STATE OF MINNESOTA
DEPARTMENT OF HUMAN SERVICES

TRIBAL CONSULTATION POLICY

Draft 1 (12/13)
Tribal Consultation Policy

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1. INTRODUCTION
On November 5, 2009, President Obama signed an Executive Memorandum reaffirming the
government-to-government relationship between Indian tribes and the Federal Government, and
directing each executive department and agency to consult with tribal governments prior to taking
actions that affect this population. The importance of consultation with Indian tribes was affirmed
The U.S. Department of Health and Human Services (DHS) and Indian tribes share the goal of
eliminating health and human service disparities of American Indians and Alaska Natives (AI/AN)
and ensuring that access to critical health and human services is maximized.

On August 8, 2013, Governor Mark Dayton signed Executive Order 13-10 affirming the government
to government relationship between the State of Minnesota and Minnesota Tribal Nations. The
Executive Order asserted that the State of Minnesota shall recognize the unique legal relationship
between the State of Minnesota and the Minnesota Tribal Nations, respect the fundamental principles
that establish and maintain this relationship, and accord Tribal Governments the same respect as
accorded to other governments. The Executive Order also directed that the following Cabinet-level
Executive Branch agencies shall, in consultation with the Minnesota Tribal Nations, develop and
implement tribal consultation policies to guide their work and interaction with the Minnesota Tribal
Nations.

2. THE DEPARTMENT OF HUMAN SERVICES CONSULTATION PROTOCOLS
The Office of Indian Policy (OIP), as an Operating Division within DHS, hereby establishes a
consultation policy with federally recognized Indian tribes. The purpose of the DHS Tribal
Consultation Policy is to build meaningful relationships with federally recognized tribes by engaging
in open, continuous, and meaningful consultation. True consultation leads to information exchange,
mutual understanding, and informed decision-making.

This DHS Tribal Consultation Policy document was developed based upon:
1. Presidential Executive Memorandum “Tribal Consultation,” November 5, 2009;
2. Presidential Executive Order 13175, reaffirmed in 2009;
3. Executive Order 13-10, signed by Governor Mark Dayton on August 8, 2013
4. DDHS Tribal Consultation Policy
5. Input from an DHS Tribal Relations Steering Team;
6. Input from the DHS-Tribal Relations Workgroup; convened to develop the draft DHS
Consultation Policy and to provide on-going consultation.

3. BACKGROUND
Since the formation of the Union, the United States (U.S.) has recognized Indian tribes as sovereign
nations. A unique government-to-government relationship exists between AI/AN Indian tribes and
the Federal Government. This relationship is grounded in the U.S. Constitution, numerous treaties,
statutes, Federal case law, regulations and executive orders, as well as political, legal, moral, and
ethical principles. This relationship is derived from the political relationship that Indian tribes have
with the Federal Government. This relationship has been delegated to States in those instances when
the state when the state has been delegated the responsibility to assist in the fulfilling of federal trust
responsibility. This happens in all instances that the state receives and implements federal
programming.
An integral element of this government-to-government relationship is that consultation occurs with Indian tribal nations. DHS program offices shall provide an opportunity for meaningful consultation between tribal nations and DHS in policy development, as set forth in this policy.

The Executive Memorandum titled “Tribal Consultation” reaffirmed this government-to-government relationship with Indian tribes on November 3, 2009. The implementation of this policy is in recognition of this special relationship. This special relationship is affirmed in statutes and various Presidential Executive Orders including, but not limited to:

- Older Americans Act, Public Law 89-73, as amended (42 U.S.C. 3001 et seq.);
- Indian Self-Determination and Education Assistance Act, Public Law 93-638, as amended (25 U.S.C. 450 et seq.);
- Native American Programs Act, Public Law 93-644, as amended (42 U.S.C. 2991 et seq.);
- Indian Health Care Improvement Act, Public Law 94-437, as amended (25 U.S.C. 1601 et seq.);
- Patient Protection and Affordable Care Act (ACA), Public Law 111-148 (42 U.S.C. 18001);
- Fostering Connections to Success and Increasing Adoptions Act of 2008, Public Law 110-331 (42 U.S.C. 1305 et seq.);
- Presidential Executive Memorandum to the Heads of Executive Departments dated April 29, 1994; Governments, November 6, 2000; and

4. 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 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-government and self-determination. 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. Self-determination and meaningful involvement for Indian tribes in Federal decision-making through consultation in matters that affect Indian tribes have 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 it receives, and its internal program management.

5. BACKGROUND ON DHS

DHS provides state leadership and direction to plan, manage, and coordinate the statewide administration of comprehensive and supportive programs for vulnerable and at-risk children and families. DHS oversees and finances a broad range of programs for children and families, including Native Americans, persons with developmental disabilities, refugees, and legal immigrants, to help them develop and grow toward a more independent, self-reliant life. These programs, carried out by State, county, city, and tribal governments, and public and private local agencies, are designed to promote stability, economic security, responsibility, and self-sufficiency.
DHS coordinates development and implementation of family-centered strategies, policies, and linkages among its programs, and with other Federal, tribal, and State programs serving children and families. DHS's programs assist families in financial crisis, emphasizing short-term financial assistance, and education, training, and employment for the long term. Its programs for children and youth focus on those children and youth with special problems, including children of low-income families, abused and neglected children, those in institutions or requiring adoption or foster family services, runaway youth, children with disabilities, migrant children, and Native American children. DHS promotes the development of comprehensive and integrated community and home-based modes of service delivery where possible. The following offices are located in DHS:

- Children and Family Services
- Continuing Care
- Chemical and Mental Health
- Health Care Administration
- Operations

In June 2010, DHS established the Office of Indian Policy (OIP). The primary function of the OIP is to provide guidance in the implementation and coordination of ongoing consultation and program development with tribal governments regarding the delivery of human services to American Indians living both on and off the reservation. The goal of the OIP is to create a human services system in which Indian clients, eligible for public assistance, will have full access to the benefits of DHS programs and will experience the unique protections and health and human services they have been guaranteed as a result of historic federal-tribal relations as well as state laws/policy. The Cornerstones of the OIP are

1. Promoting Government to Government Relations
2. Enhancing tribal infrastructure
3. Increasing Access
4. Addressing Disparities
5. Designing effective programs (culturally appropriate/specific)
6. Maximizing fiscal resources

Two teams have been created within the OIP. The DHS Tribal Relations Steering Team and the DHS-Tribal Human Services Work Group. The DHS Tribal Relations Steering Team will function as an internal agency workgroup to support the Commissioner of DHS, the DHS Executive Team, each of the 5 Assistant Commissioners, and all DHS program areas. On behalf of the DHS, the Director of OIP is the Chair of the DHS Tribal Relations Steering Team and OIP is the lead office to coordinate the activities.

One of the responsibilities of NAAAC is to facilitate the development of the DHS Tribal Consultation Policy, in conjunction with the Deputy Commissioner of DHS and in consultation with tribes.

The members of TSWWG will include

6. CONSULTATION PRINCIPLES
Consultation is an enhanced form of communication that emphasizes trust, respect, and shared responsibility. It is an open and free exchange of information and opinions among parties, which leads to mutual understanding and comprehension. 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. DHS will consult, as defined in this document and as practicable and permitted by law, with Indian tribes before taking action that will significantly affect Indian tribes.

The DHS policy is to conduct timely, respectful, meaningful, and effective two-way communication and consultation with tribes wherein elected officials and other authorized representatives of the tribal governments provide input prior to any action that either DHS or one or more tribes determines has or may have significantly affected one or more Indian tribes, and before any such action or further action is taken. An action that triggers consultation is any legislative proposal, new rule adoption, or other policy change that either DHS or a tribe determines may significantly affect Indian tribes. DHS or a tribe may determine that an action may significantly affect one or more Indian tribes and by appropriate communication initiate tribal consultation. An action is considered to significantly affect tribes if there exists a reasonable presumption that it has or may have substantial direct effects on one or more Indian tribes, on the relationship between the DHS and Indian tribes, on the amount or duration of DHS program funding, on the delivery of DHS program services to one or more tribes, or on the distribution of power and responsibilities between the DHS and Indian tribes.

7. CONSULTATION PARTIES
Consultation parties are:
A. The DHS Commissioner and Deputy Commissioners, DHS Assistant Commissioners, the Director of the Office of Indian Policy, and
B. Tribal President, Tribal Chair or Chief Executive Officer, or an elected or appointed Tribal Leader, or their authorized representative(s).

Each party will identify their authorized representatives with delegated authorities to negotiate on their behalf.

8. CONSULTATION PROCESS
A. A consultation is initiated:

When either DHS or one or more tribes makes a written request for a consultation:
   a. Either DHS or a tribe may determine an action significantly affects or may affect one or more Indian tribes.
   b. An action that triggers consultation is any legislative proposal, new rule adoption, or policy change that either DHS or a tribe determines may significantly affect Indian tribes.

An action is considered to significantly affect tribes if there exists a reasonable presumption that it has or may have substantial direct effects on:
   a. One or more Indian tribes;
   b. The amount or duration of DHS program funding for one or more tribes;
   c. The delivery of DHS program services to one or more tribes;
   d. The relationship between the MN State Government and Indian tribes; or
   e. The distribution of power and responsibilities between the State Government and Indian tribes.

   B. A consultation request by DHS or tribe(s) should:

      1. Identify the subject issue(s) for resolution.
2. Identify the applicable program(s), policy, rule, regulation, statute, and authorizing legislation.

3. Identify the related concerns such as State-tribal relations, related programs, complexity, time constraints, funding and budget implications.

4. Identify the affected and potentially affected Indian tribe(s).

C. DHS will acknowledge receipt of the tribal consultation request within 14 calendar days after receipt of the request.

D. DHS shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of policies that have tribal implications.

E. To the extent practicable and permitted by law, DHS shall not promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribes, or that is not required by statute, unless:

1. Funds necessary to pay the direct costs incurred by the Indian tribe in complying with the action are provided by the state government; or

2. DHS, prior to the formal promulgation of the regulation,
   a. Consulted with tribal officials early and throughout the process of developing the proposed regulation;

   b. Provided a tribal summary impact statement in a separately identified communication to tribal officials that consists of a description of the extent of DHS's prior consultation with tribal officials, a summary of the nature of their concerns and DHS'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. Made available to the Deputy Commissioner any written communications submitted to DHS by tribal officials.

G. Proper notice of the tribal consultation and the level of consultation shall be communicated to all affected and all potentially affected Indian tribes within 45 calendar days after receipt of the tribal request. Appropriate forms of notice include a “Dear Tribal Leader Letter” signed by the Deputy Commissioner, broadcast e-mail, and other outlets. The notice will provide at least 30 days notice of subject, location, date, and time.

H. Consultation will occur through a combination of one or more methods, and will include additional actions and participants as determined by the parties. The following are examples of methods of consultation:

1. Meeting(s): One or more meetings for consultation with affected and potentially affected Indian tribes to discuss all pertinent issues related to the legislative proposal, new rule adoption, or other policy change that may significantly affect the tribe(s) using a single purpose meeting, or a national or regional forum, if appropriate, when
the consultation is determined to include all tribes. Meetings can be face-to-face, by teleconference call, and other forms of new technologies.

2. Correspondence: Written communications for consultation exchanged between DHS and the Indian tribe(s) provide affected and potentially affected Indian tribes an opportunity to identify concerns, potential impacts, proposed alternatives or flexibilities, and provide DHS with the opportunity to identify resources and other considerations relevant to the issue(s) raised. All correspondence will identify the manner in which tribal comments will be solicited.

3. State Register (SR): When one or more meetings are not practicable, notices in the SR may be used as the method of consultation to solicit comment from tribes about broad-based issues including concerns, potential impacts, proposed alternatives or flexibilities. Such notices will include clear and explicit instructions for the submission of comments that provide adequate time, a minimum of 45 days, for tribal responses. The FR will not be used as a sole method of communication for consultation.

I. Reporting of Outcome: All consultation meetings and recommended actions shall be recorded and made available to Indian tribes.

DHS program offices will provide a detailed report on their consultation sessions, which summarizes the discussions, specific recommendations, and responses, and solicits tribal feedback on the consultation process, within 45 calendar days of the conclusion of the consultation process. The DHS report will be available on the program offices' websites. Once the consultation process is complete and a proposed policy is approved and issued, the final policy must be broadly distributed to all Indian tribes and it will be independently posted on the DHS webpage and also linked to several appropriate tribal and inter-tribal organization websites.

J. Meaningful Outcomes: The consultation process and activities conducted within the scope of the DHS policy should result in a meaningful outcome for both DHS and tribes. Before any final policy decisions are adopted that significantly affect Indian tribes, the proposed outcome of a consultation shall be widely publicized and circulated for review and comment to affected Indian tribes, inter-tribal organizations, and within DHS, when appropriate, practicable and permitted by law.

Good faith implementation of DHS programs and a cooperative working relationship with tribes in support of DHS programs is the primary meaningful outcome. DHS will work with counties to emphasize the importance of working cooperatively with tribes.

DHS shall facilitate meaningful consultations and outcomes between tribe(s) and one or more counties administering 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 DHS program requirements.

K. Waivers: The intent of this policy is to provide increased ability to address issues impacting Indian tribes. DHS will, consistent with Governor’s Executive Order and as practicable and permitted by law, utilize flexible approaches to enable tribes to achieve
established DHS program objectives, including consideration of waivers of statutory and regulatory requirements and other alternatives that preserve the prerogatives and authority of Indian tribes.

L. Elevation of Issues: Indian tribes may elevate an issue of importance to a higher or separate decision-making authority, detailed in Section 11. DHS-Tribal Conflict Resolution.

9. DHS CONSULTATION AND COMMUNICATION RESPONSIBILITIES
DHS will conduct an annual agency-wide tribal consultation each year, in addition to the tribal consultations required by several DHS program offices. The following will guide DHS's coordination of the various sessions. THSWG will work with the program offices to coordinate DHS required consultations, on required topics and in required regions, to maximize the time and resources of Indian tribes and program offices.

A. DHS Annual Tribal Consultation Session

1. DHS will hold, at a minimum, an agency-wide annual tribal consultation session to discuss DHS budget, programs and policies impacting tribal programs. OIP, working through THSWG, will be the lead agency to coordinate the annual tribal consultation session.

2. Every DHS program office Principal, or their designee, will be required to participate in the annual DHS tribal consultation.

3. THSWG will coordinate with the program offices to prepare and disseminate a written report within 45 calendar days of the conclusion of the annual DHS tribal consultation.

4. DHS will post this report on its website within 7 days of the final report completion.

5. The annual DHS tribal consultation session will not supplant any tribal consultation sessions that are required by law to be conducted by DHS program offices.

B. Special Statutory Consultation Requirements

1. The following DHS Offices have programs that require consultation with Indian tribes in accordance with their authorizing statutes.
   - Chemical Dependency Division
   - Mental Health Division
   - Children And Family Services
   - Health Care Administration

2. DHS program offices will conduct tribal consultation sessions that are required by law, including in conjunction with the Annual DHS Tribal Consultation Session.

C. Individual Program Consultation Responsibilities
1. Each individual program office will meet with Indian tribes and AI/AN grantees regarding programmatic concerns at the request of the Indian tribe or AI/AN grantee.

2. The Office of Indian Policy is designated as responsible for the initial coordination and facilitation of the program office interaction with tribes and Native American organizations and to serve as the program single point of contact for interaction with offices and workgroups within DHS on AI/AN issues. *(Protocol being drafted)*

3. DHS program offices will acknowledge requests for consultation within 14 calendar days of receipt of the request.

4. DHS program offices will acknowledge and report on unresolved issues with the tribe in a timely manner. DHS program offices will acknowledge issues within 14 calendar days after the conclusion of the consultation.

5. Feedback will be provided by DHS program offices to tribes on the resolution of issues for which consultation has been requested within 45 calendar days of the conclusion of the consultation.

6. DHS program offices will ensure intra-agency coordination with various DHS program areas to facilitate communication and outreach on consultations that effect more than one program area.

7. DHS program offices, coordinated by OIP will provide assistance in efforts to resolve tribal-county issues.

8. DHS program offices will provide a written report on the consultations, which summarizes the discussions, recommendations, and responses, within 45 calendar days after the conclusion of the last consultation.

10. DHS Performance and Accountability
    A. Implementation of this policy shall be made part of the Annual Performance Plan for DHS Senior Management, and other key staff, as a critical performance element in those offices where there are specific tribal activities.

    B. DHS program offices will design indicators to ensure accountability among program managers, and central office and state operated services in carrying out the Governor’s Executive Order and DHS tribal consultation policies.

    C. DHS will ensure that all personnel working with Indian tribes receive appropriate training on consultation, this policy, and working with tribal governments.

    D. 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 DHS will be recorded and evaluated to determine whether the intended results were achieved and to solicit recommendations for improvement from tribes.

11. DHS-Tribal Conflict Resolution
A. Should an impasse arise between DHS and a tribe(s) concerning DHS compliance with the consultation policy or outcome of consultation, a tribe may invoke the conflict resolution process by filing a written notice of conflict resolution and any action that is the subject of an impasse will be stayed until the conflict resolution process with DHS is complete to the extent practicable and permitted by law. Authorized tribal representatives shall have the opportunity to meet with the DHS Deputy Commissioner, and/or the DHS Director of Indian Policy, and the Assistant Commissioner that oversees the program area that is in question. The goal is to accomplish the following:

1. Clarify all aspects of the issue(s) at an impasse;
2. Explore the alternative position(s) available to resolve the impasse;
3. Clearly state the issue(s) that the parties can accept on the record;
4. Form acceptance of recommended actions; and
5. Facilitate coordination of resolution(s) for parties.

B. In cases where a tribe(s) is not satisfied with the resolution of an issue or issues after consultation with DHS, a tribe(s), consistent with the government-to-government relationship, may elevate an issue of importance to the Commissioner Human Services, through the Office of Indian Policy, for decision.

12. WORKGROUPS AND ADVISORY COMMITTEES
A. To maximize the expertise and knowledge of individuals working in tribal communities, DHS will convene multiple Advisory Councils and Tribal Workgroups, subject to available funding, to develop and discuss agency-wide policies that impact Indian tribes, prior to formal tribal consultation sessions on the policies.

The TFWG will work in accordance with the DHS policy on tribal workgroups and will follow procedures to ensure compliance with the DHS Tribal Consultation Policy. See the DHS Tribal Consultation Policy, Addendum 1.

DHS has a standing internal working group made up of staff representatives from each DHS program office. This Native American Affairs Workgroup meets once a month to work on tribal issues at the program, business area, and agency-wide DHS levels.

DHS retains the right to meet with various representatives of organizations on an individual basis.

For policies that impact more than federally recognized Indian tribes, DHS will develop forums to provide opportunities for input and dialogue for Indians living in the urban areas of the state, American Indian organizations, urban Indian centers; and others that are recognized by the larger Indian community of the state.

These groups, while not federally recognized tribes, are eligible to receive funding under certain DHS programs in the same manner as federally recognized tribes. DHS will make every effort to seek the input of these groups when changes to policy impact these groups as well.

E. Program offices may still convene their individual working groups to work on program specific policies. Program offices will ensure that these working groups operate within the DHS Tribal Consultation guidelines and requirements.
13. DEFINITIONS

14. ACRONYMS

15. POLICY REVIEW

DHS shall review and, if necessary, revise its Tribal Consultation Policy no less than every 2 years. Should DHS determine that the policy requires revision, the THSWG will be convened to develop the revisions.

16. RETENTION OF EXECUTIVE BRANCH AUTHORITIES

Nothing in this Order shall require state agencies to violate or ignore any laws, rules, directives, or other legal requirements or obligations imposed by state or federal law, or set forth in agreements or compacts between one or more of the Minnesota Tribal Nations or any other Tribal Nation and the State or its agencies. This Order is not intended to, and does not create, any right to administrative or judicial review, or any other right or benefit or responsibility, substantive or procedural, enforceable against the State of Minnesota, its agencies or instrumentalities, its officers or employees, or its subdivisions or any other persons. Nothing in this Order prohibits or limits any state agency from asserting any rights or pursuing any administrative or judicial action under state or federal law to effectuate the interests of the State of Minnesota or any of its agencies.

17. EFFECTIVE DATE

This policy is effective on the date of signature by the Commissioner of Human Services and shall apply to all DHS program offices.