

Circular 2006-01

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Indian Health Service
Rockville, Maryland 20852

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TRIBAL CONSULTATION POLICY

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1. **INTRODUCTION.** The Indian Health Service (IHS) and Indian Tribes share the goals of eliminating the health disparities experienced by American Indians and Alaska Natives (AI/AN) and ensuring that their access to critical health services is maximized. To achieve these goals, it is essential that Indian Tribes and the IHS engage in open, continuous, and meaningful consultation. True consultation is an ongoing process that leads to information exchange, respectful dialogue, mutual understanding, and informed decisionmaking. The importance of consultation with Indian Tribes was affirmed through Presidential Memoranda in 1994 and 2004, and Executive Order in 2000.
2. **BACKGROUND.** The United States Government and each federally recognized Indian Tribe has a Government-to-Government relationship grounded in numerous historical, political, legal, moral, and ethical considerations. Treaties and laws, together with court decisions, have defined a relationship between Indian Tribes and the Federal Government that is unlike that between the Federal Government and any other group of Americans. Since the formation of the Union, the United States has recognized Indian Tribes as sovereign Nations. The Federal Government has enacted numerous regulations that implement and support this trust relationship with Indian Tribes.

An integral element of the Government-to-Government relationship is that consultation occur with Indian Tribes on issues that impact them and that Indian Tribes participate in the decisionmaking process to the greatest extent possible. This Government-to-Government relationship with Indian Tribes was reaffirmed on September 23, 2004, by the Executive Memorandum, "Government-to-Government Relationship with Indian Tribes." The implementation of this consultation policy is in recognition of this special and unique relationship.

The requirements for consultation are contained in statutes and various Presidential Executive orders including the:

Indian Self-Determination and Education Assistance Act, Public Law (P.L.) 93-638 as amended;

Indian Health Care Improvement Act, P.L. 94-437, as amended;

Memorandum to the Heads of Executive Departments and Agencies from President William J. Clinton, April 29 1994;

Presidential Executive Order 13084, Consultation and Coordination with Indian Tribal Governments, May 14, 1998;

Presidential Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, November 6, 2000; and

Presidential Memorandum, Government-to-Government Relationship with Tribal Governments, September 23, 2004.

3. **TRIBAL SOVEREIGNTY.** This policy does not waive any Tribal governmental rights, including treaty rights, sovereign immunities, or jurisdiction. Additionally, this policy does not diminish any rights or protections afforded other AI/AN people or entities under Federal law.

Our Nation, under the law of the United States and in accordance with treaties, statutes, Executive orders, and judicial decisions, has recognized the right of Indian Tribes to self-govern. Indian Tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian Tribes on a Government-to-Government basis to address issues concerning Tribal self-government, Tribal trust resources, and Tribal treaty and other rights.

A constitutional relationship among sovereign governments is inherent in the very structure of the Constitution and is formalized in and protected by Article I, Section 8. Increasingly, this special relationship has emphasized self-determination and meaningful involvement for Indian Tribes in Federal decisionmaking (consultation) where such decisions affect Indian Tribes. The involvement of Indian Tribes in the development of public health and human services policy allows for locally relevant and culturally appropriate approaches to public issues.

Tribal self-government has been demonstrated to improve and perpetuate the Government-to-Government relationship and strengthens Tribal control over Federal funding and program management.

4. **POLICY.** It is the IHS policy that consultation with Indian Tribes will occur to the extent practicable and permitted by law before any action is taken that will significantly affect Indian Tribes. Such actions refer to policies that have Tribal implications and substantial direct effects on one Indian Tribe or more regarding the relationship between the Federal Government and the Indian Tribe(s) or on the distribution of power and responsibilities between the Federal Government and the Indian Tribe(s).

Nothing in this policy waives the Government's deliberative process privilege. For example, in instances where the IHS is specifically requested by Members of Congress to respond to or report on proposed legislation, the development of such responses and of related policy is a part of the Executive Branch's deliberative process privilege and should remain confidential. In addition, in specified instances where Congress requires the IHS to work with Tribes on the development of recommendations that may require legislation, such reports, recommendations, or other products are developed independent of an IHS position, the development of which is governed by Office of Management and Budget (OMB) Circular A-19.

The following process objectives and guidelines will be used in the implementation of this policy:

- A. The IHS shall have an accountable consultation process to ensure meaningful and timely input by Tribal Officials in the development of policies that have Tribal implications. (See Section 9 for consultation guidelines.)
- B. To the extent practicable and permitted by law, the IHS shall not propose the promulgation of any regulation that has Tribal implications that imposes substantial direct-compliance costs on Indian Tribes and that is not required by statute, unless:
1. the funds necessary to pay the direct costs incurred by the Indian Tribe(s) in complying with the regulation are provided by the Federal Government; or
 2. the IHS, prior to the formal promulgation, of the regulation:
 - a. consults with Tribal Officials early and throughout the process of developing the proposed regulation, as guided by these policies;
 - b. provides, in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register (FR), a Tribal summary impact statement, which consists of a description of the extent of the prior consultation with Tribal Officials, a summary of the nature of their concerns and the Agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of Tribal Officials have been met; and
 - c. makes available to the Director, IHS, any written communications regarding the proposed regulations submitted to the Agency by Tribal Officials.
- C. To the extent practicable and permitted by law, the IHS shall not propose the promulgation of any regulation that has Tribal implications and that preempts Tribal law unless the Agency, prior to the formal promulgation of the regulation:
1. consults with Tribal Officials early in the process of developing the proposed regulation, as guided by these policies;
 2. provides, in a separately identified portion of the preamble to the regulation as it is to be issued in the FR, a Tribal summary impact statement, which consists of a description of the extent of the prior consultation with Tribal Officials, a summary of the nature of their concerns and the Agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of Tribal Officials have been met; and

3. makes available to the Director, IHS, any written communications regarding the proposed regulations submitted to the Agency by Tribal Officials.
- D. On issues relating to Tribal self-government, Tribal trust resources, or Tribal treaty and other rights, the IHS should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.
5. **PHILOSOPHY.** Indian Tribes have, through the cessation of more than 400 million acres of land to the United States in exchange for promises, among other things, of health care, often reflected in treaties, secured the right to health care from the United States based on the moral, legal, and historic obligations of the United States to AI/AN people.

Indian Tribes have an inalienable and inherent right to self-govern. Self-government means a government in which decisions are made by the people who are most directly affected by them. As sovereign Nations, Indian Tribes exercise inherent sovereign powers over their members, territory, and lands.

The IHS exists to provide health services to Indians and has a commitment to working in partnership on a Government-to-Government basis with Indian Tribes. The IHS is committed to enhancing collaboration and partnership between its operating units and Area Offices with Indian Tribes to ensure that the requirement for Tribal consultation permeates the entire IHS system. The IHS is further committed to assisting Indian Tribes to advocate for their priorities with all Department of Health and Human Services (HHS) Divisions including Regional Offices and State governments/agencies.

The Office of Tribal Programs and the Office of Tribal Self-Governance within the Office of the Director are identified as the responsible offices within the IHS for monitoring compliance with the IHS Tribal Consultation Policy.

6. DEFINITIONS.

- A. **Consultation.** An enhanced form of communication that emphasizes trust, respect and shared responsibility. It is an open and free exchange of information. Consultation is integral to a deliberative process, which results in effective collaboration and informed decisionmaking with the ultimate goal of reaching consensus on issues.
- B. **Critical Events.** Planned or unplanned events that have or may have a substantial impact on Indian Tribes or Indian communities, e.g., issues, policies, or budgets.
- C. **Deliberative Process Privilege.** A privilege exempting the Government from the disclosure of Government agency materials containing recommendations, opinions, and other communications that are part of the decisionmaking process within the agency.
- D. **Executive Order.** An order issued by the Government's executive branch on the basis of authority specifically granted to the executive branch (as by the U.S. Constitution or an Act of Congress).
- E. **Indian.** A person who is a member of an Indian Tribe. (25 United States Code (U.S.C.) 450b(d)) Throughout this circular, Indian is synonymous with American Indian or Alaska Native.
- F. **Indian Organization.** Any group, association, partnership, corporation, or legal entity owned or controlled by Tribes or Indians, or with a majority of members who are Indian.
- G. **Indian Tribe.** Any Indian Tribe, Band, Nation, or other organized group or community including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. (See 25 U.S.C. Sec 450b.)
- H. **Joint Tribal/Federal Workgroups and/or Task Forces.** A group composed of individuals who are Tribal Officials, appointed by federally recognized Indian Tribes and/or Federal agencies, to represent their

interests while working on a particular policy, practice, issue and/or concern.

- I. **Policies with Tribal Implications.** Regulations, legislation, and other policy statements or actions that have substantial direct effects on one Indian Tribe or more on the relationship between the Federal Government and Indian Tribes or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.
- J. **Sovereignty.** The ultimate source of political power from which all specific political powers are derived.
- K. **Substantial Direct Compliance Costs.** Costs incurred directly from the implementation of changes necessary to meet the requirements of a Federal regulation. Because of the large variation in Indian Tribes, "substantial costs" is also variable by Indian Tribes. Each Indian Tribe and the Director, IHS, shall mutually determine the level of costs that represent "substantial costs" in the context of the Indian Tribe's resource base.
- L. **Treaty.** A legally binding and written agreement that affirms the Government-to-Government relationship between two or more nations.
- M. **Tribal Officials.** An elected/appointed Tribal Leader or official delegate designated in writing by an Indian Tribe.
- N. **Tribal Resolution.** A formal expression of the opinion or will of an official Tribal governing body that is adopted by vote of the Tribal governing body.
- O. **Tribal Self-Government.** The governmental actions of Tribes exercising self-government and self-determination.

7. OBJECTIVES.

- A. To formalize the requirement of the IHS to seek consultation and participation by representatives of Indian Tribes in policy development and program activities to ensure that Tribal health priorities and goals are recognized.
- B. To establish a minimum set of requirements and expectations with respect to consultation and participation for the three levels of IHS management: Headquarters, Area Offices, and service units.
- C. To identify critical events for which Tribal consultation and participation will be required for the three levels of IHS management: Headquarters, Area Offices, and service units.
- D. To require the IHS to consult with Indian Tribes on proposed, new, and existing health policies and programs.
- E. To identify critical events where partnerships and the inclusion of Indian organizations would complement consultation with Indian Tribes.
- F. To promote and develop innovative methods of involving Indian Tribes in IHS policy development and in the decisionmaking processes of the IHS.
- G. To coordinate with the HHS Divisions/Regional Offices, State agencies, supporters of Indian Health, and others to assist Indian Tribes to advocate for their priorities.
- H. To charge and hold responsible all levels of management within the IHS for the implementation of this policy.

8. ROLES.

- A. **Indian Tribes.** The Government-to-Government relationship between the United States and Indian Tribes dictates that the principal focus for IHS consultation is with individual Indian Tribes.

B. Indian Organizations. It is frequently necessary that the IHS communicate with Indian organizations/committees to solicit consensual Tribal advice and recommendations. Although the special "Tribal-Federal" relationship is based on a Government-to-Government relationship, other statutes and policies exist that allow for consultation with Indian organizations. These organizations by the nature of their business serve and represent Indian Tribal issues and concerns that might be affected if these organizations were excluded from the consultation process.

Even though some of the organizations/committees do not represent federally recognized Indian Tribes, the IHS is able to consult with these groups individually.

C. Headquarters. The IHS has the responsibility to engage and oversee open, continuous, and meaningful consultation with Indian Tribes to the extent practicable and permitted by law. True consultation is an ongoing process that leads to information exchange, mutual understanding, and informed decisionmaking.

D. Area Offices. The Area Director, in consultation with Indian Tribes located in his/her respective region, must designate a committee/workgroup comprised of delegated Tribal Officials from all Indian Tribes served by the respective Area Office. If all Indian Tribes are not represented by the committee/workgroup, the Area Director will develop a process to ensure that full consultation with all Indian Tribes within the Area is coordinated. The designated committee/ workgroup shall provide advice and consultation to the Area Director and Area Office staff.

Meetings between the designated committee/workgroup and Area Office staff shall occur on an as-needed basis, but at least once each year. Each Area Director has the responsibility to coordinate, communicate, and collaborate with the HHS Regional Directors for the specific regions of which the IHS Area is a part of on issues that are pertinent to Indian Tribes in the respective regions and Area.

E. Service Units. The service unit Chief Executive Officer (CEO), in consultation with Indian Tribes located in his/her respective service unit, must designate a committee/workgroup comprised of delegated Tribal Officials from all Indian Tribes served by the respective service unit. If all affected Indian Tribes are not represented by the committee/workgroup, the CEO will develop a process to ensure that full consultation with all Indian Tribes within the service unit is coordinated. The designated committee/workgroup, shall provide advice and consultation to the CEO. Any decisions/recommendations made through consultation at this level will be formally communicated to the respective Area Director.

9. TRIBAL CONSULTATION GUIDELINES. A critical event may be identified by the IHS and/or an Indian Tribe. Upon identification of a critical event significantly affecting one Indian Tribe or more, the IHS will initiate consultation regarding the event.

A. Consultative Relationship. Trust between the IHS and Indian Tribes is an indispensable element in establishing a good consultative relationship. The degree and extent of consultation will depend on the identified critical event. While this policy does not provide specific guidelines, all levels of IHS management shall use the following criteria to ensure that the requirements of this policy are satisfied:

1. Identify the critical event. This includes complexity, implications, time constraints, and issue (funding, policy, programs).
2. Identify affected potentially affected Indian Tribes, etc.
3. Determine the level of consultation. This can be done after considering the critical event and the Indian Tribe(s) affected/potentially affected.

B. When Consultation Occurs.

1. When the IHS Director/Deputy Directors, and/or their designee, and a Tribal Official and/or his/her designee meet or exchange written correspondence to discuss any issue(s) concerning either party.
2. When an Area Director, and/or his/her designee meets or exchanges written correspondence with a

Tribal Official and/or his/her designee to discuss any issue(s) concerning either party.

3. When a service unit CEO and/or his/her designee meet or exchanges written correspondence with a Tribal Official and/or his/her designee to discuss any issue(s) concerning either party.

C. **Level of Consultation.** Upon the determination of the level of consultation necessary, proper notice of the critical event and the level of consultation to be used shall be communicated to affected/potentially affected Indian Tribes using all appropriate methods. These methods include but are not limited to the following:

1. **Correspondence.** Written communications should clearly provide affected/potentially affected Indian Tribe(s) of the critical event and the manner in which to provide comment. The IHS frequently uses a "Dear Tribal Leader Letter" to notify individual Indian Tribes of consultation activities. Other forms of correspondence include broadcast e-mail, an FR notice, and other outlets.
2. **Meetings.** When the critical event is determined to have substantial direct impact, the IHS shall convene a meeting(s) to the extent practicable and permitted by law with the affected/potentially affected Indian Tribe(s) to discuss all pertinent issues. This meeting(s) may be in a national, regional, and/or Area forum, as appropriate.

Other types of meetings and/or conferences occur that may not be considered consultation sessions, but these meeting/conferences may provide an opportunity to share information, conduct workshops, and provide technical assistance to the Indian Tribe(s).

3. **Federal Register Notice.** An FR notice is the most formal method used by the IHS for communication and/or consultation. This method can be used for a variety of purposes including but not limited to requests for comments by the affected Indian Tribe(s) regarding critical events.

D. **Official Tribal Correspondence.** Correspondence submitted by Indian Tribes to the IHS shall be referred to the appropriate IHS program office.

1. **Tribal Resolution.** Communications from Indian Tribes frequently come in the form of Tribal resolutions. A resolution may be the most formal declaration of an Indian Tribe's position for the purpose of Tribal consultation. Once the IHS receives a Tribal resolution, the Agency should respond appropriately. An appropriate response may include Tribal consultation.
2. **Tribal Executive Correspondence.** The IHS will give equal consideration to correspondence received from the executive branch of an Indian Tribe as is provided to a Tribal resolution.
3. **Response.** A response regarding a Tribal resolution and/or Tribal executive correspondence shall be provided by the IHS within 60 calendar days to the Indian Tribe(s).

E. **Schedule for Consultation.** The IHS must establish and adhere to a formal schedule of meetings to consult with the Indian Tribe(s) and their representatives concerning the planning, conduct, and administration of applicable activities. The IHS must involve Tribal Officials in meetings at every practicable opportunity. The IHS is encouraged to work with Indian Tribes to establish additional forums for Tribal consultation, participation, and information sharing.

F. **Policy Development through Tribal Consultation.** The need to develop a policy may be identified from within the IHS or may be identified by an Indian Tribe(s). This need may result from external forces such as Executive, Judicial, or Legislative Branch directives. Once the need to develop a policy is identified, the IHS will respond within 60 calendar days to the request. The consultation process must begin in accordance with critical events and level of consultation upon the receipt of the IHS response. (See Section 9A, B, and C to determine the level of consultation.)

10. **CONSULTATION PROCESS.** The IHS shall develop instructions for the submission of comments and will report on all outcomes of the consultation.

A. **Tribal.** Specific consultation mechanisms that will be used to consult with an Indian Tribe(s) include but are not limited to mailings, meetings, teleconferences, and roundtables.

1. Consultation sessions will be held to solicit official Tribal comments and recommendations on policy and budget matters affecting the Indian Tribe(s). These sessions at roundtables, forums, and meetings will provide the opportunity for meaningful dialogue and effective participation by the Indian Tribe(s).
2. An Indian Tribe may meet one-to-one with the IHS or a designated representative to consult on issues specific to that Indian Tribe.
3. Upon completion of a consultation session, the IHS will document and follow up on any unresolved issue(s) that would benefit from the ongoing involvement of the Indian Tribe(s).
4. All IHS policies are posted on the IHS Web site.

B. **HHS Divisions and Regional Offices.**

1. Upon the request of an Indian Tribe(s), the IHS will advocate for and facilitate collaboration between HHS Divisions, Regional Offices, and the Indian Tribe(s) to assist with consultation.
2. The IHS will assist the Indian Tribes and HHS Divisions in addressing any identified issue(s) such as access to HHS programs and services that could be provided directly to an Indian Tribe(s).
3. The IHS and/or Area Office will work with the HHS Office of Intergovernmental Affairs (IGA) to assist Indian Tribes in advocating for improved HHS Division-Tribal relations.

C. **States.**

1. Upon the request of an Indian Tribe(s), the IHS will advocate for and facilitate collaboration between States and the Indian Tribe(s) to address the identified issue(s).
2. The IHS and/or Area Office will work with the HHS/IGA to assist the Indian Tribe(s) in advocating for improved State-Tribal relations.

11. ESTABLISHMENT OF JOINT TRIBAL/FEDERAL WORKGROUPS AND/OR TASK FORCES.

A. **Consultation.** When a new or revised national policy(ies) affect an Indian Tribe(s), the IHS Director and/or Area Director may establish a workgroup and/or task force to develop recommendations on various technical, legal, or policy issues. In such cases, the following process is generally followed:

1. **Joint Tribal/Federal Workgroups and/or Task Forces.** Although the special "Tribal-Federal" relationship is based in part on the Government-to-Government relationship, it is frequently necessary for the IHS, with Tribal concurrence, to establish joint Tribal/Federal workgroups and/or task forces. These workgroups/taskforces will be charged to address issues and complete work needed to develop and/or modify any policies and practices. These workgroups and/or task forces do not take the place of Tribal consultation but offer an enhancement by gathering individuals together with expertise on a particular policy, practice, issue and/or concern to work collaboratively and offer recommendations for consideration by Indian Tribes and Federal agencies. The subsequent work products and/or outcomes developed by these workgroups and/or task forces will be handled in accordance with this policy.
2. **Membership Notices.** Membership on workgroups shall be widely solicited with the intent to reach all Indian Tribes by requesting membership nominees from all Indian Tribes and Indian organizations, in accordance with Section 15 below, as applicable.

3. **Meeting Notices.** The purpose, time frame, and specific tasks shall be clearly identified in the notice. All meetings will be open and widely publicized, at a minimum through the Office of Tribal Self-Governance, the Office of Tribal Programs, and the office initiating the policy.
4. **Workgroup/Task Forces.** The Indian Tribe(s) and the IHS should be equally represented in workgroups, if not, then Tribal members should be in the majority. Tribal members should be selected based on volunteer responses received as a result of the notice, and if possible, should represent a cross-section of the affected parties. The IHS and/or Tribal staff may serve in a technical advisory capacity. Tribal staff may accompany the workgroup leader and serve to advise him/her. The IHS staff may serve in a technical advisory capacity to the workgroup.

B. Participation.

1. **Attendance at Meetings.** Workgroup members must make a good faith effort to attend all meetings. Other individuals may accompany members as the members believe it is appropriate to represent their interest.
2. **Appointment of Alternates.** Unless the charge states otherwise, each workgroup member may appoint an alternate by written notification. In cases where a Tribal Official appoints an alternate who is not an elected official, the alternate shall represent the primary member in the workgroup. The alternate will have the same voting rights as the primary member, as designated in the letter by that Tribal Official.
3. **Workgroup Protocols.** The workgroup may establish protocols to govern the meetings. Such protocols will include but are not limited to the:
 - a. selection of workgroup co-chairs (Tribal/Federal), if applicable,
 - b. role of workgroup members,
 - c. process for decisionmaking (consensus-based or otherwise), and
 - d. process for determining drafting and availability of all final workgroup products and documents.
4. **Workgroup Charge.** Prior to the workgroup formulation, the IHS may develop an initial workgroup charge in enough detail to define the policy concept. Once established, the workgroup will develop recommendations for the final workgroup charge for the approval of the Director, IHS.
5. **Workgroup Final Products.** Early consultation with the IHS Management Policy and Internal Control Staff (MPICS) is recommended to discuss options for the policy format and placement in the Indian Health Manual.
 - a. Upon completion, the draft policy documents will be distributed informally to the Indian Tribe(s) and Indian organization(s) for review and comment and to allow for maximum possible informal review.
 - b. A concurrent internal IHS review and comment period will be initiated by MPICS in accordance with Part 1, Chapter 1, "Indian Health Manual System," Indian Health Manual.
 - c. Comments from the Indian Tribe(s) will be returned to the workgroup, which will meet in a timely manner to discuss the comments and determine the next course of action.
 - d. Comments from IHS staff will be coordinated by MPICS, compiled, and provided to the Office of Tribal Programs for its review and recommended action, which may include further discussion with the workgroup.
 - e. If the proposed policy is considered to be substantially complete as written, the workgroup will

forward the proposed policy to the Director, IHS, as final recommendations for general endorsement.

- f. The workgroup will also recognize any contrary comments in its final report.
- g. If it is determined that the policy should be rewritten, the workgroup will rewrite it and begin informal consultation again at the initial step above.
- h. If the proposed policy is generally acceptable to the IHS Director, final processing of the policy by MPICS will be accomplished.

C. Recommendations and Policy Implementation. All final recommendations by the workgroup shall be considered by the Director, IHS. Once the consultation process is completed and a policy decision is finalized, the final policy shall be broadly distributed to all Indian Tribes and Indian organizations.

12. IHS BUDGET FORMULATION. The IHS deals with multiple fiscal-year budgets on a regular basis. The IHS budget formulation process is comprised of annual forums for Indian Tribes to interact with the IHS to provide program priorities, policies, and budget recommendations.

A. Budget Formulation. The IHS will solicit the active participation of Indian Tribes and Indian organizations in the formulation of the IHS budget request and annual performance plan.

B. Timeframe. In order to ensure that Indian Tribes are able to provide meaningful input for the IHS budget request, the IHS shall use the following timeframe to coincide with the HHS schedule:

1. October through December - Individual IHS Area budget formulation work sessions.
2. February through March -National IHS budget formulation work session.
3. May - Tribal presentation of national priorities and recommendations to the National HHS Tribal Budget Formulation and Consultation Session, including the Intradepartmental Council on Native American Affairs.
4. May through June - The IHS will assist in the development of a meeting among the co-chairs of the National Tribal Budget Formulation Workgroup, representatives from Indian organizations as appropriate, and the Director of the Office of Management and Budget (OMB).

C. Area Budget Formulation Teams. In preparation for the IHS Area-wide Tribal consultation session, Area budget formulation teams will provide ongoing support to the budget formulation activities at the Area level. Each Area budget formulation team shall consist of Tribal Officials and IHS staff.

The IHS Headquarters provides standard instructions to the Areas for the development of Area budget priorities:

1. The Area budget formulation team solicits Area-wide input in establishing the health and budget priorities for the Area.
2. The Area budget formulation team identifies two of its members to attend the National Tribal Budget Formulation Workgroup session on behalf of the Area.
3. The health priorities established at the Area work sessions provide the basis for developing the IHS Annual Performance Plan that is submitted as a part of the IHS budget request.

D. Headquarters Budget Formulation Work Team.

1. Provides staff support to the Director, IHS, for budget formulation.
2. Develops the IHS budget request in accordance with HHS and OMB guidelines.
3. Provides information on the budget request and formulation process.
4. Adheres in all activities to the priorities established at the national work session and to the guidance provided by the National Tribal Budget Formulation Workgroup.

E. **National Tribal Budget Formulation Workgroup Session.** The national budget formulation work session is conducted yearly to consolidate budget and health priority recommendations into a comprehensive set of national health priorities and the IHS proposed budget request.

F. **National Tribal Budget Formulation Workgroup.** The workgroup consists of two Tribal representatives from each of the 12 IHS Areas as identified at the Area work sessions. Additional representatives from Indian organization(s) will participate in the workgroup at the discretion of the Director, IHS. The workgroup provides input and guidance to the IHS Headquarters budget formulation team throughout the remainder of the budget formulation cycle for that fiscal year. Costs incurred by the Indian Tribe(s) or Indian organization(s) for the purpose of participating in the National Tribal Budget Formulation Workgroup shall be the responsibility of the IHS.

G. **New Funding.** It is IHS policy to involve Indian Tribes in decisionmaking that concerns the allocation of new funding (i.e., funding that is not in the existing base funding of an Indian Tribe(s) or congressionally earmarked for a specific Indian Tribe(s) that is provided as a result of the appropriations process). This policy is described in IHS Circular No. 92-5, "Budget Execution Policy (Allocation of Resources)." Barring legislative or administrative direction to the contrary, the appropriate consultative process for this purpose may use any tool or mechanism as agreed to by the IHS Area Director and the Indian Tribe(s) that is not inconsistent with IHS Circular No. 92-5.

H. **Budget Information Disclosure.** The IHS must initiate a process that provides the Indian Tribe(s) and Indian organization(s) with the following IHS budget-related information on an annual basis: appropriations, allocations, expenditures, and funding levels for programs, functions, services, and activities. Tribal requests for additional information shall be reviewed on a case-by-case basis and answered to the extent practicable, unless embargoed and/or prohibited by law.

13. IHS TRIBAL CONSULTATION PERFORMANCE AND COLLABORATION.

A. **Annual Report.** As part of the annual HHS Tribal consultation report, the IHS will report on an annual basis how the results and outcomes of Tribal consultation performance fulfill the Government-to-Government relationship with Indian Tribes. This will include:

1. the development and utilization of individualized critical performance elements to ensure consistency with the HHS Tribal consultation policy and its objectives;
2. the development of Tribal budget recommendations through the budget formulation process;
3. the promotion of a cooperative atmosphere with Indian Tribes to gather, share, and collect data between the IHS and Indian Tribes that demonstrates the effective use of Federal resources in a manner that is consistent with the Government Performance and Results Act (GPRA) performance measures and the OMB Program Assessment Rating Tool;
4. the consultation, to the greatest extent practicable within available resources and permitted by law, with Indian Tribes before taking actions that affect Indian Tribes, including regulatory practices on Federal matters and unfunded mandates;
5. the adequate assessment of the impact of the IHS activities on Tribal trust resources and of whether

Tribal interests are considered before the activities are undertaken;

6. the removal of procedural impediments to working directly with Indian Tribes on activities that affect trust property or governmental rights of the Indian Tribes;
7. the streamlining of the application process for and increasing the availability of waivers to Indian Tribes; and
8. the operation of the IHS in a collaborative manner with other HHS Divisions and Indian Tribes to carry out Executive Order 13175.

14. **MEETING RECORDS, EVALUATION, AND REPORTING.** The IHS is responsible for appropriately reporting on and evaluating consultation activities and outcomes. The level of reporting should be consistent with the level of consultation described in Section 9C of this circular. The IHS will report on major consultation activities and communicate the nature of these sessions and outcomes to HHS, Indian Tribes, and Indian organizations using the following means:

A. **IHS Report to HHS.** The IHS is responsible for preparing and submitting an annual report describing Tribal consultation activity, including outcomes, to the HHS. The IHS report is subsequently included in the “HHS Annual Tribal Consultation Report.” In order to effectively evaluate the effectiveness of Tribal consultation and the success of IHS in incorporating Tribal recommendations made as a result of consultation, the IHS annual report will address:

1. a discussion of the past year’s consultation process and activities and whether they resulted in meaningful outcomes for both the IHS and Indian Tribes,
2. a description of the level of support for the past year’s consultation activities from the perspective of Indian Tribes and IHS management, and
3. a discussion of the effectiveness of collaboration with Indian organizations and other Federal agencies that complemented the Tribal and IHS consultation process.

B. **IHS Report Submitted to Indian Tribes and Indian Organizations.** The IHS is responsible for preparing and submitting an annual report to Indian Tribes and Indian organizations describing the past year’s consultation activity. The report should include an assessment of the IHS implementation of this policy and a description of outcomes related to issues that were the subject of major consultation activity. Upon completion of a major consultation activity (e.g., policy development), the report should address follow-up action items resulting from consultation and the plan for implementation.

All major consultation meetings of national importance shall be appropriately recorded with a summary made available to Indian Tribes and Indian organizations. At a minimum the report should include:

1. a description of the issue(s) that was the subject of consultation,
2. a description of the process that was used,
3. a discussion of the recommendations that resulted from the consultation meeting(s),
4. a list of any follow-up action items and a time line for addressing these items, and
5. a discussion of the level of IHS and Tribal satisfaction with the consultation process that was used.

C. **IHS Budget Formulation Report to HHS.** Indian Tribes, and Indian Organizations. The IHS is responsible for preparing and submitting an annual report to HHS, Indian Tribes, and Indian organizations describing the consultation process used and outcomes related to the formulation of the proposed budget of the IHS. To effectively evaluate the budget formulation process and the ability of the IHS to incorporate

Tribal recommendations, the IHS will assess:

1. the effectiveness of the methods used to receive verbal comments from participating Indian Tribes, Indian organizations, IHS management, and other invited participants regarding the consultation process used to formulate the budget;
2. the results summary obtained from the evaluation forms provided to participating Indian Tribes, Indian organizations, and other invited participants to collect written feedback regarding the consultation process used to formulate the budget;
3. the effectiveness of the consultation method implemented, including IHS and Tribal views regarding the level of attendance and the number of responses received from Tribal Officials;
4. the effectiveness of IHS activities related to promoting Tribal consultation regarding the process used to formulate the budget;
5. the effectiveness of collaboration with Indian organizations and other Federal agencies to resolve issues for the mutual benefit of the IHS and Indian Tribes;
6. the recommendations received from IHS, Indian Tribes, and Indian organizations to improve the consultation process and promote meaningful outcomes; and
7. the action plans to improve the consultation process used to formulate the budget.

D. IHS Reports Regarding Specific Issues Assigned to Workgroups/Task Forces. The IHS is responsible for preparing reports at the conclusion of each workgroup/taskforce meeting and providing these reports to participating Indian Tribes and Indian organizations in advance of the next scheduled meeting of the workgroup/taskforce. Recommended actions should be appropriately recorded in these reports. The reports should include, as appropriate:

1. a description of the issue(s) that is the subject of consultation in the workgroup/taskforce meeting,
2. a description of the process including an identification of workgroup members,
3. an up-to-date summary of the efforts of the workgroup/taskforce including recommendations provided, and
4. a description of the likely agenda items for subsequent meetings.

Subsequent to the final meeting of a workgroup/task force, a final report will be prepared that will provide a listing of recommendations made to the IHS. A discussion of Tribal and IHS satisfaction with the particular workgroup/task force will be provided.

E. Tribal Consultation Results. All documents developed to communicate decisions arrived at through Tribal consultation will be posted on the IHS Web site.

15. **CONSULTATION WITH OTHER GROUPS.** Although the unique Federal relationship with Indian Tribes is based in part on the fundamental concept of Government-to-Government relations, other statutes and policies exist that allow for Federal consultation with Indian organizations that, by the nature of their business, serve Indian people and might be affected if excluded from the consultation process. Even though such Indian organizations may not represent Indian Tribes, the IHS is able to consult with these Indian organizations individually or collectively.

Such consultation is encouraged to the extent that there is not a conflict of interest with the Snyder Act of 1921 (P.L. 83-568), the IHS authorizing legislation, other applicable Federal statutes, or administrative policy.

When the IHS uses workgroups to assist the consultation process, the Federal Advisory Committee Act (FACA) requirements apply. The intergovernmental committee exemption to the FACA is found at 2 United States Code 1534. When forming workgroups, the IHS adheres to the "HHS Tribal Consultation Policy" (Section 10A1b).

16. **CONFLICT RESOLUTION.** The intent of this policy is to provide an increased ability to solve problems. However, it is inherent in the Government-to-Government relationship that Indian Tribes may elevate an issue of importance to a higher decisionmaking authority.

A. **Conflict Resolution Process.** The IHS will establish a clearly defined conflict resolution process in collaboration with Indian Tribes, under which Indian Tribes:

1. bring forward concerns which have a substantially direct effect on them, and
2. apply for waivers of statutory and regulatory requirements that are subject to waiver by the IHS.

Consistent with Presidential Executive Order 13175, this policy is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any persons.

17. **SUMMARY.** This circular considers a wide range of needs and unique characteristics in crafting these guidelines; therefore it is important for the IHS consultation policy to remain dynamic and be responsive to changing circumstances that affect Indian Tribes. The IHS will seek to integrate its efforts with those of other Federal Departments and agencies. Such intra-governmental coordination will benefit the Federal Departments and agencies as well as Indian Tribes and Indian organizations.

18. **ACRONYMS.**

AI/AN: American Indian and Alaska Native

CEO: Chief Executive Officer

FACA: Federal Advisory Committee Act

FR: Federal Register

GPRA: Government Performance and Results Act

HHS: Department of Health and Human Services

ICNAA: Intradepartmental Council on Native American Affairs

IGA: Intergovernmental Affairs

IHS: Indian Health Service

OMB: Office of Management and Budget

PART: Program Assessment Rating Tool

P.L.: Public Law

U.S.C.: United States Code

19. **SUPERSEDURE.** This circular supersedes IHS Circular No. 2001-07, dated September 21, 2001.

20. **EFFECTIVE DATE.** This circular is effective on the date of signature by the Director, IHS.

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