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Dear Tribal Leader:

I am writing today to begin a formal consultation with Tribes regarding issues surrounding the Federal Advisory Committee Act (FACA). Specifically, I am soliciting your input and assistance to help the Indian Health Service (IHS) ensure that all IHS advisory groups comply with FACA so that the work product of these essential advisory groups can withstand legal scrutiny.

FACA was enacted in 1972 to control the growth and operation of the “numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government.” FACA prescribes procedures that govern how agencies may constitute, convene, and use committees of people who are not Federal employees.

Under FACA, with limited exceptions, any group that has one or more members who are not Federal employees, established or utilized by a Federal agency to provide consensus advice to the agency, must comply with FACA. FACA applies to all meetings of such groups, regardless of whether they are held in person or through electronic means.

Government-wide implementing regulations have exempted several categories of committees from FACA. The exemption most relevant to the IHS is the Intergovernmental Exemption. For your review, I have enclosed the requirements of FACA and also the criteria required to meet the Intergovernmental Exemption to FACA. The HHS FACA Management Handbook is available at- www.hhs.gov/hhsmanuals/gam/handbook_version_3.doc. Additionally, 41 C.F.R. 102-3 provides the framework that must be used by agency heads when applying FACA. 42 C.F.R. 102-3.40 specifically addresses what types of committees or groups are not covered by FACA or the Federal Advisory Committee Management regulations. The Intergovernmental Exception is included in this section at 41 CFR Part 102-3.40(g). It is important to note that the FACA guidelines and the Intergovernmental Exemption criteria apply to both committees and any subcommittees.

I am soliciting your suggestions to identify which IHS advisory groups, if any, should be made open to the public and subject to FACA compliance, and also any suggestions you may have to ensure that all other IHS advisory groups meet the Intergovernmental Exemption to FACA. Please refer to my August 13, 2009, letter to Tribal leaders for a listing of all IHS Advisory Committees and Workgroups at: http://www.ihs.gov/PublicAffairs/DirCorner/2009_Letters/08-13-2009_Letter.pdf http://www.ihs.gov/PublicAffairs/DirCorner/2009_Letters/08-13-2009_Committees-Workgroups.pdf

It is important to note, that in order to meet the Intergovernmental Exemption to FACA, only Tribal leaders, acting in their official elected capacity, will be eligible to sit on exempted IHS advisory groups. There is limited authority for a Tribal leader to delegate an employee of his/her Tribe or to delegate his/her Washington representative to act as the Tribal leader's proxy. However, only Tribal leaders, acting in his/her elected capacity may serve as members, and such delegations are limited in scope and duration. I am writing to you about this important issue because if any IHS advisory group relying on the Intergovernmental Exemption to FACA is found to be in violation of the exemption criteria enclosed, all decisions based on the group's recommendations could be invalidated by a court. I rely on the work of IHS's advisory groups to make important recommendations to me on a variety of topics ranging from contract support costs to the Special Diabetes Program for Indians. We cannot risk decisions based on any of your recommendations becoming invalid. I hope you agree.

In order to accomplish the above objective, I am soliciting comments and suggestions from Tribal leaders for the next 60 days. Once the comment period closes, I plan to ask my Director's Advisory Workgroup on Consultation to review your comments and suggestions and prepare a final recommendation for my consideration.

I would like to thank you for your assistance with this important issue and thank you in advance for your participation. Based on my discussions with Tribal leaders, I fully understand the importance of having Tribal employees and technical advisors assist you on the IHS advisory groups. However, in order to preserve the integrity of the Government-to-Government relationship, and to comply with FACA, we must examine the actual workgroup membership. We can discuss ways to ensure adequate technical assistance for workgroup members in each workgroup. I am confident, through Tribal consultation, that we will be able to meet all of our needs.

Sincerely,

/Yvette Roubideaux/

Yvette Roubideaux, M.D., M.P.H.
Director

Federal Advisory Committee Act Requirements
and
Criteria Required to Meet the Intergovernmental Exception to Federal Advisory Committee Act

Federal Advisory Committee Act Requirements, as described in the HHS FACA Management Handbook	Intergovernmental Exemption to the Federal Advisory Act Requirement
<p>FACA is triggered when: A group</p> <ul style="list-style-type: none"> (1) is established or utilized by the agency <u>and</u> (2) provides consensus or group advice/recommendations to an agency <u>and</u> (3) consists of one or more non-federal employees <u>and</u> (4) it is not exempt from FACA by statute. <p>Major Requirements Governing FACA Committees:</p> <ul style="list-style-type: none"> (1) Limited in number (2) Established by the Secretary, charters approved and signed by Secretary, and typically are limited to a maximum duration of 2 years (3) FACA groups must provide public notice at least 15 days in advance in the Federal Register regarding time and place of meetings (4) FACA groups must make meeting minutes and documents available to the public (5) FACA groups typically must be open to the public 	<p>41 C.F.R. 102-3.40 - What types of committees or groups are not covered by the Act and this part?</p> <p>The following are examples of committees or groups that are not covered by the Act or this Federal Advisory Committee Management part:</p> <p>(g) Intergovernmental committees. Any committee composed wholly of full-time or permanent part-time officers or employees of the Federal Government and elected officers of State, local and tribal governments (or their designated employees with authority to act on their behalf), acting in their official capacities. However, the purpose of such a committee must be solely to exchange views, information, or advice relating to the management or implementation of Federal programs established pursuant to statute, that explicitly or inherently share intergovernmental responsibilities or administration (see guidelines issued by the Office of Management and Budget (OMB) on section 204(b) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1534(b), OMB Memorandum M-95-20, dated September 21, 1995, available from the Committee Management Secretariat (MC), General Services Administration, 1800 F Street, NW., Washington, DC 20405-0002)</p>