

IHS TRIBAL SELF-GOVERNANCE ADVISORY COMMITTEE

c/o Self-Governance Communication and Education

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Ms. Stacey Ecoffey, Principal Advisor for Tribal Affairs
Office of Intergovernmental and External Affairs
U.S. Department of Health and Human Services (HHS)
200 Independence Ave. SW, Room 620-E
Washington, DC 20201

RE: Opportunities to Enhance HHS' Tribal Consultation Policy – TSGAC Comments

Dear Ms. Ecoffey:

On behalf of the Tribal Self-Governance Advisory Committee (TSGAC), I am writing to provide our comments to the Tribal Consultation Policy (TCP) in response to the recent “*Dear Tribal Leader Letter*”. First let me state that the TSGAC is greatly appreciative of HHS’s outreach to Tribal leaders on the TCP. A Tribal consultation policy that provides for regular and meaningful consultation and collaboration is of utmost importance to TSGAC and I appreciate the opportunity to provide comments as HHS seeks to enhance its existing policy.

First and foremost, it is important to mention that the Tribal consultation duty arises from the common law trust responsibility to Tribal Nations, which compels the United States to protect Tribal sovereignty and Tribal resources, as well as to provide certain services to our citizens. In that respect, the Federal government’s duty to consult with Tribal Nations has a unique foundation that distinguishes it from decisions to consult with State governments or encourage public participation through the Administrative Procedures Act.¹ In addition, consultation and collaboration is meaningful when all parties involved arrive at a complete understanding of all factors and implications of the proposed action and agree on how to move forward. Consultation should never be viewed as a step in the process that must be completed to check a box.

TSGAC offers the following comments regarding opportunities to enhance the Department’s TCP:

- **Accountability & Transparency.** Accountability is imperative for a meaningful consultation policy. When Tribal leaders work hard to identify solutions to problems or provide suggestions to improve Federal delivery of services and do not see their comments reflected in final decisions, it is demoralizing and discouraging. One way the Department can improve its TCP is to increase transparency in the process. Currently, the Department does not publish Tribal comments it receives through consultation—leaving Tribal leaders uncertain whether the input obtained through the consultation was truly considered in the decision-making process.

Other Federal agencies, such as the U.S. Department of Housing and Urban Development, publish Tribal comments provided in response to requests for consultation on its website. This practice gives Tribal governments the opportunity to review all comments provided to the Department and determine whether the comments were reflected in Federal management decisions. Increased transparency in the process will help the Department build trust with Tribal governments and decrease future disagreements between Tribal Nations and the Department.

¹ Colette Routel and Jeffrey Holth, *Toward Genuine Tribal Consultation In The 21st Century*, University of Michigan Journal of Law Reform, Vol. 46:2, 2013.

- **Timing and Overlap.** Tribes must have ample notice of upcoming Tribal consultations, time to review documentation and to consider the effect of actions on the Tribe and its citizens, and time to prepare written responses for the Department. Tribal leaders often find that Federal agencies and departments operate in a silo—not considering the activities and actions of other Federal departments that also require Tribal attention and resources. Tribal leaders often have to make tough choices on which consultation meeting to attend because more than one agency will schedule consultations on the same day.

The Department's TCP calls for consultation schedules to be coordinated with its internal Office of Intergovernmental Affairs to avoid duplication or conflicts with other national Tribal events. We appreciate that HHS acknowledges the many pressures and responsibilities of Tribal leaders. However, we believe additional actions, such as establishing a mechanism to coordinate with other Federal departments and agencies on their consultation schedules, would enhance the ability of Tribal leaders to focus attention and resources on responding to HHS.

- **Formal Roles & Responsibilities.** HHS stated in a February 4, 2010 document that its consultation policies have benefitted from the establishment of Tribal Advisory Committees. However, it is not clear what role the Secretary's Tribal Advisory Committee (STAC) plays when it comes to consultation. We believe that a documented role for STAC as it relates to consultation can enhance the Department's TCP.
- **Informal Discussions.** We believe the Department's TCP can be strengthened by identifying the importance and need for informal discussions with Tribal officials prior to drafting any policy or rule that will ultimately seek Tribal consultation. Through informal discussions with Tribal leaders that occur prior to drafting policy, HHS will have a better grasp of the issues and can better ensure that proposed language is not based on an incomplete or one-sided understanding of a situation.
- **Self-Governance.** Section 4, Part D of the Department's TCP recognizes the importance of Tribal Self-Governance and we appreciate the inclusion of the section in the overall policy. However, we believe the section can be strengthened by incorporating language stating that in cases in which HHS undertakes efforts to formulate policies that have Tribal implications, it will first seek opportunities to encourage Tribal Nations to develop their own policies to achieve program objectives and it will defer to Tribal Nations to establish standards, rather than establishing standards at the Federal level.

Thank you again for the opportunity to provide these comments and for considering ways to enhance the HHS Tribal Consultation Policy. If you have any questions, you can reach me at (860) 862-6192 or via email at lmalerba@moheganmail.com.

Sincerely,



Chief Lynn Malerba, Mohegan Tribe of
Connecticut Chairwoman, IHS TSGAC

cc: Jennifer Cooper, Director, Office of Tribal Self-Governance, Indian Health Service
Jay Spaan, Executive Director, Self-Governance Communication and Education
TSGAC and Technical Workgroup Members