

**AGENCY FOR HEALTHCARE RESEARCH AND QUALITY
DRAFT TRIBAL CONSULTATION POLICY
October 2007**

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1. INTRODUCTION

The mission of the Agency for Healthcare Research and Quality (AHRQ) is to improve the quality, safety, efficiency, and effectiveness of health care for all Americans through support of health services research that develops and presents scientific evidence regarding all aspects of health care. Health services research addresses issues of “organization, delivery, financing, utilization, patient and provider behavior, quality, outcomes, effectiveness and cost. It evaluates both clinical services and the system in which these services are provided. It provides information about the cost of care, as well as its effectiveness, outcomes, efficiency, and quality. It includes studies of the structure, process, and effects of health services for individuals and populations. It addresses both basic and applied research questions, including fundamental aspects of both individual and system behavior and the application of interventions in practice settings.”¹

While AHRQ is a “research agency,” research is only a beginning and not an end in itself. On a daily basis, this means that the Agency works to ensure that providers use evidence-based research to deliver high-quality health care and to work with their patients as partners. Evidence helps patients to become better informed consumers and to be partners in their own care. This Agency also disseminates evidence to help local policymakers understand what they can do to improve the quality of health care for their constituents and ensure that local public health officials have the latest information to help them be better prepared for a possible bioterrorism event. To achieve these ends, research findings must be ready to use, widely available and actionable.

The Agency for Healthcare Research and Quality (AHRQ) shares with Indian Tribes the goal of reducing health disparities and ensuring that access to critical health services is maximized. To achieve these goals, and to the extent practicable and permitted by law, it is important that Federally-recognized Indian Tribes and AHRQ engage in open and meaningful consultation to identify Tribes’ health services research needs and priorities.

¹ Eisenberg JM. Health Services Research in a Market-Oriented Health Care System. *Health Affairs*, Vol. 17, No. 1:98-108, 1998.

Effective consultation leads to information exchange, mutual understanding, and informed decision-making.

2. BACKGROUND

A unique government-to-government relationship exists between many AI/AN Indian Tribes (Federally-recognized tribes—see “Definitions, section 9 of this policy) and the Federal government. This relationship is not based upon race. Rather, it is grounded in the Constitution, numerous treaties, statutes, and 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 Americans 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

An integral element of this government-to-government relationship is that consultation occurs with Indian Tribes in matters that significantly affect them. All divisions of the Department of Health and Human Services (HHS), including AHRQ, share in this responsibility.

3. TRIBAL SOVEREIGNTY

This policy is not intended to amend or contravene any Tribal governmental rights, sovereign immunities or jurisdiction. Additionally, this policy does not diminish any rights or protections afforded to AI/AN persons or Tribal entities under Federal law.

The U.S., in accordance with treaties, statutes, Executive Orders (EOs) and judicial decisions, has recognized the right of Indians to self-governance and self-determination. The Federal government continues to work with Indians on a government-to-government basis to address issues concerning Tribal self-government.

Increasingly, Indians have emphasized self-determination and meaningful involvement in Federal decision-making (consultation) where such decisions affect them. The involvement of Indian Tribes in the development of Federal public health and human services policy promotes locally relevant and culturally appropriate approaches to issues of mutual interest or concern.

4. POLICY

It is the policy of AHRQ that consultation with Federally-recognized Indian Tribes will occur to the extent practicable and permitted by law before action is taken by AHRQ that will or is likely to significantly affect them. Such actions refer to policies that have Tribal implications and 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.

AHRQ may include organizations lacking the government-to-government relationship in consultation activities as long as doing so is not at odds with existing Federal statutes or other legislation. AHRQ may include multi-tribal organizations, urban Indian organizations, non-Federally recognized Tribal groups, governing bodies of Indian Tribes on State Reservations, State Recognized Tribes, Native Hawaiians, Native American Pacific Islanders (including American Samoan Natives), and other Native American groups, that might be negatively affected if their representatives were to be excluded from the consultation process. However, if AHRQ includes such organizations on advisory committees or workgroups, Federal Advisory Committee Act (FACA) requirements must be followed which includes chartering the group and holding open meetings.

Nothing in this policy waives AHRQ's deliberative process privilege. For example, in instances where AHRQ 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 and will remain confidential.

5. TRIBAL CONSULTATION

Consultation occurs when the AHRQ Director/Deputy Director or their designee, and a Tribal President/Chair/Governor and/or elected/appointed Tribal Leader formally meet or exchange written correspondence to discuss issues concerning either party.

Consultation shall occur on a regular basis and may occur on an "as needed" basis as well. Both AHRQ and the Tribes may raise issues that need to be addressed. The type and extent of consultation will vary and be guided by the particulars of the immediate situation.

Regularly occurring consultation

- 1) AHRQ will take advantage of national meetings sponsored by different units of the Department (usually the Office of the Secretary or one of its subunits) to engage Tribes in consultation regarding their research needs and priorities. Foremost, the Agency will take an active role in the work of the multi-agency AI/AN Tribal Advisory Group on Health Research, which is being managed by the Department's Office of Minority Health. The purposes of this group are to: obtain input from Tribal leaders on health research priorities and needs for their communities; provide a forum through which OPDIV and STAFFDIV representatives can better coordinate

the Department's work on AI/AN health research; and provide a conduit for disseminating information to Tribes about research findings from studies focusing on the health of AI/AN populations. This group met for the first time in May 2006.

The Agency will also take part in the Department's national Tribal budget consultations which occur in the spring of each year.

"As Needed" Consultations

Both AHRQ and Tribes may raise issues that need to be addressed in a formal consultation setting. Tribal concerns should be addressed to the Director, AHRQ.

The nature and design of any consultation interaction will vary and be guided by the particulars of the immediate issues(s) and the larger situation, such as the potential number of tribes that could be affected, the complexity of the issues, and time constraints.

Different types of consultation include:

1) Correspondence: When feasible, consultations can take place via written communication between Tribal leaders and the Director, AHRQ. Written communications from AHRQ should clearly identify the issues at hand, potentially affected Tribes, any Agency positions on the issues, the type of input sought, how to provide input, and when to provide input. HHS, including AHRQ, frequently uses a "Dear Tribal Leader Letter" format to undertake/notify Tribal leaders of consultation activities.

2) Meeting(s): If a meeting is considered necessary, AHRQ will try to schedule it to correspond with another departmental meeting requesting attendance of Tribal leaders to minimize the burden on Tribal leaders. Notification to affected Tribal leaders will be made using all appropriate methods including mailing, broadcast e-mail, and other information dissemination outlets.

AHRQ may establish or participate in workgroups, task forces or other groups or committees with Indian Tribes and others to address issues affecting AIs/ANs. Membership on such groups may be considered part of AHRQ's consultation activities.

AHRQ will report to involved Tribes and the Department on the outcomes of formal consultations that it requests or is asked to participate in by Tribes.

Other types of meetings and/or conferences occur in which tribal leaders/representatives and Agency leaders exchange information. While these may not be considered formal consultation sessions, they often provide opportunities for information sharing and providing technical assistance to Indian Tribes.

The Agency's consultation policy will be posted on the Agency's website and linked to the Departmental Tribal Consultation policy on the HHS website.

6. **MEASURING TRIBAL CONSULTATION PERFORMANCE AND COLLABORATION**

As part of the Department's Annual Tribal Consultation Report and budget consultations, AHRQ will report on its consultation activities undertaken during the previous year, as well as on the results and outcomes of those activities. In addition, AHRQ will include an evaluation component in any large consultation activities it implements. More specifically, AHRQ will maintain a record of the consultation, evaluate whether the intended results were achieved, and report back to the affected Indian (s) on the status or outcomes.

7. **CONFLICT RESOLUTION**

The intent of this policy is to provide increased ability to solve problems. However, inherent in the government-to-government relationship, Indian Tribes may elevate an issue of importance to a higher or separate decision-making authority. In this case, conflicts can be raised with the Deputy Secretary.

While increased consultations as described above are to be expected and are the objective of this policy, the policy does not create any rights to any particular consultation or a right of action against AHRQ for failure to comply with this policy. Agency activities are always subject to budgetary constraints.

8. **EFFECTIVE DATE**

This policy is effective on the date of the signature by the Director, AHRQ and supersedes previous Agency Tribal Consultation policies.

9. **DEFINITIONS**

- 1) **Communication** – The exchange of ideas, messages, or information, by speech, writing, or other means.
- 2) **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. 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.
- 3) **Coordination and Collaboration** – Working and communicating together in a meaningful government-to-government effort to create a positive outcome.
- 4) **Critical Events** – Planned or unplanned events that have or may have a substantial impact on Indian Tribes or Native communities, e.g., budget development.
- 5) **Deliberative Process Privilege** – A privilege exempting the government from disclosure in litigation of government agency materials containing opinions, recommendations, and other communications that are part of the preliminary decision-making process within the agency designed to foster frank exchanges.

- 6) **Executive Order** – An order issued by the President on the basis of authority specifically granted to the executive branch (by the U.S. Constitution or a Congressional Act).
- 7) **Federally Recognized Tribal Governments** – Indian Tribes with whom the Federal Government maintains an official government-to-government relationship; 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.
- 8) **Indian Tribe** – Any Indian Tribe, band, nation or other organized group or community including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. (25 U.S.C. Sec 450e). An Indian Tribe may be represented by an individual designated by the Tribe.
- 9) **Indian** – Indian means a person who is a member of an Indian Tribe. (25 U.S.C. 450b(d)). Throughout this policy, Indian is synonymous with American Indian/Alaska Native.
- 10) **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 Federal agencies to represent their interests while working on a particular policy, practice, issue and/or concern.
- 11) **Native American (NA)** – Broadly describes the people considered indigenous to North America.
- 12) **Native Hawaiian** – Any individual whose ancestors were natives of the area, which consists of the Hawaiian Islands prior to 1778 (42 U.S.C. 3057k).
- 13) **Native Organization** – A nongovernmental body organized and operated to represent the interests of a group of individuals considered indigenous to the U.S. Organizations that represent the interests of individuals do not fall under the intergovernmental committee exemption to FACA found under 2 U.S.C. Sec 1534. Therefore, the Department is required to adhere to FACA if representatives of those organizations are included on advisory committees or workgroups.
- 14) **Non-Recognized Tribe** – Tribe with whom the Federal Government does not maintain a government-to-government relationship, and to which the Federal government does not recognize a trust responsibility.

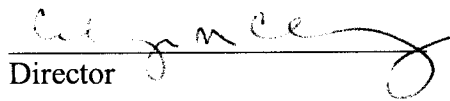
- 15) Policies that have Tribal Implications** – Refers to regulations, legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.
- 16) Self Government** – Government in which the people who are most directly affected by the decisions make decisions.
- 17) Sovereignty** – The recognized official source of political power from which specific political powers are derived.
- 18) State Recognized Tribes** – Tribes that maintain a special relationship with a State government and whose lands and rights are usually recognized by the State. State recognized Tribes may or may not be Federally recognized.
- 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 possible despite 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 of authorized inter-Tribal organizations.
- 24) Tribal Organization** – The recognized governing body of any Indian Tribe; any legally established organization of American Indians and Alaska Natives which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the community to be served by such organization and which includes the maximum participation of Indian Tribal members in all phases of its activities (25 U.S.C. 450b).

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.

27) Urban Indian Organization – An organization that is funded by the Indian Health Service under Title V (Section 502 or 513) of the Indian Health Care Improvement Act.

Approved:


Director

10/16/07
Date