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ACL Draft Tribal Consultation Policy

Administration for Community Living -- DRAFT Tribal Consultation Policy

Purpose

The Administration for Community Living (ACL) and Indian Tribes share the goal to establish clear policies to further the government-to-government relationship between the Federal Government and Indian Tribes. True and effective consultation shall result in information exchange, mutual understanding, and informed decision-making on behalf of Tribal governments involved and the Federal Government. The importance of the consultation with Indian Tribes was recognized in Executive Order (EO) 13175 in 2000, affirmed through Presidential Memoranda in 1994, 2004, 2009 and 2021, and strengthened through the Memorandum on Uniform Standards for Tribal Consultation signed on November 30, 2022.

The goal of this policy includes, but is not limited to, ensuring that ACL's programs and policies are aligned with eliminating health and human service disparities of Indians, ensuring that access to critical health and human services is maximized, and to advance or enhance the social, physical and mental health, and economic status of Indians. To achieve this goal, and to the extent practicable and permitted by law, it is essential that Federally-recognized Indian Tribes and ACL engage in open, continuous, and meaningful consultation.

ACL is bound in full by the United States (U.S.) Department of Health and Human Services (HHS) Tribal Consultation Policy, signed on September 12, 2023. Nothing in the ACL Tribal Consultation Policy shall be construed as diminishing or waiving the HHS Tribal Consultation Policy. The ACL Tribal Consultation Policy shall not conflict with the HHS Tribal Consultation Policy and applies to all offices of ACL.

Authority

The ACL Tribal Consultation Policy document was developed based upon various statutes and Presidential Executive Orders including but not limited to:

- Older Americans Act, P.L. 89-73, as amended
- Indian Self-Determination and Education Assistance Act, P.L. 93-638, as amended
- Native American Programs Act, P.L. 93-644, as amended
- Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L.104-193
- The Developmental Disabilities Assistance and Bill of Rights Act, P.L. 106-402, as amended
- American Recovery and Reinvestment Act of 2009, P.L. 111-5, 123 Stat. 115
- Patient Protection and Affordable Care Act of 2010, P.L. 111-148, 124 Stat. 119
- Workforce Innovation and Opportunity Act, P.L. 113-128
- The Rehabilitation Act of 1973, P.L. 114-95, as amended
- Presidential Executive Memorandum to the Heads of Executive Departments dated April 29, 1994
- Presidential Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, November 6, 2000
- Presidential Memorandum, Government-to-Government Relationship with Tribal Governments, September 23, 2004
- Presidential Memorandum, Tribal Consultation, November 5, 2009
- Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, January 26, 2021
- Presidential Memorandum on Uniform Standards for Tribal Consultation, November 30, 2022

Tribal Sovereignty

This policy does not waive or diminish any tribal governmental rights, including treaty rights, sovereign immunities, or jurisdiction. Additionally, this policy does not diminish any rights or protections afforded other American Indian/Alaska Native (AI/AN) persons or entities under Federal law. Our Nation, under the law of the U.S. 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 U.S. continues to work with Indian Tribes on a government-to-government basis to address issues concerning tribal self-government, tribal trust resources, tribal treaties, and other rights. The 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. This special relationship has emphasized self-determination and meaningful involvement for Indian Tribes in Federal decision-making through consultation in matters that affect Indian Tribes and has been shown to result in improved program performance and positive outcomes for tribal communities.

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 strengthen tribal control over Federal funding that the tribe receives, and its internal program management.

Philosophy/Principles

ACL believes that the consultation process should be a free, open, and meaningful exchange of information and opinions between parties. Consultation is a formal and meaningful government-to-government process involving communication that emphasizes trust, respect, and shared responsibility. Consultation is integral to a deliberative process that results in effective collaboration and informed decision-making with the ultimate goal of reaching consensus on issues and policies affecting Indian Tribes.

Indian Tribes have an inalienable and inherent right to self-govern, and 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. To establish and maintain positive government-to-government relationships, communication and consultation must occur on an ongoing basis so that Indian Tribes have an opportunity to provide meaningful and timely input on issues that may have a substantial direct effect on Indian Tribes..

Before any action is taken that will significantly affect Indian Tribes, it is the ACL policy that, to the extent practicable and permitted by law, consultation with Indian Tribes will occur. Such actions refer to new rule adoption, policy statements, or actions that have substantial direct effects on one or more Indian Tribes, 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. Such actions may be referred to as "critical events", defined as planned or unplanned event(s) that have or may have Tribal implication(s), e.g. statutory requirements, regulations, issues, policies, or budgets that may come from any level within ACL. If ACL determines that an action may significantly affect one or more Indian Tribes, it will initiate tribal consultation by appropriate communication. An Indian Tribe that believes an action may significantly affect one or more Indian Tribes may also request that ACL initiate tribal consultation.

Objectives

The objectives of this Consultation Policy are to:

- Formalize ACL's policy to seek consultation and the participation of Indian Tribes in the development of policies and program activities that impact Indian Tribes;
- Create opportunities for Indian Tribes to raise issues with ACL, and for ACL to consult with Indian Tribes and communicate with the Secretary's Tribal Advisory Committee (STAC) and Indian organizations, when applicable;
- Establish a minimum set of requirements and expectations with respect to consultation and participation for the levels of ACL management;
- Conduct Tribal consultation regarding ACL's policies and actions that have tribal implications;
- Establish improved communication channels with Indian Tribes, STAC, and Indian organizations to increase knowledge and understanding of ACL programs;
- Coordinate with other Divisions of HHS and the Office of Intergovernmental and External Affairs (IEA), in order to implement Tribal consultation in a way that is feasible and conducive to the needs of Indian Tribes;
- Participate in both the Annual Tribal Budget and Policy Consultation Session and Annual Regional Tribal Consultations with Indian Tribes;
- Coordinate among ACL Regional Offices and Central Office to assure consistent policy interpretations and interactions of all levels of ACL with Indian Tribes;
- Enhance partnerships with Indian Tribes that will include technical assistance and access to ACL programs and resources;
- Facilitate Tribal-State relations as they affect Indian Tribes and AI/ANs in the delivery of ACL programs and services.

Consultation Participants

Consultation parties are:

- The ACL Administrator/Assistant Secretary for Aging, ACL Deputy Assistant Secretaries/Administrators, ACL Center Directors, ACL Chief of Staff, ACL Director of the Office of American Indians, Alaskan Natives & Native Hawaiians, ACL Regional Administrator(s), or their designee.
- Tribal President, Tribal Chair, Tribal Governor, an elected or appointed Tribal Leader, or their designee to discuss issues or policy matters with ACL. Each party will identify their authorized representatives with delegated authorities to consult on their behalf.
- The Director of the Office of American Indian, Alaskan Native and Native Hawaiian programs and the ACL Chief of Staff shall act as the primary points of contact for Tribal Consultation on all matters and act as the primary points of contact for Tribal officials seeking consultation with ACL.

Tribal Consultation Process

Upon identification of a policy or action that has tribal implications and a substantial direct effect on Indian Tribes or on the relationship between Tribes and the Federal Government, either an Indian Tribe may request or ACL may initiate consultation regarding the policy or action. In order to initiate and conduct consultation, the following serves as a guideline to be utilized by ACL and Indian Tribes:

- Identify the applicable program, policy, rule, regulation, statute and/or authorizing legislation;

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- Identify how the policy has Tribal implications and a substantial direct effect on one or more Indian Tribes, on the relationship between Tribes and the Federal Government, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.
- Identify affected and potentially affected Indian Tribe(s).

Tribal consultation notices will include:

- Information about the topic(s) being discussed during the consultation.
- The date, time, and location of the consultation.
- An explanation of any time constraints placed on the consultation, such as statutory or regulatory deadlines.
- The deadline to submit written comments in response to the consultation.
- The names and contact information for all ACL staff that can provide additional information.

Consultation Mechanism

Upon determination by ACL that consultation is required, ACL will evaluate the nature of the critical event that may have a substantial impact on Indian Tribes to determine the appropriate level of and mechanism for consultation. Such evaluation should include, but is not limited to, a review of the complexity, implications, and time constraints at issue that may impact on policy, funding and/or budget development, programs, services, functions and activities. Consultation mechanisms include but are not limited to one or more of the following:

- Mailings;
- Teleconferences;
- Face-to-face meetings at the local, regional, and national levels between the ACL and Indian Tribes;
- Roundtables;
- Annual HHS Tribal Budget and Policy Consultation Sessions; and
- Other regular or special program level consultation sessions.

Consultation Action

ACL will acknowledge receipt of the tribal consultation request submitted by a Tribe. ACL will consider the request to determine if tribal consultation is appropriate and notify the Tribe of its decision within a reasonable time period.

ACL shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of policies that have tribal implications. To the extent practicable and permitted by law, ACL shall consult with tribal officials prior to the process of developing proposed policy changes. A tribal summary impact statement based on the input of tribal leaders will be shared publicly within a reasonable time period after consultation or meetings finish. The impact statement will consist of a description of the extent of ACL's consultation with tribal officials, a summary of the nature of their concerns and ACL's position supporting the need to issue the policy, and a statement to the extent to which the concerns of tribal officials have been met.

Consultation Occurs:

The ACL Tribal consultative process shall consist of direct communications with Indian Tribes, and Indian organizations as applicable, in various ways, including:

- When the ACL Administrator/Principal Deputy Administrator, Deputy Assistant Secretary for Aging, or their designee, meets and/or exchanges written correspondence with a Tribal President/Chair/Governor/Chief/Principal Chief and/or elected/appointed Indian Tribal Leader, or their designee to discuss issues concerning either party.
- When an ACL Center Director, or their designee, meets or exchanges written correspondence with an elected/appointed Indian Tribal Leader, or their designee to discuss issues or concerns of either party.
- When an ACL Regional Administrator who is the Administrator's representative in the field, meets or exchanges written correspondence with an elected/appointed Indian Tribal Leader, or their designee to discuss issues or concerns of either party.
- When the Administrator/Principal Deputy Administrator, Deputy Assistant Secretary for Aging/ACL Center Director, or their designee, meets or exchanges written correspondence with a Tribal representative designated by an elected/appointed Indian Tribal leader to discuss issues or concern of either party.

Tribal Consultation Communication Methods

The determination of the critical event and the level of consultation mechanism to be used shall be communicated to affected or potentially affected Indian Tribe(s) using methods appropriate to the issue and with as much advance notice as practicable. Communication methods during the consultation process include but are not limited to the following:

- **Correspondence:** Written or electronic communications exchanged between ACL and Indian Tribes that clearly provide affected/potentially affected Indian Tribe(s) with details of the critical event, the manner and timeframe in which to identify concerns and potential impacts, and an opportunity to propose alternatives and other comments.
- **Meeting(s):** ACL shall convene a meeting, within 60 calendar days of official notification, which may occur by teleconference, webinar, or face-to-face, with affected/potentially affected Indian Tribe(s) to discuss all pertinent issues in a national, regional, and/or local forum, or as appropriate, to the extent practicable and permitted by law, when the critical event is determined to have substantial impact.
- **Official Notification:** Upon the determination of the consultation mechanism, proper notice of the critical event and the consultation mechanism utilized shall be communicated to affected/potentially affected Indian Tribe(s) using all appropriate methods including mailing, broadcast e-mail, Federal Register, and other outlets as appropriate. The Federal Register is the most formal ACL form of notice used for consultation. Generally, every effort will be made to provide at least 30-days' notice prior to a scheduled consultation. If exceptional circumstances or factors beyond ACL's control warrant a shorter period of advance notice, the reason why the standard notice or written comment period could not be provided will be explained in communications to Indian Tribe(s).
- **Receipt of Tribal Comment(s):** ACL shall develop and use all appropriate methods to communicate clear and explicit instructions on the means and time frames for Indian Tribe(s) to submit comments on the critical event, whether in person, by teleconference, and/or in writing. Written comments will be accepted up to 30-days after consultation, unless this deadline is not possible because of exceptional circumstances.
- **Reporting of Outcome:** ACL shall timely report to the affected Tribe(s) the outcome of the consultation. All consultation meetings and recommended actions shall be recorded and made available to Indian Tribes including summaries of discussions, recommendations, and responses. These must be broadly disseminated to Indian Tribes, posted on the ACL AI/AN webpage, and

linked to appropriate Indian organization websites when appropriate, practicable and permitted by law.

- **State/Tribal Cooperation:** Good faith implementation of ACL programs and fostering a cooperative working relationship between States and Tribes in support of ACL programs is a primary goal of consultation. ACL will work with States to emphasize the importance of working cooperatively with Tribes. ACL shall facilitate meaningful consultations and outcomes between Tribe(s) and one or more States administering ACL programs, shall report the outcome of its efforts to affected Tribes, and shall make a good faith effort to ensure all parties fully comply with ACL program requirements.
- **Waivers:** ACL will, consistent with HHS Tribal Consultation Policy and as practicable and permitted by law, consider any application by an Indian Tribe for a waiver with a general view toward increasing opportunities for utilizing flexible approaches at the Indian Tribal level when the proposed waiver is consistent with the applicable ACL policy objectives and is otherwise appropriate; and render a decision upon a complete application for a waiver within 120 calendar days of receipt, or as otherwise provided by law or regulation. If the application for waiver is not granted, ACL shall provide the applicant with timely written notice of the decision and reasons therefore. Waiver requests for statutory or regulatory requirements apply only to statutory or regulatory requirements that are discretionary and subject to waiver by ACL.

Meeting Records. ACL is responsible for making and keeping records of its Tribal consultation activity. All such records shall be made readily available to Tribes through the Annual HHS Consultation Report as coordinated through the IEA. ACL shares the written summary of consultation meetings on its website, and through other entities such as the National Congress of American Indians and Tribes by request. Records of any consultation shall include a summary of input received from tribes, a general explanation of how Tribal input was incorporated into ACL's policies (or not incorporated).

- **Reports to Tribes.** ACL will comply with HHS annual reporting requirements as outlined in below, and in keeping with the HHS Tribal Consultation Policy.

Response to Official Tribal Correspondence

Official correspondence from an Indian Tribe may come in various forms, but a resolution is the most formal declaration of an Indian Tribe's position for the purpose of Tribal consultation. In some instances, Indian Tribes will submit official correspondence from the highest elected and/or appointed official(s) of the Tribe. ACL will give equal consideration to these types of correspondence. Once ACL receives an official Indian Tribe correspondence and/or resolution, the Administrator/Deputy Administrator and/or their designee should respond appropriately. The process for official correspondence to Indian Tribes is described below:

- **Correspondence Submitted by Indian Tribes to ACL:** Shall be officially entered into ACL correspondence control tracking system and referred to the appropriate Center(s).
- **Acknowledgement of Correspondence:** The ACL and/or Centers shall provide acknowledgement to Indian Tribes within 15 working days of receipt.
- **Official Response to an Identified Critical Event:** The ACL shall provide an official response to Indian Tribes that includes the Center responsible for follow up, the process for resolution of the critical event, and timeline for resolution.

Establishment of Ad Hoc Tribal Federal Workgroups or Taskforces

Although the special “Tribal-Federal” relationship is based in part on the government-to-government relationship, it may be necessary for ACL to maximize the expertise and knowledge of individuals working in tribal communities and therefore convene Ad Hoc Tribal Federal Workgroups, subject to available funding, to provide advice and input to ACL on agency-wide plans and policies that impact Indian Tribes. These Joint Tribal-Federal Workgroups do not take the place of Tribal consultation, but offer an enhancement whereby members can work collaboratively and offer recommendations for consideration by ACL. The Ad Hoc Tribal Federal Workgroups will allow ACL to engage with experts in different subject matter areas as the agency seeks input from stakeholders when considering changes in policy or practice as they relate to Native communities. These Workgroups will function in accordance with the HHS Tribal Consultation Policy, Addendum 1 addressing Establishing Joint Tribal/Federal Workgroups and/or Task Forces (Addendum 1). ACL Program offices will ensure that these Workgroups will follow the procedures outlined in Addendum 1 to ensure compliance with the Federal Advisory Committee Act (FACA), 5 U.S.C. App., Pub. L. 92-463, unless exempt in accordance with section 204(b) of the Unfunded Mandates Reform Act (UMRA) of 1995 (Pub. L. 104-4, approved March 22, 1995, 109 Stat. 48).

ACL will develop forums to provide opportunities for input and dialogue for State-recognized Tribes; Native American organizations, including Native Hawaiians and Native American Pacific Islanders; urban Indian centers; tribally controlled community colleges and universities; Alaska Native Corporations; and others as defined in program office guidance.

Tribal Consultation Performance and Accountability

ACL program offices will design indicators to ensure accountability among program managers, and central office and Regional Administrators in carrying out the HHS and ACL tribal consultation policies.

ACL will require all personnel working with Indian Tribes to complete annual Tribal consultation training. This training shall include, at minimum, a review of Executive Order 13175, the President’s Memorandum on Uniform Standards for Tribal Consultation, and this policy. Tribal consultation training modules established by the Secretary of the U.S. Department of the Interior and Director of the U.S. Office of Personnel Management may also be used to satisfy the annual training requirement.

As part of the Department’s annual measurement of the level of satisfaction of Indian Tribes with the consultation process and the activities conducted under this policy, Indian Tribes’ satisfaction with ACL will be recorded and evaluated to determine whether the intended results were achieved and to solicit recommendations for improvement from Tribes.

Conflict Resolution

The intent of this policy is to promote respectful partnership with Indian Tribes that enhance ACL’s ability to address issues, needs and problem resolution. Indian Tribes and ACL may not always agree and inherent in the government-to-government relationship, Indian Tribes may elevate an issue of importance to a higher decision-making authority. Consistent with EO 13175 and Presidential Memoranda addressing Tribal consultation, nothing in this policy creates a right of action against ACL for failure to comply with this policy.

Effective Date