

National Indian Health Board



January 27, 2023

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Ave SW
Washington, DC 20201

Re: HHS Draft Tribal Consultation Policy

Dear Secretary Becerra:

On behalf of the National Indian Health Board and the 574+ federally recognized American Indian and Alaska Native (AI/AN) Tribes we serve, thank you for the opportunity to provide feedback and recommendations on the draft U.S. Department of Health and Human Services (HHS) Tribal Consultation Policy. We applaud HHS for taking this step to reaffirm and strengthen the nation-to-nation relationship that exists between Tribal nations and the federal government. HHS plays a vital role in fulfilling the federal trust responsibility to ensure the health and well-being of AI/AN people. Therefore, the Department's Policy must ensure that Tribal Consultation is meaningful, thorough, and consistent with the other federal agencies. NIHB stands ready to work with HHS to strengthen the Department's Policy.

I. Process Improvements

We commend HHS and the workgroup for their efforts in updating the current Consultation Policy. However, we believe that there are areas of improvement to ensure that all Tribes and regions are better represented in this process. It is important to note that the Secretary's Tribal Advisory Committee (STAC) workgroup that engaged in the HHS process was voluntary and represented a small fraction of the IHS regions. We encourage HHS to consider a model like the one used by the Indian Health Service (IHS) Director's Advisory Workgroup on Tribal Consultation. The IHS workgroup is comprised of Tribal and Federal members and includes two Tribal representatives and one Federal member from each IHS Area and federal members from select IHS Headquarters Program Offices. The Tribal members are selected by the area Tribes. This allows for full representation from all the areas during the entire process. We recommend that HHS implement a workgroup process that is better representative of Indian country and can have representation from all regions. Additionally, any recommendations brought before any federal workgroup or advisory body is not a replacement for Tribal consultation. Lastly, we recommend that any additional updates to the policy be brought before Tribal Consultation. Additionally, once the consultation and review process is completed, but before the Secretary signs the new policy, if the Department is making a change that Tribes do not support—we ask that the Secretary meet with Tribes to discuss why the Department is taking that action.

II. Workgroup Major Recommendations & Changes

United Nations Declaration on the Rights of Indigenous People (UNDRIP). As stated in the 2022 *Presidential Memorandum on Uniform Standards for Tribal Consultation*, "Consultation requires that information obtained from Tribes be given meaningful consideration, and agencies should strive for consensus with Tribes or a mutually desired outcome." We recognize that there are certain limitations on what HHS can include in the Tribal Consultation Policy. However, HHS must understand the recommendations and thoughtfully consider the recommendations of Indian country and work collaboratively to find creative ways to achieve a mutually-desired outcome. We commend HHS for



honoring this philosophy when addressing many of the Tribal recommendations, including the recommendations to include “free prior, and informed consent,” referencing the UNDRIP. We commend HHS for understanding the intent of the recommendation and identifying a way to incorporate the principles of UNDRIP into the Consultation Policy. We urge HHS to memorialize this philosophy in the Tribal Consultation Policy and apply it to all Tribal recommendations.

Intertribal Consortium and Intertribal Organization: Tribes have the sovereign right to determine who and how they will be represented. Therefore, we commend the draft’s statement that “HHS will acknowledge [that intertribal consortia and intertribal organizations] consist of Indian Tribes for consultation purposes, including consultation on a government-to-government basis.” We also support the draft’s acknowledgement that “[p]articipation by any Intertribal Consortium or Intertribal Organization does not abridge any member Indian Tribe’s ability to also participate in consultation.”

Alaska Native Corporations (ANC). The Workgroup specifically requested input on whether consultation with ANCs) should be included in this Tribal Consultation Policy or whether HHS should instead develop a separate policy to address ANCs. NIHB strongly believes that Consultation with ANCs should be included in the HHS Tribal Consultation Policy as recommended by the workgroup and reflected in the draft text of the Consultation Policy. The definition in the draft policy addresses the Consolidated Appropriations Acts that directs the Department to consult with ANCs. It also clearly distinguishes the federal relationship with ANCs from the government-to-government relationship with federally recognized Indian Tribes. Additionally, The Department should avoid setting a precedent of separating out ANCs in Consultation. The workgroup’s strategy protects Tribal sovereignty without creating a duplicate policy.

III. Incorporation Presidential Memorandum on Uniform Standards for Tribal Consultation as a Baseline

On November 30, 2022, President Biden issued the Memorandum on Uniform Standards for Tribal Consultation. We urge HHS to make the appropriate revisions to the draft HHS Tribal Consultation Policy to ensure consistency with the President’s Uniform Standards. Such modifications would clarify essential parts of the Consultation Policy and would address many existing Tribal concerns. Specifically, we recommend that the Department conform to the standards laid out in section 5 of the November 30, 2022 Memorandum, even if those standards and timeframes are not adopted into the final HHS Tribal Consultation Policy. Additionally, HHS should consider mirroring the structure of the President’s Standards to ensure consistency and ease of use. To ensure that all provisions are considered and incorporated, HHS must develop a side-by-side comparison and present it through Tribal consultation with recommendations on incorporating the Standards in the HHS Tribal Consultation Policy.

Additionally, the Memorandum clearly states that the Uniform Standards are a baseline, and that “agencies are encouraged to build upon these standards to fulfill the goals and purposes of Executive Order 13175 consistent with their unique missions and engagement with Tribal Nations on agency-specific issues.” We encourage HHS to view these Standards as a starting point and to build upon these standards to strengthen the Department’s relationship with Tribal nations.

While the Uniform Standards are a solid baseline for the Tribal Consultation policy, HHS must build upon these standards to ensure the policy is accessible and functional, promotes accountability, and fosters meaningful government-to-government dialogue. ***To that end, we make the following additional recommendations.***

Reporting: The Policy should clarify the timeline for publishing Consultation records and reports and how these will be shared with Tribes (e.g., where they will be posted online). This is critical for ensuring accountability.



Right to request Consultation: The Policy should make it clear to Tribal leaders that they have a right to request consultation whenever they desire. The Consultation Policy should prescribe a method of contacting the agency and any timelines for a response from the agency. Providing Tribal leaders with prescribed steps on initiating a Tribal consultation and making that clear in its policy will increase accountability.

Accessibility of Consultations: Consultations should be accessible to the relevant Tribal audience. If the subject of a Consultation primarily affects an individual reservation or region, the Department should consider steps to promote access and participation by the affected Tribe or Tribes and use the appropriate Consultation mechanism to maximize participation and meaningful discussion. In addition, the Consultation Policy should ensure these meetings are accessible and that all interested parties can join the consultation even if they are not permitted to participate in the dialogue.

Accessibility of the Policy: The Policy is drafted in a way that may be difficult for the lay person to understand. Accessibility is critical so that any Tribal leader, no matter their familiarity with HHS, can easily understand and make use of the Tribal consultation policy. To that end, please also review the document's formatting to ensure consistency with the font styles used to designate different levels of headings and to ensure sections are all appropriately and distinctly labeled. This will help with ease of readability.

Indian Organizations: As stated in the draft Policy, Indian Organizations are instrumental partners in Tribal Consultation. Indian Organizations work, in collaboration with agencies, as parallel and independent entities, to outreach to Tribal Nations to ensure maximum participation in Tribal Consultation. Additionally, In order for Tribal leaders to provide the input necessary for an effective government-to-government relationship, Tribes rely on technical assistance (TA) from these national, regional, and intertribal organizations. Tribal leaders have the right to be advised on all relevant technical areas, and often, a single technical advisor does not have expertise in all subject areas. Therefore, Indian Organizations should be included in communications, notices, and reports regarding Tribal consultations. Additionally, HHS and its operating divisions must support and resource the work of Tribal organizations, such as NIHB, which are the Tribes' chosen, vital link to ensuring that Tribal leaders have access to the subject matter expertise that helps them prepare to meaningful feedback to or engage proactively with Federal or Administration Personnel.

IV. Conclusion

Thank you for the opportunity to submit comments again before the policy is finalized. We do note that significant improvements have been made between this draft and prior versions, and we appreciate the collaboration with Tribal workgroup members that brought about these positive changes. We appreciate your efforts to respect the government-to-government relationship and to provide due consideration for the opinions of Tribes, tribal organizations, and intertribal consortiums in this process.

Yours in Health,

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

