



## Director's Advisory Workgroup on Tribal Consultation Policy (Consultation Workgroup) Overview and Summary

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This brief summary outlines the comments received during the initial 45-day Indian Health Service (IHS) Tribal Consultation comment period on the IHS Tribal Consultation Policy that began on April 27, 2021. The IHS received comments from 12 Tribes, Tribal Organizations, individuals, and national advocacy organizations. The IHS worked in collaboration with the Director's Advisory Workgroup on Tribal Consultation Policy (Consultation Workgroup) to review, analyze, debate, discuss, and collectively develop recommendations for updating the DRAFT IHS Tribal Consultation Policy (Consultation Policy).

There were nine specific issues that were consistently raised through the process that needed to be worked through. These issues were:

1. *Dual/Mutual Consent;*
2. *Decision Making;*
3. *Trust Responsibility ;*
4. *Indian Cannons of Construction;*
5. *Indian Organizations, Tribal Organizations, Inter-Tribal Organizations;*
6. *IHS Budget Formulation;*
7. *Workgroup and Task Forces;*
8. *Listening Sessions; and*
9. *Indian Tribe Definition.*

Below you find a summary of each issue and the outcome of the issue as it was addressed in the DRAFT Consultation Policy. *\*Please note: The redline version captures all proposed changes and the clean version incorporates all proposed changes into the DRAFT Consultation Policy.*

**Dual/Mutual Consent:** Comments received proposed adding the concept of seeking consent from Tribes and proposed adding the following: *“True consultation is an ongoing process that leads to information exchange, respectful dialogue, ~~mutual understanding~~, **dual consent**, and informed decision-making. [Headquarters] will communicate timely information to Indian Tribes on the outcomes, decision-making process, consideration of Tribal input and feedback. Dialogue will be initiated with the goal of **dual consent** when there are disagreements prior to final decisions being made.”* There was consensus by the Consultation Workgroup to maintain the use of “mutual understanding” and recommendation to revise this section follows:

- *“True consultation is an ongoing process that leads to information exchange, respectful dialogue, **mutual understanding**, and informed decision making. **Additionally, consultation requires that information obtained from Tribes be given meaningful consideration, and IHS should strive for consensus with Tribes or a mutually desired outcome, to the extent practicable and permitted by law.**”*

**Decision-Making:** Comments received proposed that Tribes participate in the Federal decision-making process and that the following language be added: *“To formalize the requirement of the IHS to seek consultation and participation by representatives of Indian Tribes in policy **decision making**, development and program activities to ensure that Tribal health priorities and goals are recognized.”* There was consensus by the Consultation Workgroup to add the following:

- *“To formalize the requirement of the IHS to seek consultation and participation of Indian Tribes in policy development and program activities to ensure that Tribal health priorities and goals are a meaningful part of IHS’s decision making process.”*

**Trust Responsibility:** Comments received proposed adding the following language to the Policy section of the Consultation Policy: *“The **trust responsibility** exists between the federal government and Tribal Nations exclusively.”* There was consensus by the Consultation Workgroup to add the following **PREFACE** to the DRAFT Consultation Policy:

- *“Since the formation of the Union, the United States (U.S.) recognizes Indian Tribes as sovereign nations. A unique government-to-government relationship exists between Indian Tribes and the Federal Government and acknowledges that the U.S. maintains certain treaty and trust responsibilities to Tribal Nations. This relationship is grounded in the U.S. Constitution, numerous treaties, statutes, Federal case law, regulations and executive orders that establish and define a trust relationship with Indian Tribes. This relationship is derived from the political and legal relationship that Indian Tribes have with the Federal Government and is not based upon race. An integral element of the government-to-government relationship is Tribal consultation.”*

**Indian Cannons of Construction:** Comments received proposed adding the following to the Policy section of the DRAFT Consultation Policy: *“Details all comments received with a response regarding how those comments have been addressed to the satisfaction of Tribal Nations and consistent with the Indian Cannons of Construction.”*

- *There was consensus by the Consultation Workgroup to **REJECT** the proposed language.*

**Indian Organizations, Tribal Organizations, Intertribal Organizations:** During Consultation Workgroup meetings, there was a comment made to consider Tribes in a consortium being able to participate in Tribal Consultation.

- *The DRAFT Consultation Policy will include revised and new definitions for Indian Organizations, Tribal Organizations, Intertribal Organizations, and Intertribal Consortium.*

**Workgroups and Task Forces:** The Consultation Workgroup recommended moving the “*Establishment of Joint Tribal/Federal Workgroups and/or Task Forces*” section of the Consultation Policy to an Addendum of the Consultation Policy to align with the U.S. Department of Health and Human Services (HHS) Tribal Consultation Policy (HHS TCP).

- *The proposed Consultation Policy now has a 3-page Addendum that outlines the process when the IHS establishes a workgroup and/or taskforce to develop recommendations on various technical, legal, or policy issues.*

**Listening Sessions:** Comments received through Tribal Consultation and from the Consultation Workgroup stated that listening sessions do not constitute Tribal Consultation. Tribal Consultation is a meaningful process and the IHS should not just listen to concerns and move on. Language was added to the Consultation Mechanisms section of the DRAFT Consultation Policy as follows:

- *“The IHS recognizes that other types of meetings or conferences may occur, such as listening sessions, workshops, and technical assistance sessions, to provide opportunities to engage on complex or technical issues, gather input, or share information. However, these other types of meetings are not Tribal consultations and should not be used to supplant formal Tribal consultation.”*

**IHS Budget Formulation:** The IHS updated the IHS Budget Formulation section of the DRAFT Consultation Policy to reflect current practice and recommended that the Consultation Workgroup consider whether IHS Budget Formulation procedures continue to be incorporated in the updated DRAFT Consultation Policy, established as an Appendix, added to the IHS Web site, or moved to another section of the IHS *Indian Health Manual* (IHS IHM).

- *The IHS Budget Formulation section of the DRAFT Consultation Policy was updated to reflect current practice.*

**Indian Tribe (definition):** The IHS recommended updating the definition of Indian Tribe to align with the definition used in the HHS TCP, Executive Order 13175, and the Presidential Memorandum on Uniform Standards. The current definition in the IHS IHM Circular 2006-01 cites the Indian Self-Determination and Education Assistance Act definition: “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 U.S. to Indians because of their status as Indians. (See 25 U.S.C. Sec 450b.)

- *The Consultation Workgroup concurred with the IHS to use the “List Act” definition of Indian Tribe in the updated Consultation Policy.*