Submitted via email

October 30, 2020
The Honorable Alex M Azar II
Secretary
United States Department of Health and Human Services
200 Independent Ave. SW
Washington, DC 20201

Re: Tribal Vaccine Jurisdiction Decision Deadline and the Need for More Information and Greater Flexibility

Dear Secretary Azar:

On behalf of all of our organizations, and Tribes and American Indian and Alaska Native people we serve, we write to share our grave concerns about the upcoming deadline for Tribes to select between receiving approved coronavirus (COVID-19) vaccines through the Indian Health Service (IHS) or states. The administration announced this deadline on a White House call, Thursday, October 22, 2020 and set the deadline for this Friday, October 30, 2020. The administration did not share a Dear Tribal Leader Letter with Tribes to notify them of this deadline, nor did it follow other regular methods of sharing notice. The impossibly short time frame, coupled with a lack of notice, all but guarantees that a good percentage of Tribes will miss the deadline. Even with additional time and notice, we know many Tribes have simply not received enough information from the federal government and the states to make an informed decision. Furthermore, Tribes need additional options beyond simply choosing between a state or IHS.

<u>Tribes Need Additional Information</u>
The IHS and state vaccine distribution plans currently exist in draft form and they contain gaps in information that make it difficult for Tribes to determine which plan will work best for their populations. At the same time, this decision is likely to have significant ramifications on their ability

to ensure their communities are vaccinated. This deadline places Tribes, their citizens, and communities in a precarious position.

IHS released its draft COVID-19 Pandemic Vaccine Draft Plan on October 14, 2020, and called for Tribal comments immediately after release. The comment period closed five business days later on October 21. The following day, Tribes attending the White House call heard that they had one week to make a decision on which jurisdiction they would prefer to receive a potential COVID-19 vaccination – a state distribution plan or an IHS distribution plan. IHS has not incorporated recommended changes or added clarifying and needed detail. Nor has IHS held a formal Tribal consultation on the draft plan. On the state side, many states find themselves similarly situated, with draft plans that have not been thoroughly vetted with the Tribes they will impact. **At a minimum, we need sufficient time for Tribal engagement, time for the jurisdictions to finalize their plans, and time for Tribes to weigh their decision with the information contained in finalized plans.**

Trust Responsibility

We kindly remind the agency that 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 and Alaska Natives (AI/ANs). In recognition of the 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).[1] 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."[2] **We believe that the federal government's announcement that forces Tribes to pick between two options for which incomplete information exists is a violation of the trust responsibility and directly imperils the ability of Tribes to protect their citizens from COVID-19.**

Incomplete Information

Although we do not outline all problematic aspects of the draft IHS plan, we highlight some select portions that warrant specific mention.

I. Population Counts

How will the populations be counted and who will be considered a part of the community? On page 9, the guidance merely says that, "Initial IHS estimates will likely be based on existing data in the Clinical Reporting System (facility level), the National Data Warehouse (NDW), as well as pre-planning information provided by I/T/U programs considering NSSC distribution to inform high level planning for vaccine distribution." We underscore that Tribes, as sovereign nations, are the only appropriate units of government to provide these numbers and should be supported with

[1] 25 U. S. C. § 1601 et seq.
[2] Id. § 1601(1)

technical assistance if they request help in compiling these numbers. Tribes may determine to include non-American Indians and Alaska Natives (AI/AN) that reside in their community, which aligns with IHS regulations. The IHS guidance should be made clearer on this point. Furthermore, as sovereign governments, Tribes should determine how the vaccine will be allocated within Tribal communities. We are also concerned about the non-committal "will likely" phrasing used in this sentence because it reinforces the element of uncertainty to this entire process. If a Tribe is expected to make a decision based on this draft plan, they are left without any remote certainty about how their population will even be counted.

II. Vaccine Distribution

There is also uncertainty about how a vaccine will be distributed across the Indian health care system. Page 4 of the draft IHS plan mentions that the prioritization team will develop an algorithm to ensure equitable distribution of the vaccine. However, providers have no idea what this algorithm will look like and how it will impact their allotted amounts. This is an important piece of information to have when trying to decide whether or not to use a state or IHS vaccine distribution channel. We anticipate that states may also be in a similar state of uncertainty about how to distribute a vaccine. We do know, however, that at least a few states are planning to or have already involved Tribes in their planning processes. It is unclear as to what extent Tribes will be consulted in the development of IHS's algorithm. Without a clear plan from IHS and a rushed deadline for a decision, Tribes may feel compelled to pick the state for distribution even with incomplete information on their options.

III. Cost

We also have concerns about the costs of the vaccine and its associated supplies. The IHS plan is not immediately clear about who will assume these costs. We believe that it should be made abundantly clear that the vaccine and any associated supplies will be provided to the Indian health system free of cost and will not come from the existing IHS budget. Requiring the Indian health system, which is already chronically underfunded, to pay for the costs of these supplies would put an additional strain on the system. In order to make a fair comparison between the states and IHS, Tribes must know who will pay for these supplies.

<u>Additional Choices are Needed</u>

Tribes should be allowed to elect to receive the vaccine from both IHS and states. Tribes have struggled in the past to access vaccines and we believe that maximum flexibility will be needed to ensure that this does not happen again. We believe that Tribes should not have to be reliant on only one source for the vaccine; which may leave them in a vulnerable position where a potential shortage could prove problematic. If a Tribe feels comfortable relying only on IHS or the state, they should be able to make that choice. However, we believe that a hybrid approach should also be treated as an equally valid choice. If a Tribe desires to work with both the state and IHS, they should be allowed to do so. Furthermore, some Tribes have shared that they would prefer to work directly with Operation Warp Speed, so they can have the same status as a state or IHS, essentially allowing them to also function as one of the vaccine "jurisdictions."

<u>Consultation</u>

An extension of the deadline is warranted because it will allow IHS and the states to engage in required consultation with Tribes to make sure that the relevant plans are responsive to Tribal needs and concerns. Given the gravity of this situation, and particularly in light of the vulnerability to COVID we have seen in Tribal populations, it is extremely important that Tribes are fully heard and that their concerns are reflected in any plan that is implemented. As noted above, the federal government has a trust responsibility to Tribes, so it is essential that any federal plan is responsive to the needs of Tribes.

Conclusion

We believe that the current deadline of October 30, 2020 is wholly inappropriate, was not disseminated to Tribes in a government-to-government manner, and does not give Tribes enough time to adequately weigh their options. Furthermore, at present, IHS and many state plans do not provide enough information to make an informed choice. Finally, Tribes should have additional options to select from, including the option to work with both states and IHS, or to work directly with Operation Warp Speed as a vaccine jurisdiction, if they so choose.

Our immediate and urgent request is to extend the decision deadline. Our additional request is to conduct formal Tribal consultation (and any additional engagement activities that may be needed) to finalize the IHS vaccine plan. Once finalized, Tribes will need robust communications on every available platform so they have the finalized plan, know all of their options, and have the opportunity to make decisions that will best serve their citizens and protect the health of their communities.

Sincerely,

National Indian Health Board
National Congress of American Indians
Alaska Native Health Board
Great Lakes Area Tribal Health Board
Rocky Mountain Tribal Leaders' Council
California Rural Indian Health Board
Great Plains Tribal Leaders' Health Board
United South and Eastern Tribes Sovereignty Protection Fund
Southern Plains Tribal Health Board
Northwest Portland Area Indian Health Board

CC:
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