

National Indian Health Board



April 9, 2021

Shalanda Young, Acting Secretary
Office of Management and Budget
Executive Office of the President
725 17th Street, NW
Washington, DC 20503

Re: OMB Tribal Consultation Policy

Dear Ms. Young:

On behalf of the National Indian Health Board (NIHB) and the more than 574 federally recognized Tribes we serve, both American Indian and Alaska Native (AI/AN),¹ I write in response to the recent Tribal consultation that the Office of Budget Management (OMB) initiated with Tribal leaders. This inaugural, and ongoing, consultation was commenced to inform OMB’s development of a Tribal consultation plan of action pursuant to the January 26 Presidential Memorandum and to gain meaningful contribution from Tribes on how OMB can improve engagement with Tribal Nations. After decades of neglect in this space, the development of an OMB consultation policy is truly an historic first step. NIHB is encouraged by OMB’s commitment to “build Tribal consultation into their DNA.” We applaud OMB for taking steps toward recognizing and strengthening the nation-to-nation relationship that exists between Tribal Nations and the federal government. The Tribes look forward to working with OMB in ways that respect Tribal sovereignty and Tribal leaders as heads of sovereign nations.

True participation in a government-to-government relationship with Tribal Nations requires a robust and meaningful Tribal consultation policy and agency-wide integration of standards and practices that demonstrate understanding and recognition of, and respect for the unique nation-to-nation relationship between Tribes and the federal government. OMB must consider Tribal Nations as sovereign governments and not merely as grant recipients or an ethnic group. To that end, we respectfully submit a summary of elements that Tribes request be implemented in OMB’s Tribal consultation plan and agency-wide standards and practices.

Strengthening the Government-to-Government Relationship

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.

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 at the beginning of the process, share concerns, generate ideas and solutions, negotiate their roles and responsibilities, agree on a course of action and expect follow-up and accountability. Because each of OMB's five main function areas affect Indian Country, Tribal Nations must also have the ability to request or initiate consultation at any time and on any topic that Tribes deem a concern for purposes of consultation with OMB. **Given its role in serving a powerful oversight function within the federal government, OMB must ensure that it is prioritizing Tribal consultation.**

Trust Responsibility

As the Biden Administration Memo highlights and affirms, 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 and public health 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 OMB's oversight role within the federal government creates a heightened need to be vigilant and ensure that respect for the trust responsibility is embedded in its work. OMB must work to measure how well other agencies are honoring the trust responsibility. The federal government's work with AI/AN people *must* be informed by this responsibility and OMB plays a key role in ensuring that that happens.

Engaging as Sovereigns

Tribes are sovereign nations and OMB 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

² 25 U. S. C. § 1601 et seq.

³ Id. § 1601(1)

⁴ 30 U.S. 1 (1831)

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 decisions.

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

To better honor Tribal sovereignty, meaningful and robust Tribal consultation should be developed. 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 OMB.** 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 OMB 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 some 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**

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.

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 Tribal consultation meets the President's criteria only when top-level political leadership is available to Tribal leaders before policy decisions are made.

Tribal Funding

We also want to emphasize that OMB's role as the primary agency in the federal budgeting process creates an enhanced responsibility to ensure that programs that impact Indian Country are funded at the levels needed to carry out their mission and fulfil the trust responsibility. The U.S. Commission of Civil Rights' "Broken Promises" report found that this is often not the case. We believe that OMB can play a key role in addressing this issue. **We urge OMB to work with federal agencies to determine how much money is going to Tribes and how it is being delivered to Tribes.** Tribes have historically experienced issues with accessing funding. They are often invited to apply for competitive grants with onerous application and reporting requirements, which create a burden on Tribal programs that may not have the resources needed to meet the requirements.

The trust responsibility creates a duty on the federal government to ensure that Tribes have access to the funding needed in order to serve their people. **We urge OMB to work with the different departments and agencies to move away from competitive grant funding and towards formula-based funding. OMB must also ensure that there are Tribal set-asides in all sources of funding.** Tribes are frequently told to work with the states to access funding and we want to reiterate that this is unsuccessful and inappropriate. Shifting the federal trust relationship between the United States and Tribes to the states is also an abdication of the federal trust responsibility.

Improving Accountability and Access

As mentioned above, Tribal leaders frequently are unable to meet directly with decision-makers and are instead reliant on someone unequal in authority or stature to leaders of Tribal nations and these junior employees are charged with 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 or respecting Tribal voices in the policy-making process. Prospectively, Tribal consultation cannot be meaningful without some degree of accountability from OMB. Tribal leaders need to know that their opinions and counsel have been heard and carefully considered by OMB.

To facilitate accountability, OMB 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 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 OMB to address **why** certain suggestions were not implemented. In whatever follow up mechanism used, OMB 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. Tribes experience far too often, making suggestions and outlining a path forward, but never hearing back.

They are left to wonder if their recommendations were received, understood, and considered. **Meaningful consultation is not possible without meaningful consideration and follow-up.**

In addition, OMB should issue an annual report on consultation and an annual report on federal funding within each agency and department, to include funding and shortfalls. OMB should consider holding an annual summit or round table discussions in addition to consultations. Tribes would also benefit greatly from having access to the budget sooner, when possible. We also urge OMB to exercise its oversight authority and require departments/agencies to provide an annual and complete report on its spending in Indian Country, as well as information on what grant opportunities Tribes were eligible for but did not receive.

Informed Tribal Decision Making

We urge OMB 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. Tribes experience lack of preparation time as consultations that feel like they exist to allow an agency to, again, just “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 OMB 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 consultation processes 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 OMB 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

The Tribes strongly recommend establishing **an OMB Tribal Advisory Committee (TAC).** A TAC would provide OMB with direct, regular communication with Tribal leaders. The TAC would supplement, not replace, OMB’s consultation with all Tribal Nations and provide guidance on OMB initiatives and functions. While we reiterate that consulting with a TAC is not a substitute for Tribal consultation, TACs should be utilized by OMB when policies are being formulated. The TACs are the best conduit through which OMB can receive technical assistance that is diverse in

Tribal representation, Tribally informed and representative of broad regional variation. We urge OMB to begin engaging with a TACs early in the policy and regulatory making process so any proposed policies can be Tribally informed from the start. We also urge OMB 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.** OMB should not wait until a policy or regulation is formulated before asking for feedback from Indian Country.

We also believe that OMB should create a dedicated office for Tribes and Tribal programs that is staffed by experts in federal Indian law who also possess cultural competency. We believe that having experts embedded within OMB would help the agency understand how and why certain policies may be harmful to Tribes. **In order to ensure that OMB's policies are informed by an understanding of the trust responsibility and federal Indian law, the agency must stand up a Division of Tribal Affairs.**

Conclusion

We want to thank OMB for its attention to the Biden Administration Memo and efforts to address its Tribal consultation policy. OMB's commitment 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 and one that includes accountability. We look forward to ongoing productive discussions on how OMB can develop a truly meaningful and robust Tribal Consultation policy that respects Tribal sovereignty and honors the unique nation-to-nation relationship. We applaud the Administration's commitment to moving us toward more meaningful consultation.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Smith". The signature is fluid and cursive, with a large initial "W" and "S".

William Smith, *Valdez Native Tribe*
Chairman
National Indian Health Board