

February 4, 2010

The Honorable Peter Orszag
Director of the Office of Management and Budget

Dear Mr. Orszag,

I am writing to follow up on the President's memorandum of November 5, 2009 regarding Tribal consultation policies at Executive Branch departments and agencies.

The Department of Health and Human Services (HHS) has taken its responsibility to comply with Executive Order 13175 very seriously over the past decade – including the initial implementation of a Department-wide policy on Tribal consultation and coordination in 1997, and through multiple evaluations and revisions of that policy, most recently in 2008. Many HHS agencies have already developed their own consultation policies that complement the Department-wide efforts.

HHS's policy has five key components:

- Each HHS Operating and Staff Division has an accountable consultation process to ensure meaningful and timely input by Tribal officials in the development of policies that have Tribal implications. Several HHS Divisions currently have their own consultation policy based on the main Departmental policy. All other Divisions follow the Department-wide policy. (Currently, 5 out of HHS's 10 Operating Divisions have individual policies.)
- No Division shall promulgate any regulation that has Tribal implications and imposes costs on Indian Tribes, or that is not required by statute, unless the federal government is paying the costs or formal consultation has taken place with Tribes.
- No Division shall promulgate any regulation that has Tribal implications and that preempts Tribal law unless the Division consulted with Tribes, included a Tribal summary impact statement in the Federal Register, and provides the Secretary with all written communications from Tribes on the issue.
- Each Division should explore and use consensual mechanisms for developing regulations, including negotiated rulemaking.
- There are some instances where HHS can consult with other Tribal groups, as outlined in the *Native American Programs Act P.L. 93-644, as amended*, though these meetings do not occur in lieu of consultation with federally recognized Tribal governments. If the Department includes organizations that do not represent a specific federally recognized Tribal government on advisory committees or workgroups, then Federal Advisory Committee Act (FACA) requirements must be followed.

There are primarily five ways in which HHS consults with Tribes:

- Budget Consultation – The HHS consultation policy states that an annual, Department-wide Tribal budget formulation and consultation session, which includes each Operating and Staff Division that has involvement in Tribal activities, will be conducted to give Indian Tribes and Tribal Organizations the opportunity to present their health and human services budget priorities and recommendations to the Department. In order for Divisions to receive and consider Tribal recommendations in the development of the budget request, the 11th Annual Tribal Budget Consultation Session will be held March 4 and 5, 2010.
- Regional Consultation – The HHS Regional Tribal Consultation Sessions are designed to solicit Tribes’ priorities and needs on health and human services and programs. The Sessions provide an opportunity for Indian Tribes to articulate their comments and concerns on budgets, regulations, legislation, and HHS health and human services policy matters. This year marks the seventh year of these consultation sessions in the field, with eight regional sessions scheduled across the country.
- Tribal Delegation Meetings – The Secretary, Deputy Secretary, and IGA Director have created an open door policy in the Immediate Office of the Secretary for Tribal delegations wishing to discuss issues. IGA Tribal Affairs convenes and staffs these meetings to assure Divisions follow up with tribes on issues addressed during the delegations.
- Individual Agency Consultations and Consultation Policies – Many HHS agencies, such as the Indian Health Service, the Substance Abuse and Mental Health Services Administration, the Centers for Disease Control and Prevention, Centers for Medicare & Medicaid Services, and the Administration for Children and Families, host their own consultations with Tribes throughout the year and have established consultation policies specific to their agency. These policies and consultation sessions focus on issues unique to those agencies.
- Consultation Report – The HHS Consultation Policy calls for an annual HHS Consultation Report, compiled by the Office of Intergovernmental Affairs. Once compiled, the report is distributed to every Tribe in the country, as well as national and regional Tribal organizations. This report measures and reports results and outcomes of Tribal consultation activities across the Department held in accordance with the government-to-government relationship with Tribes.

Our consultation policies have also benefited from the establishment of Tribal Advisory Committees, which serve many of our agencies and advise HHS leadership on how best to work with Indian Country. Currently, Tribal Advisory Committees have been established for the Centers for Medicare & Medicaid Services, the Centers for Disease Control and Prevention, the Substance Abuse and Mental Health Services Administration, and Health Research.

These steps highlight HHS’s determination to be a leader within the Administration for Tribes and Tribal consultation, and I believe our Department is in full compliance with Executive Order 13175. However, we can and must continually work to improve our services, outreach, and consultation efforts to Indian Country.

In December 2009, I sent a letter to Tribal leaders requesting their feedback and suggestions on how we can improve our consultation efforts. Specifically, I asked how we can improve (1) the accountability of our consultation policy across the Department to ensure all agencies are participating appropriately, (2) our communication and outreach regarding policy or program changes with Tribes, and (3) our annual regional consultation process. I also asked Tribal leaders for any general comments or concerns that would help us improve our policy.

The comments and suggestions we receive will be compiled and used as the foundation for our upcoming regional consultation sessions, to be led by Paul Dioguardi, Director of Intergovernmental Affairs, and Stacey Ecoffey, Principal Advisor for Tribal Affairs – the primary contacts for tribal consultation at HHS. To date, we have received many positive and constructive responses, and I anticipate the regional sessions will focus on our overall policy, format, agency-specific policies, and the Tribal Advisory Committee process. The suggestions we have received to date include improving follow-up to consultation meetings, making clearer distinctions between the Indian Tribes and corporate or non-profit Indian organizations, requiring HHS Operating Divisions to expand consultation opportunities and tailor them to issues particular to those divisions, and allowing Tribes to initiate consultation rather than having federal agencies act unilaterally.

At the conclusion of the planned regional consultation sessions, HHS will convene a Tribal-Federal Work Group whose task it will be to review the reports of the regional sessions and develop a strategy for implementing improvements to our Department-wide consultation policy. Simultaneously, we will work to establish agency-specific consultation policies in those divisions without a current plan, and create a Secretary's Tribal Advisory Committee for the Department. I look forward to sharing the results of these efforts with you next fall.

I take the Department's responsibility with respect to Tribal consultation very seriously and look forward to working with you as we continue to improve our relationship and build healthier communities in this Administration.

Sincerely,

Kathleen Sebelius

Enclosure: HHS Department Tribal Consultation Policy