



USET

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Transmitted via consultation@hhs.gov

March 15, 2019

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

Dear Principal Advisor Ecoffey,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write to provide comment to the U.S. Department of Health and Human Services (HHS) regarding the October 22, 2018 Dear Tribal Leader Letter (DTLL) requesting feedback on the agency's current Tribal Consultation Policy (TCP). Issued in 2010, the current revised TCP was the result of extensive Tribal consultation via written comments, in-person consultation, and a joint Tribal-Federal Work Group. While USET SPF strongly agrees that it is imperative to continue to evaluate and revisit consultation policies, we are not aware of any Tribal Nation, advisory committee, or organization recommending that the HHS TCP be revised. While we provide some limited recommendations below, we note that any substantive revisions must only be undertaken after extensive Tribal consultation, including through the Secretary's Tribal Advisory Committee.

USET SPF is a non-profit, inter-tribal organization representing 27 federally recognized Tribal Nations from Texas across to Florida and up to Maine¹. Both individually, as well as collectively through USET SPF, our member Tribal Nations work to improve health care services for American Indians. Our member Tribal Nations operate in the Nashville Area of the Indian Health Service (IHS), which contains 36 IHS and Tribal health care facilities. Our citizens receive health care services both directly at IHS facilities, as well as in Tribally-operated facilities under contracts with IHS pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93-638.

Introduction

USET SPF underscores the critical component Tribal consultation has in the government-to-government relationship between Tribal Nations and the United States. Tribal Nations access various programs within HHS, not just services through IHS. As an agency of the federal government, HHS has a trust responsibility and obligation to Tribal Nations. These obligations are the result of millions of acres of land and resources ceded to the U.S. and result in a legal and moral responsibility on behalf of the federal government to provide health care in perpetuity to American Indians and Alaska Natives (AI/ANs). Below, we provide

¹ USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

recommendations to HHS on the TCP to ensure it continues to reflect this unique relationship, as well as ensure an inclusive and robust Tribal consultation process.

Impetus for Consultation on TCP Unclear

Although HHS Deputy Secretary Eric Hargan suggests that this is a periodic review of the TCP and that Tribal leaders have supported the current TCP in the past, USET SPF is unaware of any Tribal entity calling for substantive revisions to the document. While we are strongly supportive of opportunities to review policies for their effectiveness and relevancy, we caution HHS from making changes unilaterally. HHS must only revise the TCP at the request of Tribal Nations, and these changes must be made with a goal of more fully delivering upon the trust responsibility and obligations. We urge HHS to ensure this process is fully transparent and Tribally-driven.

HHS Trust Responsibility Preamble

Though USET SPF is appreciative of the references to the federal trust responsibility within the TCP, we strongly recommend the TCP provide a preamble statement, or other introduction, that details HHS' commitment to Tribal consultation in carrying out that responsibility. As stated within the TCP:

A unique government-to-government relationship exists between 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 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.

USET SPF recommends the preamble reinforce HHS' commitment to the federal government's trust responsibility to protect the interests of Tribal Nations and the unique government-to-government relationship, as stated above. This includes acknowledging and underscoring the trust obligation, within the preamble, that has been made through the numerous Indian-specific laws and policies to provide for Indian health care. These laws and policies include: the Indian Health Care Improvement Act (IHCIA), the ISDEAA, expanding Social Security Act to authorize IHS and Tribal health programs to bill Medicare and Medicaid, and many others. This sacred obligation cannot continue to be carried out if HHS, or its operating divisions (OPDIV's), do not adhere to or observe its own Tribal consultation policy. A preamble would strengthen that commitment that HHS has made within the TCP.

Tribal Consultation Policy Definitions

ISDEAA Terminology. USET SPF strongly recommends HHS revise terminology within the TCP to make terms consistent with definitions under the ISDEAA, as other federal Indian laws and policies have done including the IHCIA. As you know, the historic passage of ISDEAA was intended to strengthen the government-to-government relationship between Tribal Nations and the federal government. Revising these terms consistent those in ISDEAA would ensure the TCP aligns with the goals of ISDEAA. These terms include:

- **Indian Organization** –This term should be replaced with “Tribal Organization.” Under ISDEAA, “Tribal organization” is defined as “the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities.”
 - However, it is the position of USET SPF that, while we're seeking consistency with ISDEAA, Tribal Nations are government structures and not organizations.

- **Indian Tribe** – The definition under this term should be replaced by “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) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians [25 U.S.C. 450b(e)].” It would be helpful to specifically refer to Public Law 103-454, the Federally Recognized Indian Tribe List Act (108 Stat. 4791, 4792), which requires the Secretary of the Interior to publish annually a list of the federally recognized Tribal Nations in the Federal Register.

Definition of ‘Indian’. USET SPF strongly recommends changes that would assure the TCP does not inadvertently exclude individuals within its definition of “Indian” who are defined as “Indians” for other purposes related to HHS activities. Therefore, rather than citing the definition of “Indian” at 25 U.S.C. 479a, we recommend the definition be redrafted to include those who are eligible for IHS services, otherwise known as “IHS beneficiaries”, see 25 C.F.R. § 136.12, and other individuals who are considered to be “Indian” for purposes of eligibility for Indian health care services. However, USET SPF takes the position that Tribal consultation should take place between Tribal governmental entities and the federal government.

Tribal Self-Determination & Self-Governance

Though the TCP briefly mentions Tribal self-governance under Section 3, “Tribal Sovereignty”, USET SPF encourages HHS to expand upon the critical importance of Tribal self-determination and self-governance within the Indian Health system. USET SPF urges the inclusion of language within the TCP that is reflective of HHS’ commitment to uphold and promote the principles of Tribal self-governance within the agency. The TCP must reflect that by engaging in Tribal self-governance, Tribal Nations and the federal government are able to work together to promote the exercise of inherent Tribal sovereignty and self-determination to meet the unique priorities of our communities. With respect to federal Indian policies, any policy within the federal government, including HHS, must be reflective of the important role that Tribal self-governance has, and ensure agencies are engaging in meaningful relationships with Tribal Nations who choose to operate their own programs.

Reporting of Comments and Outcomes

In order to strengthen transparency within the TCP, USET SPF recommends HHS improve the reporting of comments and outcomes following Tribal consultation periods to reflect a more meaningful Tribal consultation process. Oftentimes, Tribal Nations will participate in extensive consultations only to discover the input provided to the federal agencies has not been taken into consideration. This is a violation of the federal trust obligation to engage in meaningful consultation with Tribal Nations on issues that affect them. Though HHS includes a very detailed process for evaluating and reporting consultation activities within the TCP, specifically under Section 8, “Tribal Consultation Process” and Section 13, “Evaluation, Recording of Meetings and Reporting,” notably missing from these sections are processes for follow-up on concerns and other issues gathered during Tribal consultations. There must be a transparent process in place to ensure meaningful Tribal consultation where issues and concerns raised by Tribal Nations are fully addressed by HHS.

Additionally, USET SPF is glad to see specific processes within the current TCP on the reporting of outcomes in a timely manner under Section 8(A)(5). Under this section, OPDIV’s under HHS are required to report on the outcomes of consultations within 90 calendar days of final consultation, as well as on the status of ongoing issues. However, to ensure there is adequate follow-through on commitments made or critical issues discussed during Tribal consultations, USET SPF believes there should be a continued cycle of consultation, where HHS provides feedback to Tribal Nations regularly to promote an ongoing dialogue regarding issues identified by Tribal Nations. HHS should periodically report on ways in which the agency

has followed through on commitments and/or has worked to address the concerns or issues identified by Tribal Nations during consultation.

Culturally Competent HHS Representatives

USET SPF recommends that HHS include language within the TCP that will ensure that agency representatives are properly and appropriately educated on working with Tribal Nations. Specifically, HHS must ensure that agency representatives participating in Tribal consultation be informed and fully trained not just on the culturally sensitive, distinct cultures, and protocols of individual Tribal Nations, but on the unique legal status of Tribal Nations and the trust responsibility of the federal government to uphold federal trust obligations to AI/ANs.

HHS Tribal Consultation Workgroup

As HHS moves forward with reviewing the TCP, USET SPF recommends the agency consider establishing an HHS Tribal Consultation Workgroup that includes both federal and Tribal partners. As with similar federal-Tribal workgroups throughout the federal government, the Workgroup should include a group of Tribal technical advisors who are knowledgeable and experienced on Tribal consultation. The Workgroup would be able to assist the agency in determining the effect the current TCP has on the consultation relationship between Tribal Nations and HHS and provide needed recommendations to the agency to ensure they are inclusive of the unique priorities of Indian Country. We underscore the critical resources available to HHS when it comes to federal-Tribal Workgroups. Should the agency decide to formulate a TCP Workgroup, USET SPF recommends that HHS go back to the Workgroup with the recommendations submitted during this consultation period to determine how to best implement Tribal input.

Conclusion

USET SPF appreciates the opportunity to provide recommendations to HHS on the TCP with the expectation that HHS will ensure efforts to strengthen the TCP are transparent and Tribally-driven. We further continue to caution HHS from making any unilateral revisions to the TCP that would diminish HHS' ability to fully deliver upon the trust responsibility and obligations. As an agency of the federal government, HHS, including all OPDEV's, are charged with delivering upon the trust responsibility to provide comprehensive health care to Tribal Nations. The services delivered by and through HHS are critical to the execution of the federal trust responsibility. With this in mind, we support any revisions and additions to the TCP only if those changes would do more to undergird our sacred government-to-government relationship.

Further, while it is imperative that HHS have a strong consultation process, it is equally important that HHS evolve to embrace a model of consent between two sovereign governments. In doing so, such a process would be more representative of a relationship between two governments that is respectful of the sovereign authorities and powers of each. Should you have any questions or require further information, please contact Mr. Kitcki Carroll, USET SPF Executive Director, at kcarroll@usetinc.org or 615-495-2814.

Sincerely,



Kirk Francis
President



Kitcki A. Carroll
Executive Director