



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

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**1. INTRODUCTION**

The Department of Health and Human Services (HHS) and Indian Tribes share the goal of eliminating health and human service disparities of American Indians and Alaska Natives (AI/AN) and ensuring that access to critical health and human services is maximized. 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. True consultation leads to information exchange, mutual understanding, and informed decision-making. The importance of consultation with Indian Tribes was affirmed through Presidential Memoranda in 1994 and 2004, and an Executive Order in 2000.

**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 AI/AN Indian Tribes and the Federal Government. This relationship is grounded in numerous treaties, statutes, and executive orders as well as political, legal, moral, and ethical principles. This relationship is not based upon race, but rather, is derived from the government-to-government relationship. The Federal Government has enacted numerous regulations that establish and define a trust relationship with Indian Tribes.

An integral element of this government-to-government relationship is that consultation occurs with Indian Tribes. This policy applies to all Divisions of the Department. Divisions shall provide an opportunity for Tribes to participate in policy development to the greatest extent practicable and permitted by law. Executive Memorandum entitled “Government-to-Government Relationship with Tribal Governments” reaffirmed this government-to-government relationship with Indian Tribes on September 23, 2004. 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 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

### **3. TRIBAL SOVEREIGNTY**

This policy does not waive any Tribal Governmental rights, including treaty rights, sovereign immunities or jurisdiction. Additionally, this policy does not diminish any rights or protections afforded other AI/AN persons or entities under Federal law.

Our Nation, under the law of the U.S. and in accordance with treaties, statutes, Executive Orders (EO), and judicial decisions, has recognized the right of Indian Tribes to self-government and self-determination. Indian Tribes exercise inherent sovereign powers over their members and territory. The U.S. continues 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.

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

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.

#### 4. **POLICY**

It is the HHS policy that consultation with Indian Tribes will occur to the extent practicable and permitted by law before any action is taken that will significantly affect Indian Tribes. 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.

Nothing in this policy waives the Government's deliberative process privilege. For example, in instances where 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. In addition, in specified instances where Congress requires the Department to work with 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 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 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 should explore, and where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.
- E.** The special "Tribal-Federal" relationship is based on the government-to-government relationship, however, other statutes and policies exist that allow for consultation with urban Indian organizations, non-federally recognized Tribal groups, governing bodies of Indian Tribes on Federal and State Reservations, State Recognized Tribes, other Indian organizations, Native Hawaiians, Native American Pacific Islanders (including American Samoan Natives), and other Native American groups, that, by the sheer nature of their business, serve American Indians, Alaska Natives or Native Americans and might be negatively affected if excluded from the consultation process. Section 9.B. of this policy describes when HHS will consult with other groups.

Even though some of the organizations and groups do not represent federally-recognized Tribal governments, the Department is able to consult with these groups individually. However, if the Department wants to include organizations which do not represent a specific federally-recognized Tribal government on advisory committees or workgroups then Federal Advisory Committee Act (FACA) requirements must be followed.

## **5. PHILOSOPHY**

Indian Tribes have an inalienable and inherent right to self-governance. Self-governance 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.

The Office of Intergovernmental Affairs (IGA) is identified as the responsible organization within HHS 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 semi-annually and to provide advice on all HHS policies that relate to American Indians/Alaska Natives/Native Americans (AI/AN/NA). 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 requirement of HHS to seek consultation and the participation of Indian Tribes in policy development and program activities to ensure that health and human service priorities and goals are recognized.
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. To identify critical events at which Tribal consultation and participation will be required for all levels of HHS management, the OS, by each Division, and the Regional level.
4. To identify events and partnerships that HHS would participate with Tribal and Native Organizations that will establish and foster partnerships to complement and enhance consultation with Indian Tribes.
5. To promote and develop innovative methods of involving Indian Tribes in HHS policy development 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 Division Heads for the implementation of this policy.
8. To be responsive to an Indian Tribe's request for consultation and technical assistance in obtaining HHS resources.
9. To charge the Divisions with the responsibility for enhancing partnerships with Indian Tribes which will include, technical assistance, access to programs and resources.
10. To provide a single point of contact within HHS for Indian Tribes at a level that has access to the Immediate Office of the Secretary (IOS), the Deputy Secretary, Regions, and Divisions. The Senior Advisor for Tribal Affairs will serve as the Department's point of contact in accessing department-wide information. Each Division will designate a representative through the ICNAA to serve as a Liaison and a Division point of contact for Indian Tribes.

## 7. ROLES

1. **Indian Tribes:** The government-to-government relationship between the U.S. and Indian Tribes dictates that the principal focus for HHS consultation is with individual Indian Tribes.
2. **Tribal Organizations:** It is frequently necessary that the HHS communicate with Tribal organizations/committees to solicit consensual Tribal advice and recommendations. Although the special "Tribal-Federal" relationship is based on the government-to-government relationship with Indian Tribes, other statutes and policies exist that allow for consultation with other Tribal organizations. These organizations by the sheer nature of their business serve and represent Indian Tribes issues and concerns that might be negatively affected if these organizations were excluded from the consultation process.
3. **Native Organizations:** It is frequently necessary that HHS communicate with Native organizations/committees to solicit consensual advice and recommendations. Although the special "Tribal-Federal" relationship is based on the government-to-government relationship, other statutes and policies exist that allow for consultation with other Native organizations. These organizations, by the sheer nature of their business, serve and represent Native issues and concerns that might be negatively affected if these organizations were excluded from the consultation process. Section 9. B. of this policy describes when HHS will consult with other groups.

Even though some of the organizations and groups do not represent federally recognized Tribal governments, the Department is able to consult with these groups individually. However, if the Department wants to include organizations which do not represent a specific federally recognized Tribal government on advisory committees or workgroups then FACA requirements must be followed.

4. **Office of Intergovernmental Affairs:** 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 Native organizations, at a level with access to all Divisions, is the Senior Advisor for Tribal Affairs. As a part of the IOS, the 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.
5. **Assistant Secretary for Budget, Technology, and Finance:** The Assistant Secretary for Budget, Technology, and Finance (ASBTF) is the lead office for budget consultation for the overall departmental budget request. The IGA supports the ICNAA and ASBTF as the coordinating office within the IOS for communications among Regional Offices, Divisions and the ICNAA.
6. **Intradepartmental Council on Native American Affairs:** The Secretary's ICNAA plays a critical role in the execution of the HHS consultation policy. The ICNAA is charged to: (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 AI/AN/NAs and 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 AI/AN/NA people, and (5) promote the Tribal/Federal government-to-government relationship on an HHS-wide basis in accordance with EO 13175. The underpinning concept of the Council is the premise within HHS that all Divisions bear responsibility for the government's obligation to Native Americans.
7. **Regional Offices:** The ten (10) HHS Regional Offices share in the Department-wide responsibility to coordinate and communicate with Indian Tribes on issues that affect Indian Tribes and States. The Regional Directors are the Secretary's immediate representatives in the field for the HHS. Each Regional Office is to conduct an annual regional Tribal consultation with Indian Tribes in their respective regions. 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.
8. **HHS Divisions:** The Department has numerous Staff Divisions and Operating Divisions under its purview. Each of these Divisions share in the Department-wide responsibility to coordinate, communicate and consult with Indian Tribes on issues that affect these governments. All Staff Divisions will comply with the Department Tribal Consultation Policy. Additionally, all Operating Divisions will comply with this policy and revise their own Tribal consultation policy or plan to

conform to this Policy. All Divisions are responsible for conducting Tribal consultation to the extent practicable and permitted by law on policies that have Tribal implications.

## 8. TRIBAL CONSULTATION

### A. Consultation occurs:

1. When the HHS Secretary/Deputy Secretary, or their designee, and a Tribal President/Chair/Governor and/or elected/appointed Tribal Leader meet or exchange written correspondence to discuss issues concerning either party.
2. When a Division Head meets or exchanges written correspondence with an elected/appointed Tribal Leader to discuss issues or concerns of either party.
3. When a Regional Director, or their designee, who is the Secretary's representative in the field meets or exchanges written correspondence with an elected/appointed Tribal Leader to discuss issues or concerns of either party.
4. When the Secretary/Deputy Secretary/Division Head, or their designee, meets or exchanges written correspondence with a Tribal representative designated by an elected/appointed Tribal leader to discuss issues or concerns of either party.

### B. Consultation Criteria: Trust between HHS and Indian Tribes is an indispensable element in establishing a good consultative relationship. The degree and extent of consultation will depend on the identified critical event. While this policy does not provide specific guidelines, Divisions shall utilize the following criteria to ensure that the requirements of this policy are satisfied.

1. Identify the Critical Event: Complexity, implications, time constraints, issue (funding, policy, programs)
2. Identify affected/potentially affected Indian Tribe(s), etc.
3. Determine level of Consultation – The level of consultation can be determined after considering the critical event and Indian Tribes affected/potentially affected.
  - 1) **Correspondence:** Written communications should clearly provide affected/potentially affected Indian Tribes of the critical event and the manner 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 IGA if technical assistance is required for proper format, current mailing lists, and content.
  - 2) **Meeting(s):** The Divisions shall convene a meeting with affected/potentially affected Indian Tribes to discuss all pertinent issues in a national or regional



forum, or as appropriate, to the extent practicable and permitted by law, when the critical event is determined to have substantial direct impact.

Other types of meetings and/or conferences occur which may not be considered consultation sessions, but these meetings may provide an opportunity to share information, conduct workshops, and provide technical assistance to Indian Tribes.

- 3) **Notice:** Upon the determination of the level of consultation necessary, proper notice of the critical event and the level of consultation utilized shall be communicated to affected/potentially affected Indian Tribes 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.
  - 4) **Receipt of Comment:** The Division shall develop clear and explicit instructions for the submission of comments.
  - 5) **Reporting of Outcome:** The Division shall report on the outcomes of the consultation.
- C. Tribal Resolution:** Communications from Indian Tribes frequently come in the form of Tribal resolutions. These resolutions may be the most formal declaration of an Indian Tribe's position for the purpose of Tribal consultation. Once the Division receives a Tribal resolution, the Division should respond appropriately. Appropriate response may include Tribal consultation.
- D. Schedule For Consultation:** Divisions must establish and adhere to a formal schedule of meetings to consult with Tribal governments and 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 forwarded to IGA to be posted on the IGA website and to check for duplication or conflicts with other national Tribal events and HHS consultation sessions.
- E. Policy Development Through Tribal Consultation Process:** The need to develop a policy may be identified from within the Division or may be identified by Indian Tribes. This need may result from external forces such as Executive, Judicial, or Legislative Branch directives. Once the need to develop a policy is identified the consultation process must begin in accordance with critical events and level of consultation. The Divisions may request technical assistance from IGA for the Tribal consultation process.

## 9. CONSULTATION PROCESS

### A. Tribal

1. Work sessions will be held to solicit official Tribal comments and recommendations on policy and budget matters affecting Indian Tribes. These sessions at roundtables, forums and meetings will provide the opportunity for meaningful dialogue and effective participation by Indian Tribes.
2. Indian Tribes have the ability to meet one-on-one with a Division Head or designated representative to consult on issues specific to that Indian Tribe.
3. The IGA or Division upon completion of a consultation session will document and follow-up on any unresolved issues that would benefit from ongoing involvement of Indian Tribes in implementation and evaluation.
4. IGA will consult with Tribally-elected/appointed Leader on the Tribal consultation policy to ensure effective and meaningful participation.
5. The HHS Tribal consultation policy will be posted on the HHS website homepage and offered to appropriate Tribal and Native organization websites.
6. IGA will continue to inform Indian Tribes on the Tribal Consultation Policy by conducting meetings, roundtables, teleconferences, forums, and placing information on the HHS website homepage and other appropriate websites.
7. Specific mechanisms that will be used to consult with Tribal governments include, but are not limited to: mailings, meetings, teleconferences, and roundtables.

- B. Consultation with Other Groups:** In cases where the government-to-government relationship does not exist, consultation is encouraged to the extent that a conflict of interest does not exist with Federal statutes or the Division authorizing legislation. Some aspects of this consultation are set out in statute and administrative policy.

Even though the organizations and/or groups do not represent federally recognized Tribal governments, the Department is able to consult with these groups individually. However, if the Department wants to include organizations which do not represent specific federally-recognized Tribal governments on advisory committees or workgroups then FACA requirements must be followed. The intergovernmental committee exemption to FACA is found under 2 U.S.C. 1534. As a result, the Department is required to adhere to FACA when such organizations are made a part of an advisory committee or workgroup.

The Secretary's ICNAA is responsible for ensuring inclusion of the organizations and groups in policies affecting Native Americans Department-wide. The ICNAA will work closely with IGA, Regional Directors and the Divisions to identify those

instances when other Native American non-governmental organizations and groups may be negatively affected if excluded from the consultation process such as urban Indian organizations, non-federally recognized Tribal groups, governing bodies of Indian Tribes on Federal and State Reservations, State Recognized Tribes, other Indian organizations, Native Hawaiians, Native American Pacific Islanders (including American Samoan Natives), and other Native American groups that, by the sheer nature of their business, serve American Indians, Alaska Natives or Native Americans.

Although consultation may be allowed with these organizations, non-federally recognized Tribes and Tribal organizations listed above do not fall under the intergovernmental committee exemption to FACA found under 2 U.S.C. 1534. As a result, the agency is required to adhere to FACA when such organizations are made a part of an advisory committee or workgroup.

The ICNAA will work with IGA and the Divisions to facilitate any required consultation forums, the level of consultation required, recording of meetings, evaluate the results, determine whether additional consultation on policy items may be needed, and report to the affected Native American groups and non-governmental Indian and Native organizations.

**C. States:**

1. In some instances, the authority and appropriations for HHS programs and services to Indian Tribes flow through the States for the benefit of Indian Tribes, based on statute, regulation or HHS policy. It is important that HHS facilitate collaboration between States and Indian Tribes to assist with consultation in the same manner should HHS programs and services be provided directly to an Indian Tribe.
2. When States are authorized to administer HHS programs, services, and funding for the benefit of Indian Tribes and AI/ANs, IGA will collaborate with Divisions to assist States in developing mechanisms for consultation with Indian Tribes before taking any actions that have substantial direct effects on Indian Tribes. HHS will recommend the development of State plans for Tribal consultation. States will receive HHS technical assistance in developing these plans.
3. IGA, Regional Directors, and Divisions will assist States to consult with Indian Tribes in a meaningful manner that is consistent with the definition of “consultation” as defined in this policy. Divisions will communicate the input received through Tribal consultation to the States through the appropriate program(s) and work with the Regional Directors to facilitate collaboration between Indian Tribes, States, and HHS.
4. IGA will assist Divisions in helping States develop and implement plans on Tribal consultation to assist States with intergovernmental communications with

Indian Tribes. Regional Directors and Regional Office staff will provide technical assistance to States and Indian Tribes for the Tribal consultation process.

5. When a Division foresees the possibility of a conflict between Tribal and State laws and Federally protected interests within its area of regulatory responsibility, the Division shall consult, to the extent practicable and permitted by law, with appropriate Indian Tribes and/or States in an effort to facilitate a dialogue.
6. IGA and Regional Directors are encouraged to invite and include State governmental, health, and human services experts in the Annual Regional Tribal Consultation Sessions whenever Indian Tribes express that State/Tribal dialogue is necessary to enhance and strengthen HHS health and human services and programs.
7. IGA shall provide guidelines that define how the Divisions will monitor and evaluate State plans to meet Tribal consultation meetings, forums, and/or sessions with Indian Tribes for HHS programs and services administered by or through a State for Indian Tribes. HHS will address State plans in situations where the evaluation has identified deficiencies in the consultation process as set forth in this policy, and work closely with States to strengthen consultation necessary for HHS funded programs and services for Indian Tribes and AI/ANs.
8. Regional Directors and HHS Divisions will measure and report on their interaction with States to facilitate and provide Tribal consultation technical assistance to States and Indian Tribes. Divisions will include their efforts in the IGA Annual Tribal Consultation Report.

**D. Regional Tribal Consultation:**

1. The HHS Regional Tribal Consultation Sessions are designed to solicit Indian Tribe's priorities and needs on health and human services and programs. The Sessions will provide an opportunity for Indian Tribes to articulate their comments and concerns on budgets, regulations, legislation and HHS health and human services policy matters.
2. Regional Offices/Directors and Divisions will work collaboratively with the Indian Tribes in their respective Regions on the development of consultation meetings, roundtables and annual sessions.
3. Regional Offices/Directors and Divisions will work with the Indian Tribes to identify regional Tribal and Native organizations that assist in representing the Indian Tribes in planning Tribal consultation sessions.

4. Regional Offices/Directors and Divisions will work collaboratively with the Indian Health Service (IHS) Area Directors in communicating and coordinating on issues and concerns of Indian Tribes in those respective regions or areas.
5. Regional Offices/Directors and Divisions will work collaboratively to facilitate Tribal-State relations as they affect Indian Tribes and AI/ANs.

## 10. ESTABLISHMENT OF JOINT TRIBAL/FEDERAL WORKGROUPS AND/OR TASK FORCES

### A. Consultation:

1. **New Policy:** When new or revised national policy/policies affect an Indian Tribe/Tribes, HHS may establish a workgroup and/or task force to develop recommendations on various technical, legal, or policy issues. In such cases, the following process is generally followed:
  - a) **Joint Tribal/Federal Workgroups and/or Taskforces:** 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 Tribal governments 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.
  - b) **Membership Notices:** The Department is allowed to meet with various representatives of organizations on an individual basis. However, if the Department or Division desires to form an advisory committee or workgroup, which includes representatives from organizations, assurance must be provided to the IGA which demonstrates compliance with FACA. If such organizations are exempt from FACA because of the intergovernmental committee exemption found under U.S.C. 1534, then documentation must be provided to IGA. In order to assure compliance with FACA requirements and exemptions, advice from agency counsel may be sought prior to formation of advisory committees or workgroups.
  - c) **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.

- d) **Workgroups:** Tribal membership should be selected based on the responses received from prospective volunteers 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.

**B. Participation:**

1. **Attendance at Meetings:** Workgroup members must make a good faith effort to attend all meetings. Other individuals may accompany members, as that member believes is appropriate to represent his/her interest.
2. **Appointment of Alternates:** Each workgroup member may appoint an alternate by written notification. In cases where an elected Tribal leader appoints an alternate who is not an elected official, the alternate shall represent the primary member on a workgroup. The alternate will have the same voting rights as the primary member, as designated in the letter by that Tribal leader.
3. **Workgroup Protocols:** The workgroup may establish protocols to govern the meetings. Such protocols will include, but are not limited to the following:
  - a) Selection of workgroup co-chairs, if applicable
  - b) Role of workgroup members
  - c) Process for decision-making (consensus based or otherwise)
  - d) Process for determining drafting and availability of all final workgroup products and documents
4. **Workgroup Charge:** Prior to the workgroup formulation, the HHS may develop an initial workgroup charge in enough detail to define the policy concept. The workgroup will develop recommendations for the final workgroup charge for the approval of the HHS Secretary, the IGA Director or the Division head.
5. **Workgroup Final Products:** Once a final draft of the workgroup has been created by the workgroup the following process will be used to facilitate additional consultation:
  - a) Upon completion, the draft policy documents will be distributed informally to Indian Tribes, National Tribal and Native Organizations for review and comment and to allow for maximum possible informal review.
  - b) 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.

- c) If the proposed policy is considered to be substantially complete as written, the workgroup will forward the draft policy to the HHS Secretary as final recommendation for consideration.
  - d) The workgroup will also recognize any contrary comments in its final report.
  - e) If it is determined that the policy should be rewritten, the workgroup will rewrite and begin informal consultation again at the initial step above.
  - f) If the proposed policy is generally acceptable to the HHS Secretary, final processing of the policy by the workgroup will be accomplished.
6. **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, National Tribal Organizations, other Native 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.

## 11. **HEALTH AND HUMAN SERVICES BUDGET FORMULATION**

1. **Performance Budget Formulation:** HHS ensures the active participation of Indian Tribes in the formulation of the HHS performance budget request as it pertains to Indian Tribes.
2. **Operating Division Consultation Plan:** Each Division Consultation Plan includes a description of how the Division consults with Indian Tribes regarding the formulation of the annual budget.
3. **National Divisional Tribal Budget Formulation and Consultation Session:** A national budget formulation session that includes each Operating and Staff Division that has involvement in Tribal activities is conducted annually to give Tribes and Tribal Organizations the opportunity to present their health and human services priority recommendations as a comprehensive set of national priorities and a proposed budget request. The intent of these sessions is to permit Divisions to consider Tribal comments as they prepare their budgets for submission to the Office of the Secretary. In order for Divisions to receive and consider Tribal recommendations in the development of the budget request, this session is conducted no later than March 15 of each year.
4. **National HHS Tribal Budget Formulation and Consultation Session:** An annual, Department-wide Tribal budget formulation and consultation session is conducted to give Indian Tribes the opportunity to present their budget priorities/recommendations to the Department with participation of the ICNAA to ensure priorities/recommendations are addressed as HHS prepares to receive the budget

requests of its Divisions. The session is convened in May of each year as a means for final input in the development of the Department's budget submission to OMB.

5. **Intradepartmental Council on Native American Affairs:** The ICNAA represents the internal HHS team providing direction across the Divisions for AI/AN/NA issues. The Tribal priorities and budget recommendations presented at the Divisional Meeting and Regional Consultation Sessions are compiled by the IGA and presented to the ICNAA.

One of the primary responsibilities of IGA/ICNAA is to solicit Tribal input in establishing the health and human service budget priorities and recommendations for their respective Divisions.

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

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

As part of the IGA Annual Tribal Consultation Report, Divisions will measure and report results and outcomes of their Tribal consultation performance to fulfill the government-to-government relationship with Indian Tribes.

The Department mission and the Department-wide performance objectives are designed to enhance the health and well-being of Americans by providing for effective health and human services and by fostering strong, sustained advances in the sciences underlying medicine, public health and social services.

Divisions shall address the Department's mission and performance objectives in carrying out the Department Tribal Consultation Policy.

Generally, one such objective promotes increasing access to health care (closing the gaps in health care). Specifically, Division performance is measured on the division's ability to increase access to quality health care services for AI/ANs, and to eliminate racial and ethnic health disparities. Another objective is to expand consumer choices in health care and human services. Other Division objectives emphasize preventive health measures, health outcomes, improve the quality of health care, and improve the well being and safety of families and individuals, especially vulnerable populations. Objectives also require Divisions to strengthen American families, including, but not limited to, increase the proportion of low-income individuals and families, including those receiving welfare and who improve their economic condition, and improving the economic and social



development of distressed communities. Objectives call for Divisions to reduce regulatory burden on providers and consumers of HHS services.

In meeting HHS objectives for the Department Tribal Consultation Policy, Divisions provide a status report on the outcome of Tribal budget recommendations developed through the budget formulation process as part of the budget process defined in Section 11, HHS Budget Formulation. They shall also record, evaluate and report on the Annual Regional Tribal Consultation Sessions as described in Section 9, Consultation Process.

Divisions and Indian Tribes will also promote a cooperative atmosphere to gather, share, and collect data to demonstrate the effective use of federal resources in a manner that is consistent with the Government Performance and Results Act (GPRA) performance measures and the OMB Program Assessment Rating Tool (PART); 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;

1. The impact of Division activities on Tribal trust resources shall be adequately assessed and Tribal interests considered before activities are undertaken;
2. the removal of governmental procedural impediments to work directly with Indian Tribes on activities that affect trust property or governmental rights of the Indian Tribes;
3. the Divisions will work to reduce regulatory burdens by streamlining the application process for and increase the availability of waivers to Indian Tribes; and,
4. divisions operate in a collaborative manner to accomplish the goals of Executive Order 13175 and this policy.

### **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. In order 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' response 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. 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 conducts one Annual Tribal Budget Consultation Session to ensure the active participation of Indian Tribes in the formulation of the HHS performance budget request as it pertains to Indian Tribes, which is usually held at the HHS Headquarters in Washington, DC in the spring. The IGA shall post a record of the annual session on the IGA website within 90 days.
3. At a minimum, HHS Regional Directors conduct an Annual Regional Tribal Consultation for Divisions to consult with Indian Tribes. These sessions shall provide an opportunity to receive the Indian Tribes priorities for budget, regulation, legislation, and other policy matters. Unless otherwise specified, the IGA Annual Consultation Report shall provide an annual reporting mechanism for this purpose and all Divisions are required to participate in this report.
4. Upon completion of consultation, the Division, and affected Indian Tribes, shall determine if there are any unresolved issues that would benefit from ongoing involvement of Indian Tribes in implementation and evaluation, including, but not limited to: assess the impact of the Division's plans, projects, programs and activities on Tribal and other available resources; removing any procedural impediments to working directly with Indian Tribes; and working collaboratively with other Federal agencies in these efforts.
5. IGA, Regional Directors and the Divisions shall ensure the annual department-wide Tribal Budget Consultation session and the Annual Regional Tribal Consultation Sessions 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 session conducted.
6. With the assistance of Indian Tribes, IGA will measure the implementation and effectiveness of this Policy. IGA will assess the Department Tribal Consultation Policy at the Annual Regional Consultation Sessions and the HHS Annual Budget Consultation Session, and utilize comments from Indian Tribes and federal participants to determine whether amendment to the Policy may be required. IGA should fully consider reconvening the Tribal Consultation Policy Revision Workgroup (TCPRW) that helped to form this policy or a similar workgroup to assist IGA in making this determination.
7. The Divisions and the Regional Directors will report at each regional Tribal consultation session, what actions were taken as a result of the previous regional Tribal consultation session and describe how HHS addressed the consultation evaluation comments received by participants.
8. Divisions are required to submit to IGA the fiscal year Tribal consultation information within 90 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 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 Department-Wide Tribal Budget 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 website, the IGA Annual Tribal Consultation Report, including the evaluation results at <http://www.hhs.gov/ofta>.

9. All national and regional consultation meetings and recommended actions shall be formally recorded and made available to Indian Tribes. 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 Division and reported to the Indian Tribes in the IGA Annual Tribal Consultation Report.

#### **14. 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.

Agencies shall consult with Indian Tribes to establish a clearly defined conflict resolution process under which Indian Tribes: 1) bring forward concerns which have a substantial direct effect, and 2) apply for waivers of statutory and regulatory requirements that are subject to waiver by the Division.

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

#### **15. SUPERSEDURE**

Department Policy on Consultation with American Indian/Alaska Native Tribes and Indian Organizations dated August 7, 1997. Tribal Consultation Plan, U.S. Department of Health and Human Services, Office of the Secretary – Staff Divisions

#### **16. EFFECTIVE DATE**

Department Tribal Consultation Policy, U.S. Department of Health and Human Services  
This policy is effective on the date of the signature by the Secretary of Health and Human Services. (Signed January 14, 2005).

This policy replaces the Tribal Consultation Plan for the Office of the Secretary Staff Divisions and it applies to all Operating Divisions. Operating Divisions shall complete necessary revisions to their existing Division consultation policy/plan to conform to the revised Department Tribal Consultation Policy.

#### **17. SUMMARY**

In developing this Policy a wide range of needs across HHS, as well as the unique characteristics of the Divisions that comprise it were taken into account. As there is diversity among the Divisions, there is also a need for Divisions to be responsive to changes, which occur within their programs and within their constituency. Hence, it is important that consultation plans developed by Divisions remain dynamic, changing as circumstances and

Indian Tribes input indicate. The Department should strengthen and make every effort with those of other departments and agencies. Such intra-governmental coordination will benefit the departments and agencies as well as the Indian Tribes.

## 18. 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 unplanned events that have or may have a substantial impact on Indian Tribes or Native communities, e.g., issues, policies, 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 program leadership, and are empowered to speak on behalf of that Division for AI/AN/NA programs, services, issues, and concerns.

10. **Indian Organization** – Any group, association, partnership, corporation, or legal entity owned or controlled by Indians, or a majority whose members are Indians.
11. **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 450b).
12. **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.
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. **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).
17. **Native Organization** – A nongovernmental body organized and operated to represent the interests of a group of individuals considered indigenous to North American countries. 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.
18. **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.
19. **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.
20. **Public Participation** – When the public is notified of a proposed or actual action, and is provided meaningful opportunities to participate in the policy development process.
  21. **Reservation** – Lands reserved with the Federal Government for Tribal use and are usually held in trust by the Federal Government or within certain defined boundaries.
  22. **Self Government** – Government in which the people who are most directly affected by the decisions make decisions.
  23. **Sovereignty** – The ultimate source of political power from which all specific political powers are derived.
  24. **State Recognized Tribes** – Tribes that maintain a special relationship with the State government and whose lands and rights are usually recognized by the State. State recognized Tribes may or may not be federally recognized.
  25. **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.
  26. **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.
  27. **Treaty** – A legally binding and written agreement that affirms the government-to-government relationship between two or more nations.
  28. **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.
  29. **Tribal Officials** – Elected or duly appointed officials of Indian Tribes or authorized inter-Tribal organizations.
  30. **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 Tribe members in all phases of its activities (25 U.S.C. 450b).

31. **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.
32. **Tribal Self–Governance** – The governmental actions of Tribes exercising self-government and self-determination.
33. **Urban Indian Organization** – A program that is funded by the Indian Health Service under Title V (Section 502 or 513) of the Indian Health Care Improvement Act.

## 19. ACRONYMS

<b>AI/AN:</b>	American Indian/Alaska Native
<b>AI/AN/NA:</b>	American Indian/Alaska Native/Native American
<b>ASBTF:</b>	Assistant Secretary for Budget, Technology and Finance
<b>BIA:</b>	Bureau of Indian Affairs
<b>Division:</b>	Staff Division and/or Operating Division
<b>EO:</b>	Executive Order
<b>FACA:</b>	Federal Advisory Committee Act
<b>FR:</b>	<i>Federal Register</i>
<b>GPRA:</b>	Government Performance Results Act
<b>HHS:</b>	U.S. Department of Health and Human Services
<b>ICNAA:</b>	Intrdepartmental Council on Native American Affairs
<b>IGA:</b>	Office of Intergovernmental Affairs
<b>IHS</b>	Indian Health Service
<b>IOS:</b>	Immediate Office of the Secretary
<b>NPRM:</b>	Notice of Proposed Rule Making
<b>OMB:</b>	Office of Management and Budget
<b>OS:</b>	Office of the Secretary
<b>PART:</b>	Performance Assessment Rating Tool
<b>TCPRW:</b>	Tribal Consultation Policy Revision Workgroup
<b>U.S.:</b>	United States
<b>U.S.C.:</b>	United States Code