

National Indian Health Board



June 15, 2021

Elizabeth Fowler
Acting Director, Indian Health Service
U.S. Department of Health and Human Services
5600 Fishers Lane
Rockville, MD 20857

Re: IHS Tribal Consultation Policy

Dear Director Fowler:

On behalf of the National Indian Health Board (NIHB),¹ we are responding to your call for Tribal consultation regarding the Indian Health Service's (IHS) Tribal consultation policy. We applaud IHS for taking this step towards reaffirming and strengthening the Government-to-Government relationship that exists between Tribal Nations and the Federal Government. IHS has a central role in fulfilling the trust responsibility, and they must have a policy in place that ensures that Tribal Consultation is meaningful, thorough, and consistent with the other operating divisions throughout the Department of Health and Human Services (HHS).

IHS must update their policy to increase accountability, acknowledge and honor the Tribe's right to call for consultation and provide opportunities for meaningful engagement in policies that impact American Indian and Alaska Native (AI/AN) nations during the policy development process. First, Tribal leaders want to know that they are being heard by the agency and that their recommendations are, to the greatest extent possible, accepted and implemented. To that end, we want to ensure that the government-to-government relationship is being respected. The current consultation policy does not provide a mechanism for Tribal leaders to verify whether their feedback has been considered, which makes it difficult to hold the agency accountable for the results of the consultation. **We ask that IHS issue a Dear Tribal Leader (DTL) letter 30 days after every consultation that outlines what was discussed, enumerate Tribal recommendations and requests and reports what the federal government is doing with that information and input.** We also urge IHS to facilitate accountability with other agencies, particularly when IHS policies are impacted by the actions of those agencies. Meaningful consultation is also difficult when Tribal leaders are not given adequate time to prepare, and the Agency is not providing support to the organizations on which they rely for technical assistance

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.

with consultation preparation and participation. Recently, due to the COVID-19 pandemic, IHS has come to rely on rapid consultations, which Tribal leaders do not find helpful as a regular course of action. **For meaningful consultation to occur, Tribal leaders must have adequate time to prepare.**

Tribal leaders look forward to working with IHS in ways that respect and affirm their Tribal sovereignty and we believe that the steps outlined in this letter will be beneficial as IHS is considering ways to make their consultation policy more responsive to the government-to-government relationship.

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 consultation requirements are achieved by merely scheduling a time and sending personnel to hear concerns. Proper consultation and government-to-government engagement exceeds that limited scope. The engagement must allow for the heads of governments to come together, share concerns, generate ideas and solutions, negotiate their roles and responsibilities, and agree on a course of action. Consultation policy requires recognizing a Tribal Chairperson to be first to speak among Tribal representatives – yet no parallel construct exists for the federal government. That needs to change. Comparable heads of State from the federal government must meet with heads of State of Tribal governments. Tribal consultation as a tool for intergovernmental 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 IHS should adopt to strengthen its Tribal Consultation Policy and ultimately, its government-to-government relationship with Tribal Nations.

Engaging as Sovereigns

Tribes are sovereign nations. As IHS develops policies that impact AI/AN people, they must be mindful of the sovereign status of Tribal nations. **Tribal consultation is an important mechanism that allows the government to engage with Tribal nations as true sovereigns.** Tribal governments are the oldest governments in North America and their existence predates the United States. This was recognized by the United States government 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*,² which states that Tribes occupy a unique area within the American political framework as “domestic dependent nations.” The distinctive nature of Tribal Nations is recognized throughout American law and jurisprudence. Many AI/ANs were not even United States citizens until the Indian Citizenship Act of 1924. Today, however, AI/ANs are dual citizens, of their Tribe and the United States government. This reality should inform any work, conducted by the U.S. government, that seeks to address long-standing concerns in AI/AN

² 30 U.S. 1 (1831)

communities.³ The United States has affirmed its unique trust responsibility to Tribal Nations, through countless statutes, regulations, agency guidance, and court decisions. **Respect for the sovereignty of Tribal Nations should frame every interaction between Tribes and the federal government.**

The Indian Health Service is the primary means through which the United States government honors its trust and treaty obligations to provide health care to AI/AN people. It is imperative that IHS is mindful of this relationship and frames their interactions with Tribal nations. IHS is a direct representative of the United States government, and it provides health care funding and services to AI/AN people, in furtherance of the trust responsibility. **IHS cannot be effective if the concerns of Tribal leaders do not inform their policies.**

Improving Accountability

As leaders of sovereign nations, Tribal leaders require accountability from the agency responsible for providing health care to their citizens. **Tribal leaders require affirmative actions demonstrating that their concerns are being heard, considered, and adopted.** To facilitate accountability, IHS should issue a Dear Tribal Leader Letter after *every* Tribal consultation that details what was discussed, what Tribal leaders requested, and follow-up actions in response to those suggestions. Other mechanisms should 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. We acknowledge that Section 10(3) provides that IHS will “document and follow up on any unresolved issue(s) that would benefit from the ongoing involvement of the Indian Tribe(s).” However, this does not go far enough in mandating a thorough review of the Tribal consultation and does not provide a mechanism for Tribal leaders to track how the agency is using their recommendations.

Further, it should be required that IHS address **why** certain suggestions were not implemented. In any follow-up mechanism used, IHS must include a way for Tribal leaders to inquire further about why their request or proposal was not incorporated or to suggest alternative approaches that may be mutually beneficial. Far too often, Tribal leaders make suggestions, but never hear back. Instead, they are left to wonder if their suggestion was received, understood, and considered. We also urge the agency to survey Tribal leaders who attend consultations to see if they were effective and how they can be improved upon in the future. **Meaningful consultation is not possible without meaningful consideration, communication, implementation, and follow-up.**

IHS should also make it clear to Tribal leaders that they have a right to ask for a consultation whenever they desire. The policy should prescribe a method of contacting the agency and any timelines for response from the agency. Providing Tribal leaders with prescribed steps on how to

³ 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.

initiate a Tribal consultation and making that clear in their policy will go a long way towards facilitating accountability.

Tribal leaders have routinely asked for the Office of Management and Budget (OMB) to be directly involved in the IHS Budget Formulation process. It disadvantages Tribes when OMB is not involved from the onset and leads to less than full and meaningful consultation. As the central budgetary arm of the executive branch, they should be directly accountable to Tribal leaders for funding requests made to Congress that impact Indian Country. **We believe that without OMB's involvement, consultations on the budget are not meaningful.** Therefore, OMB must be at the table during the entire IHS Budget Formulation process.

Informed Tribal Decision Making

We urge IHS 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, **rapid consultations should be avoided in all but the most urgent situations, such as was the case throughout the COVID-19 crisis.** A rushed effort does 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 IHS to “check a box” and not learn about Indian Country's concerns. Tribal leaders are leaders of sovereign nations and cannot be reasonably expected to be ready for a consultation on short 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 IHS 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 with little time to prepare. Tribal leaders should have some degree of predictability regarding Tribal consultations to operationalize preparation and have a mechanism to ensure that they have ample time to prepare. We are also concerned that Tribal leaders may not receive the invitation in a timely manner and can either not 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 urge the agency to adopt a policy of requiring at least 30-day notice for consultation, with limited exceptions for emergency items.** There is currently no prescribed timeline in the policy. We believe that a uniform requirement will allow for both a degree of predictability and adequate time for Tribal leaders to prepare.

There are also no requirements around *how* Tribal consultations will be communicated to Tribal leaders. Section 9(C)(1) of the policy merely says that the agency frequently uses Dear Tribal Leader Letters but that other forms of correspondence include, “broadcast e-mail, an FR notice, and other outlets.” Section 9(C)(3) further notes that, “[a]n FR notice is the most formal method used by IHS for communication and/or consultation.” There needs to be a uniform means of reaching Tribal leaders. **We urge the agency to adopt a uniform requirement to send a Dear Tribal Leader Letter for every consultation and mandate that the letter include any pertinent information (such as a Federal Register notice).**

The agency must also expand the methods through which Tribal leaders can participate in Tribal consultations. As we learned during the COVID-19 pandemic, it is possible for consultations to be conducted remotely and for Tribal leaders to be engaged in that format. While the agency should resume in-person consultations, they must continue to ensure that Tribal leaders are able to participate remotely. Many Tribes are small and do not have the resources to pay for travel for their leadership to participate in consultations. The ability to participate remotely expands the number of Tribal leaders who can participate, which helps to ensure that the agency is hearing from a broad cross-section of Tribal leaders.

Tribal Technical Assistance

Consulting with a Tribal Advisory Committee (TAC) is not a substitute for Tribal consultation. TACs should be utilized by IHS when they are formulating policies. The TACs are the best conduit through which IHS can receive technical assistance that is Tribally informed and representative of the various regions. IHS currently has five different advisory committees that can be utilized to inform the agency in the various policy areas that their programs touch. We urge IHS 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 IHS to consider expanding the usage of listening sessions during these early stages of policy development to hear directly from Tribal leaders. **If IHS engages Tribal leaders from the start, it should make for a more fruitful consultation process.** IHS should not wait until they have formulated a policy or regulation before asking for feedback from Indian Country.

We also have concerns about support for technical assistance for Tribal leaders from Tribal organizations. Tribal organizations, such as NIHB, are routinely consulted by Tribal leaders in preparation for TAC meetings and Tribal consultations. However, there is little support for this work. **We urge IHS to financially support the work of Tribal organizations, who are vital in ensuring that Tribal leaders have access to the subject matter expertise that helps them prepare to offer meaningful feedback to the agency.** We believe that this technical assistance is vital to full and meaningful consultation.

Conclusion

Thank you for your attention to the Biden Administration Memo and efforts to address its Tribal consultation policy. Rededication to government-to-government relationship presents an opportunity to improve the processes that maintain and strengthen these sacred relationships. 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. There must be accountability from IHS. Thank you again for taking this first step, and we look forward to an ongoing dialogue on how to make Tribal consultation more respectful and responsive to the needs of Tribes.

Sincerely,



Stacy A. Bohlen, CEO
National Indian Health Board