of behavioral health issues, including substance abuse. The State Health and Human Services Departments and the New Mexico Indian Tribes and Pueblos will ensure accountability of resources and will work toward a fair and equitable allocation of resources to address these health disparities. A community-based and culturally appropriate approach to health and human services is essential to maintain and preserve Indian cultures.
5. ***Establishing Partnerships:*** In order to maximize the use of limited resources, the State Health and Human Services Departments and the New Mexico Indian Tribes and Pueblos, and other interested entities including academic institutions, are encouraged to partner in areas of mutual interests or concerns. Tribes should work with the State to advocate for state and federal funding for tribal programs and services to benefit all of the State's Native American peoples.

6. ***Individual and Collective Responsibility:*** The health and well-being of Tribal communities and Indian people is an individual and collective responsibility. The State and Tribal Governments should work together on a government-to-government basis to address health and human services issues and empower Native Americans to take responsibility for their health and well-being.
7. ***Future Partnership:*** In an effort to continue a dialogue on health and human services programs, the State Health and Human Services Departments and the New Mexico Indian Tribes and Pueblos will work together to develop a formal consultation process. A Tribal advisory board may be established to help accomplish the goals and actions identified as a result of this Tribal Consultation meeting.

IV. DEFINITIONS

A. The following definitions shall apply in this Protocol:

1. **Consultation:** is an enhanced form of communication that emphasizes trust and respect. It is a shared responsibility that allows the parties to exchange, in an open and free manner, timely and accurate information and opinions for the purpose of fostering mutual understanding and comprehension. Consultation is mutually satisfying deliberation that results in collaboration and joint decision-making. Consultation with New Mexico Tribal governments is uniquely a government-to-government process that has two main goals: (a) to reach a consensus during decision-making; and (b) whether or not consensus is reached, at the end of the process the parties have honored each other's sovereignty.
2. **Consensus:** In the spirit of the Governor's 2003 Statement and in Executive Order 2005-004, the term Consensus herein means collective agreement. Consensus recognizes that the HHS and Tribes will conduct their deliberations and communications in good faith in accordance with the consultation process. Within this process it is understood that the Tribal and HHS agencies may disagree on consultation outcomes.
3. **Participation:** is an on-going activity that allows all interested parties to engage with one another through negotiation, compromise and problem-solving for the purpose of reaching a desired outcome.
4. **Tribal Implications:** refers to state legislation, regulations, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, or on the relationship between the State and Tribal governments.
5. **Internal HHS Operations Exemption:** refers to certain internal HHS department operations not subject to consultation. Each HHS Department has the authority and discretion to determine what internal processes are exempt from the consultation processes contained in this Protocol.

6. Internal Tribal Government Operations Exemption: refers to certain internal Tribal Government operations not subject to consultation. Each Tribal sovereign Government has the authority and discretion to determine what internal processes are exempt from the consultation processes contained in this Protocol.
7. Other Indian Organizations: Indian organizations that represent or provide services to urban Indians or off-reservation Indians.
8. Tribes: means the 22 New Mexico Indian Tribes, nations or pueblos 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.
9. HHS: means the New Mexico Health and Human Services Departments, which are the Aging and Long-Term Services Department; Children, Youth and Families Department; the Department of Health and the Human Services Department.
10. Tribal Officials: means elected or duly appointed officials of Indian Tribal governments or authorized intertribal organizations.
11. IAD: means the New Mexico Indian Affairs Department, a state agency of the New Mexico State Government.

V. GENERAL PROVISIONS

A. Applicability

Tribal consultation is most effective and meaningful when conducted before taking action that impacts Tribal governments and people. The State and Tribes acknowledge that a best-case scenario may not always exist, and that the parties may not have sufficient time or resources to fully consult on a relevant issue. If a process appropriate for consultation has not already begun, this Protocol recommends initiating consultation as soon as possible thereafter.

1. The principle focus for State-Tribal government-to-government consultation is with Tribal governments through their respective elected or duly appointed Tribal Officials. Nothing herein shall restrict or prohibit the ability or willingness of Tribal Officials and an HHS Secretary or Secretaries to meet directly on matters that require direct consultation. HHS and Tribes agree that the principle of leader-to-leader communication, collaboration and cooperation is always the first step in government-to-government consultation in accordance with the Statement of Policy and Process.

2. Required Consultation. The consultation process set forth herein is required when:
 - The Governor of the State of New Mexico, a Pueblo Governor or Tribal President initiates a request for consultation;
 - An HHS Secretary, the HHS Secretaries as a whole, or delegated Tribal officials requests consultation, subject to HHS and Tribal Governments' internal operations exemption;
 - Federal law or regulation requires consultation; and
 - State law or regulation mandates consultation.

B. Limitations to State-Tribal Consultation

1. Other Mandated or Approved Processes. The consultation process may not be applicable when a mandated and approved process exists, such as the State or Tribal process for negotiating and approving professional services contracts, Joint Powers Agreements, Intergovernmental Agreements, Memoranda of Understanding or other established administrative procedures and practices mandated by State or Tribal law.
2. Federal Mandate. The consultation process may not be required but may be nonetheless useful when the federal government mandates changes to federal-state programs. HHS will provide timely, written notification to Tribal leaders, at a minimum, when federal law, policy or regulations mandate such programmatic changes. Consultation should not be precluded when the federal government mandates changes to federal-state programs.
3. Certain internal HHS department operations and Tribal Governmental Operations Exemptions are not subject to consultation such as administrative internal budget processes, personnel matters, federal mandates, etc. Each HHS Secretary and/or Tribal Official has the authority and discretion to determine what State or Tribal internal processes are exempt from the consultation processes contained in this protocol.

C. Objectives

1. To formalize the requirements for Tribal consultation and participation in HHS policy development and program activities that have tribal implications and to ensure that HHS recognizes Tribal health and human services priorities and goals.
2. To establish a set of minimum requirements and expectations with respect to consultation and participation between HHS and Tribes.

3. To identify critical events requiring HHS to enlist tribal consultation and participation, subject to HHS and Tribal Governments' internal operations exemption.
4. To promote and develop innovative methods of obtaining consultation from Tribal representatives and to involve those representatives in consultation processes and other methods of communication.
5. To underscore HHS' responsibility to consult with the Tribes on new and existing HHS service policies, programs, functions, services, activities, and funding that have Tribal implications, subject to the HHS internal operations exemption.
6. To charge and hold responsible the principal Tribal and HHS managers for the implementation of this policy.
7. To strengthen the input for identifying budget and legislative priorities related to health and human services needs and issues, Tribal leaders or their representatives will continue to be encouraged to participate in processes where stakeholder input is utilized and incorporated for finalizing such priorities. Some HHS Departments have already developed processes for gathering input for their respective programs. Tribes will be included as key stakeholders in these processes and mechanisms as a means to address issues of mutual concern.

D. Components

1. Tribal Officials and an HHS Secretary or Secretaries may initiate direct leader-to-leader, government-to-government consultation.
2. The HHS Secretaries or Secretaries, in consultation with Tribal Officials, may delegate or designate a consultation work group to engage in the consultation process.
3. The HHS Secretaries may delegate consultation compliance to an HHS deputy secretary and/or the HHS Native American Liaison who will be responsible for ensuring the Protocol's implementation. A Tribal Governor or President may delegate consultation compliance to a Tribal Official who will be responsible for ensuring the Protocol's implementation.
4. The appropriate HHS agency will notify the Indian Affairs Department if a single HHS department or the HHS as a whole requires consultation with Tribes or a single tribal entity.

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E. Protocol for Government-to-Government Consultation

HHS may review proposed policy or a program's impact, scope and overall agency goals and determine whether tribal consultation or cooperation will assist in the programs' implementation. If the purpose of the program or project includes services or impacts on the Tribal communities, HHS may notify the Tribes and inquire as to whether tribal consultation should occur and assess the willingness of the Tribes or Tribe to engage in the process. The Tribe has discretion to decide whether to engage in the consultation process.

1. HHS and Tribes agree that the principle of leader-to-leader communication, collaboration and cooperation is always the first step in government-to-government consultation in accordance with the Statement of Policy and Process. HHS and Tribes may engage in direct consultation and/or establish a work group.

2. Establishment of Work Groups. To accomplish consultation, HHS and Tribes may establish a work group and/or task force to develop recommendations. The work group shall, to the extent possible, consist of members from HHS, IAD and the Tribes.

3. Membership on Work Groups. HHS Departments shall solicit tribal membership on work groups. HHS shall widely publicize the solicitation with the intent to reach all Tribes, and request that the Tribes appoint Tribal members in writing for work groups. Membership should be based on Tribal and HHS appointment or delegation, respectively, and shall be open to delegated or appointed Tribal and State agency members. As State and Tribal leadership changes, work group membership shall be designated as appropriate.

4. Meeting Notices. Written notices announcing meetings shall identify the purpose, work group, task force preliminary responsibility, time frame and other specific tasks. All meetings shall be open and widely publicized through each of the Native American Liaison offices, HHS departments, and Tribal offices.

5. Work Group Procedures. The work group may establish procedures to govern the meetings. Such procedures will include, but are not limited to, the following:

- a) Selection of Tribal and State co-chairs to represent the work group and to serve as lead coordinators to ensure tribal consultation protocol is adhered to;
- b) Defining roles and responsibilities of individual work group members;
- c) Process for decision-making to arrive at a final product, which may consist of direct participation in work groups or providing timely and written comments from tribal and state agencies or both;

- d) Process for determining drafting and dissemination of all final work group products, including data-sharing materials subject to policy, procedures and/or federal or state statutes; and
- e) Defining an appropriate timeline; and
- f) Attendance of meetings related to the work group. Work group members shall make good faith efforts to attend all meetings.

6. Work Group Responsibility. The work group will develop final recommendations for HHS and Tribal review and/or approval.

7. Work Group Parameters. Parameters shall determine the lines of authority, responsibility and boundaries, definition of issues and delineation of negotiable and non-negotiable points.

8. Work Group Final Products. Once the work group has created a final draft recommendation or policy, it will initiate the following process to facilitate implementation or additional consultation:

- a) Distribution. The work group will distribute the draft recommendation to the Tribal Governor or President, HHS and IAD Secretaries and the Native American Liaisons for review and comment.
- b) Comment. The Tribes and HHS will return comments to the work group, which will meet in a timely manner to discuss the comments and determine the next course of action.
 - i. If the work group considers the policy to be substantially complete as written, the work group will forward the proposed policy to the HHS and Tribes for finalization.
 - ii. The work group will record any contrary comments, disagreements and/or dissent in the final report.
 - iii. If, based on the comments, the work group determines that the policy should be rewritten; it will reinitiate the consultation process to redraft the policy.
 - iv. If HHS and the Tribes accept the policy as is, the work group will accomplish the final processing of the policy.
- c) Recommendations. HHS, IAD and Tribes should seriously consider any work group final recommendations for action or implementation.
- d) Implementation. Once the consultation process is complete and the HHS, IAD and Tribes have finalized the recommendation, the HHS and Tribal work group co-chairs shall be responsible for broadly

distributing the final recommendation to HHS departments, Tribal leaders, and IAD.

- e) Evaluation. At the conclusion of the Consultation process, work group participants will participate in an evaluation of the process. The evaluation will measure outcomes and make recommendations for improving the process.

F. HHS General Communication and Coordination

1. Importance of Tribal Liaisons. Tribal governments strongly encouraged state agencies to employ full-time Native American liaisons to work with tribal leaders, staff and their programs in developing policies or implementing program changes. The HHS departments have established such liaisons to improve state-tribal interactions, enhance communications and resolve potential issues in improving the delivery of HHS departments' services to Native Americans.
2. Informal Communications. HHS and the Tribes recognize that consultation meetings may not be required in all situations or interactions involving state-tribal relations. Tribal members may communicate with other HHS employees outside the consultation process, including the Tribal Liaisons and Program Managers to ensure programs and services are delivered to their constituents. While less formal mechanisms of communicating may be more effective at times, this does not negate the State's or the Tribe's ability to request formal consultation on a particular issue or policy.
3. Informal Communications with Other Indian Organizations. The State-Tribal relationship is based on a government-to-government relationship. However other Indian organizations, such as those representing or providing services to urban Indians or off-reservation Indians might be adversely affected if excluded from HHS departments' communications. Although these organizations are not considered federally-recognized Tribal governments, nothing in this protocol prevents HHS departments from soliciting recommendations, or otherwise communicating with these groups.
4. HHS Responsibility For Programs Requiring Consultation. The HHS Secretaries retain full responsibility for their programs and for complying with all relevant New Mexico statutory and regulatory requirements.

G. Role of Tribal Advisory Bodies

Protocol Does Not Affect Tribal Advisory Bodies. The principal focus for HHS' consultation protocol is with Tribal governments. However, it may be necessary that the HHS departments solicit advice and recommendations from Tribal advisory organizations or committees to involve Tribes in policy development prior to the more formal consultation contained in this Protocol. This Protocol does not prevent

HHS from convening such Tribal advisory organizations/committees to provide advice and recommendations on such HHS policies and programs matters that directly impact the Tribes. Input derived from such activities will not be defined as tribal consultation.

VI. INTERGOVERNMENTAL COORDINATION AND COLLABORATION

1. Interacting with Federal Agencies. The HHS and Tribes recognize there may be issues of mutual concern where it will be beneficial to coordinate with and involve federal agencies that provide services and funding to the HHS and Tribes. Due to the complex nature of programs and services provided by multiple agencies, the goal, at times, may be to coordinate efforts with federal agencies.

2. Administration of similar programs. The HHS recognize that under certain federal tribal self-governance and self-determination laws, Tribal governments are authorized to administer their own HHS programs and services which were previously administered by a state agency, as a form of self-governance by the federal government. Although a state agency or a tribal program may have its own federally-approved plan to adhere to, HHS and their tribal counterparts are encouraged to always work in cooperation and to have open communication that provides a two-way dialogue in these program areas.

VII. ANNUAL HHS-TRIBAL SUMMITS

The HHS and Tribes shall meet annually to consult on HHS issues that are identified as important to dialogue on.

VIII. DISSEMINATION OF PROTOCOL TO HHS EMPLOYEES

HHS shall inform its employees of this Protocol and disseminate a copy appropriately to all staff members.

IX. AMENDMENTS TO THE PROTOCOL

This Protocol shall be reviewed annually and revised as needed upon written mutual agreement of the parties.

X. EFFECTIVE DATE

This Protocol shall become effective upon the date all necessary signatures and/or approvals to this Protocol are obtained.

XI. SOVEREIGN IMMUNITY

Nothing herein shall be construed to waive the sovereign immunity of the Tribes or the State of New Mexico or to create a right of action by or against either party or its officials for failure to comply with the Protocol.

Each HHS Department and Tribal Government has the authority and discretion to determine what internal operations are exempt from the consultation processes contained in this Protocol. The Tribes also have discretion to decide not to participate or respond to a particular consultation request.

IN WITNESS WHEREOF, THE PARTIES HEREBY ADOPT THE TRIBAL AND HEALTH AND HUMAN SERVICES CONSULTATION PROTOCOLS.

On Behalf of the Tribal Nations:

Levi Pesata, President
Jicarilla Apache Nation

Mark Chino, President
Mescalero Apache Tribe

Dr. Joe Shirley, Jr., President
Navajo Nation

IV. On Behalf of the New Mexico Pueblo Leaders

Jason Johnson, Governor
Pueblo of Acoma

Ray Trujillo, Governor
Pueblo of Cochiti

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Pueblo of Jemez

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George Rivera, Governor
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Pueblo of Zuni

Joe A. Garcia, Chairman
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V. On Behalf of the Health and Human Services, and Indian Affairs Departments:

Deborah Armstrong, Secretary
Aging and Long Term Services Department

Dorian Dodson, Secretary
Children, Youth and Families Department

Michelle Lujan-Grisham, Secretary
Department of Health

Pamela S. Hyde, Secretary
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Benny Shendo, Jr., Secretary
Indian Affairs Department