

National Indian Health Board



March 26, 2021

Norris Cochran, Acting Secretary
Office of the Secretary
U.S. Department of Health and Human Services
200 Independence Ave S.W.
Washington D.C. 20201

Re: HHS Tribal Consultation Policy

Dear Acting Secretary Cochran:

On behalf of the National Indian Health Board (NIHB),¹ I write in response to your call for Tribal consultation regarding the U.S. Department of Health and Human Services (HHS) Tribal consultation policy.

We applaud HHS for taking this step towards reaffirming and strengthening the Nation-to-Nation relationship that exists between Tribal Nations and the Federal Government. The Tribes look forward to working with HHS in ways that respect Tribal sovereignty and Tribal leaders as heads of sovereign nations.

Strengthening the Government-to-Government Relationship

Tribal leaders seek to improve the government-to-government relationship between Tribal Nations and the federal government. While we recognize that federal agencies regularly conduct consultation, we reject the notion that the requirements of consultation are achieved by merely scheduling a time and sending personnel to hear concerns. True consultation and government-to-government engagement goes far beyond that limited scope. The engagement must allow for the heads of the governments to come together, share concerns, generate ideas and solutions, negotiate their roles and responsibilities, and agree on a course of action. Tribal consultation as a tool of government-to-government relations must include the concept of ***consent*** if it is to be meaningful, respectful, and ultimately successful.

With this goal in mind, we suggest some interim steps that HHS should adopt as it works towards this ideal.

¹ Established in 1972, the National Indian Health Board (NIHB) is an inter-Tribal organization that advocates on behalf of Tribal governments for the provision of quality health care to all American Indians and Alaska Natives (AI/ANs). The NIHB is governed by a Board of Directors consisting of a representative from each of the twelve Indian Health Service (IHS) Areas. Each Area Health Board elects a representative to sit on the NIHB Board of Directors. In areas where there is no Area Health Board, Tribal governments choose a representative who communicates policy information and concerns of the Tribes in that area with the NIHB. Whether Tribes operate their entire health care program through contracts or compacts with IHS under Public Law 93-638, the Indian Self-Determination and Education Assistance Act (ISDEAA), or continue to also rely on IHS for delivery of some, or even most, of their health care, the NIHB is their advocate.

Trust Responsibility

As the Biden Administration Memo highlights, the United States has a unique legal and political relationship with Tribal governments established through and confirmed by the United States Constitution, treaties, federal statutes, executive orders, and judicial decisions. Central to this relationship is the federal government's trust responsibility to protect the interests of Indian Tribes and communities, including the provision of health care to American Indians/Alaska Natives (AI/ANs). In recognition of that trust responsibility, Congress has passed numerous Indian-specific laws to provide for Indian health care, including laws establishing the Indian health care system and those providing structure and detail to the delivery of care, such as the Indian Health Care Improvement Act (IHCIA).² In the IHCIA, Congress reiterated that "federal health services to maintain and improve the health of the Indians are consonant with and required by the federal government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people."³ The federal government's work with AI/AN people *must* be informed by this responsibility.

Engaging as Sovereigns

Tribes are sovereign nations. HHS must be mindful of this status as policies that impact AI/AN people are developed. **Tribal consultation is the primary means through which this relationship is respected.** Tribal governments are the oldest governments in North America and their existence predates the United States. This was recognized in Article I, Section 8, Clause 3 of the U.S. Constitution, which states that the United States Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The sovereignty of Tribes within the framework of the United States government was further clarified in *Cherokee Nation v. Georgia*,⁴ which states that Tribes occupy a unique area within the American political framework as "domestic dependent nations." The distinctive nature of Tribal Nations has consistently been recognized in American law and jurisprudence. Many AI/ANs were not even United States citizens until the passage of the Indian Citizenship Act of 1924. Today however, AI/ANs are dual citizens, of their Tribe and the United States government, and this reality should inform any work being done to address long-standing concerns in AI/AN communities.⁵ As previously stated, the United States has a unique trust responsibility to Tribal Nations, which has repeatedly been invoked in statutes, regulations, agency guidance, and court

² 25 U. S. C. § 1601 et seq.

³ Id. § 1601(1)

⁴ 30 U.S. 1 (1831)

⁵ Tribal citizens are also citizens of their states and eligible for services through them. states are instruments of joint state/federal policy – like Medicaid – and when operating in that space, they are obligated to carry out the protections and special benefits the federal government owes to Tribes/Tribal people. If states fail to carry out these duties, the federal government should provide a reliable remedy. For state programs that receive federal funding, the federal government should be ensuring that the states are working with Tribes to ensure that Tribal citizens receive these benefits. It is our experience that many of the funds that come from the federal government to states do not make their way into Indian Country. States are not a party to the trust responsibility but are often used by the federal government to administer programs, making it important for the federal government to hold them accountable.

decisions. **Respect for the sovereignty of Tribal Nations should frame every interaction between Tribes and the federal government.**

To better honor Tribal sovereignty, current methods of Tribal consultation could be improved. The Biden Administration Memo presents an opportunity for all federal agencies to better honor Tribal sovereignty and develop truly meaningful consultation policies. **Tribal leaders deserve to have access to top level political leadership at HHS.** Tribal consultations are supposed to be *meaningful* and it is perceived as less than meaningful when political leadership avoids meeting directly with Tribal leaders when decisions are being made that impact their citizens. This contrasts greatly with the access that is afforded to states. We know that when decisions are being made that affect the states, governors are not left to speak with people who lack decision-making authority. State governors are included in calls with political leadership, from the HHS level to the President of the United States. Despite also being mentioned in the United States Constitution, in the *same sentence* as states, Tribes are not afforded the same status or level of access. Under its current construction, Tribal consultation often involves meeting with agency personnel having little decision-making authority and then relying on that person to relay Tribal concerns to their leadership. **This does not advance the government-to-government relationship or honor Tribal sovereignty.**

As President Biden stated in Section 1 of the Presidential Memorandum on Tribal Consultation, “[m]y Administration is committed to honoring Tribal sovereignty and including Tribal voices in policy deliberation that affects Tribal communities. The Federal Government has much to learn from Tribal Nations and strong communication is fundamental to a constructive relationship.”⁶ He also called on agencies to engage in “**regular, meaningful, and robust** consultation with Tribal officials in the development of Federal policies that have Tribal implications.”⁷ **NIHB believes that Tribal consultation meets the President’s criteria only when top-level political leadership is available to Tribal leaders before policy decisions are made.**

Improving Accountability

As mentioned above, Tribal leaders frequently are unable to meet directly with the decision-makers and are instead reliant on someone relaying the information gathered from a Tribal consultation up the chain of command. Tribal leaders perceive this method not as true consultation, but rather as, merely “checking a box” and not fully considering Tribal voices in the policy-making process. Tribal consultation cannot be meaningful without some degree of accountability from HHS. Tribal leaders need to know that their opinions have been heard and carefully considered by HHS.

To facilitate accountability, HHS should issue a Dear Tribal Leader Letter after *every* Tribal consultation that details what was discussed, what Tribal leaders suggested, and follow up actions were taken in response to those suggestions. Other mechanisms might be explored and utilized

⁶ See “Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships,” <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>, January 26, 2021.

⁷ *Id.*

that will allow improved communication and accountability in addition to a follow up letter. For example, having federal agency partners report out in every meeting about prior recommendations could increase accountability and improve transparency. Further, we urge HHS to address **why** certain suggestions were not implemented. In whatever follow up mechanism used, HHS should include a means for Tribal leaders to inquire further about why their suggestion was not incorporated or to suggest alternative approaches that may be mutually beneficial. Far too often, Tribal leaders make suggestions, but never hear back. They are left to wonder if their suggestion was received, understood, and considered. **Meaningful consultation is not possible without meaningful consideration and follow-up.**

Informed Tribal Decision Making

We urge HHS to move towards a consultation model that encourages informed Tribal decision making by giving Tribal leaders ample time to prepare so the consultation can be fruitful and meaningful for both sides. Although we understand that some situations call for quick decision making, in all but the most urgent situations, **rapid consultations should be avoided.** They do not produce good results for Indian Country. We believe that such consultations do not give Tribal leaders enough time to research and prepare to discuss the issue at hand. The lack of preparation time often results in consultations that feel like they exist to allow HHS to “check a box” and not learn about the concerns of Indian Country. Tribal leaders are leaders of sovereign nations and cannot be reasonably expected to be ready for a consultation on just a couple of days’ notice. While one might argue that a rapid consultation meets a minimum technical threshold to be called a “Tribal consultation,” such meetings do not allow for informed and meaningful discussions with Indian Country.

Further, we also urge HHS to adopt a uniform notice requirement that ensures that every federally recognized Tribe can participate in Tribal consultations. It often takes time for notice of these meetings to arrive on the desk of Tribal leaders, who are then expected to turn their attention towards getting ready for the meeting. Tribal leaders should have some degree of predictability regarding Tribal consultations so they can operationalize preparation and have a mechanism to ensure that they are prepared for the meeting. We are also concerned that Tribal leaders may not receive the invitation in a timely manner and are either unable to attend or do not have time to prepare. **Tribal leaders are leaders of sovereign nations and often have competing priorities, it is unrealistic to expect them to be ready on short notice.** We also ask HHS to create a mechanism to ensure that every federally recognized Tribe receives notice of Tribal consultations so that the voices of all Tribes can be considered.

Tribal Technical Assistance

While we reiterate that consulting with a Tribal Advisory Committee (TAC) is not a substitute for Tribal consultation, TACs should be utilized by HHS and its operating divisions when policies are being formulated. The TACs are the best conduit through which HHS can receive technical assistance that is Tribally informed and representative of the various IHS regions. We urge HHS to begin engaging the TACs early in the policy and regulatory making process so any proposed policies can be Tribally informed from the start. We also urge HHS to consider expanding the

usage of listening sessions during these early stages of policy development so they can hear directly from Tribal leaders. **If Tribal leaders are engaged from the start, it should make for a more fruitful consultation process.** HHS should not wait until a policy or regulation is formulated before asking for feedback from Indian Country.

Intra-Agency Consistency and Training

Tribal consultation policy is only as strong as the weakest version of the policy within each federal agency. Ideally, the federal government should have one uniform Tribal consultation policy. At a minimum, Tribes should expect to find one uniform, and consistently implemented intra-agency policy. The structural integrity of Tribal consultation policy is weakened if not implemented consistently across all agency operating divisions. In addition, training operating division staff on Tribal consultation policy is a vital component of meaningful consultation. Unfortunately, some agency operating divisions are not even aware of Tribal consultation or the status of Tribes as sovereign nations. HHS should work internally to bring all of its divisions under one uniform Tribal consultation policy and train staff on the policy and Indian health law basics.

Conclusion

We want to thank HHS for its attention to the Biden Administration Memo and efforts to address its Tribal consultation policy. Rededication to improving the government-to-government relationship presents an opportunity to improve the processes that maintain that relationship. Given the status of Tribes as pre-existing sovereigns and their unique position in the American legal framework, Tribal consultation must be robust and meaningful. To be meaningful, there must be accountability from HHS. Ideally, HHS must also work towards a more robust model that seeks the **consent** of Tribes.

Thank you for taking this first step and we look forward to an on-going dialogue on how to make Tribal consultation more respectful and responsive to the needs of Tribes.

Sincerely,



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CC:

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