

**NORTHWEST  
PORTLAND  
AREA  
INDIAN  
HEALTH  
BOARD**

Burns-Paiute Tribe  
Chehalis Tribe  
Coeur d'Alene Tribe  
Colville Tribe  
Coos, Siuslaw, &  
Lower Umpqua Tribe  
Coquille Tribe  
Cow Creek Tribe  
Cowlitz Tribe  
Grand Ronde Tribe  
Hoh Tribe  
Jamestown S'Klallam Tribe  
Kalispell Tribe  
Klamath Tribe  
Kootenai Tribe  
Lower Elwha Tribe  
Lummi Tribe  
Makah Tribe  
Muckleshoot Tribe  
Nez Perce Tribe  
Nisqually Tribe  
Nooksack Tribe  
NW Band of Shoshoni Tribe  
Port Gamble S'Klallam  
Tribe  
Puyallup Tribe  
Quileute Tribe  
Quinalt Tribe  
Samish Indian Nation  
Sauk-Suiattle Tribe  
Shoalwater Bay Tribe  
Shoshone-Bannock Tribe  
Siletz Tribe  
Skokomish Tribe  
Snoqualmie Tribe  
Spokane Tribe  
Squaxin Island Tribe  
Stillaguamish Tribe  
Suquamish Tribe  
Swinomish Tribe  
Tulalip Tribe  
Umatilla Tribe  
Upper Skagit Tribe  
Warm Springs Tribe  
Yakama Nation

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REVISION ON 1/9/2012 TO JANURARY 6, 2012 LETTER

Yvette Roubideaux, M.D., M.P.H.  
Director  
Indian Health Service  
801 Thompson Avenue, Suite 440  
Rockville, MD 20852

Dear Dr. Roubideaux:

The Northwest Portland Area Indian Health Board (NPAIHB) is a Public Law 93-638 Tribal organization that represents health care issues of forty-three federally-recognized Tribes in the states of Idaho, Oregon, and Washington. We are responding to your request for Tribal consultation and recommendations on whether, and or which, IHS advisory groups should be made open to the public and subject to the Federal Advisory Committee Act (FACA) compliance.

Your November 9, 2010, "Dear Tribal Leader Letter," was shared with Portland Area Tribal leaders, health directors and our Board delegates during our December 29, 2010 budget formulation session in Tacoma, Washington. The letter was also disseminated by IHS and the Board prior to our meeting. The following are recommendations from our discussion and represent the consensus of Portland Area Tribes on this issue.

Most important from our discussion is that Portland Area Tribes are concerned that FACA is being cited as a reason to limit participation of tribal employees and inter-tribal organizations, like the NPAIHB, who assist in informing tribal leaders by providing technical expertise on issues. The federal government and Indian tribes are engaged on hundreds of complex issues, and there is a role for appropriate expert and administrative assistance to tribal leaders as the IHS Director conducts consultation and dialogue on issues.

Northwest Tribes feel that it is important to note that FACA does not apply to the vast majority of routine meetings involving Indian tribes and the federal government. It only applies to "committees" or similar groups that are "actually managed and controlled by the executive branch," and does not apply to groups formed by non-federal entities.<sup>1</sup> Even when a federal advisory committee is established and controlled by a federal agency, assuring that membership on such committees is open to authorized tribal employees is necessary to comply with the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1534(b)), OMB Memorandum M-95-20 (September 21, 1995), and the published statements of the General Services Administration (65 Fed. Reg. 2504, 2508-09 (Jan. 14, 2000)).

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<sup>1</sup>Federal Advisory Committee Management, Final Rule, General Services Administration, 66 Fed. Reg. 37728, 37735-6 (July 19, 2001).

Not only is placement of authorized tribal employees on such committees necessary to comply with the controlling statute and regulatory directives; it is also good policy. As you know, key tribal employees possess enormous expertise grounded in actual implementation of federal health care initiatives. This technical expertise complements perfectly the political and policy expertise possessed by tribal leaders. Effective intergovernmental consultation requires that all these perspectives be represented on the agency's advisory committees.

In 1995, the Unfunded Mandates Reform Act, 2 U.S.C. 1501 (UMFRA) was enacted to reduce the imposition of unfunded federal mandates on state, local, and tribal governments and increase collaboration and communications between federal officials and state, local, and tribal governments. UMFRA Section 204 (2 U.S.C. 1534) specifically exempts state, local, and tribal governments from FACA:

**SEC. 204. STATE, LOCAL, AND TRIBAL GOVERNMENT INPUT.**

(a) IN GENERAL.—Each agency shall, to the extent permitted in law, develop an effective process to permit elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates.

(b) MEETINGS BETWEEN STATE, LOCAL, TRIBAL AND FEDERAL OFFICERS.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to actions in support of intergovernmental communications where—

(1) meetings are held exclusively between Federal officials 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; and

(2) such meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.

(c) IMPLEMENTING GUIDELINES.—No later than 6 months after the date of enactment of this Act, the President shall issue guidelines and instructions to Federal agencies for appropriate implementation of subsections (a) and (b) consistent with applicable laws and regulations.

Subsection 204(c) of UMFRA required the President to issue guidelines and instructions to federal agencies for implementation of Section 204. The OMB guidelines published in 1995 provide further guidance on the scope of the exemption for tribal, state and local governments.

This exemption applies to meetings between Federal officials and employees and State, local or tribal governments, acting through their elected officers, officials, employees, and Washington representatives, at which “views, information or advice” are exchanged concerning the implementation of intergovernmental responsibilities or administration, including those that arise explicitly or implicitly under statute, regulation, or Executive Order.

The scope of meetings covered by the exemption should be construed broadly to include any meetings called for any purpose relating to intergovernmental responsibilities or administration. Such meetings include, but are not limited to, meetings called for the purpose of seeking consensus; exchanging views, information, advice, and/or recommendations; or facilitating any other interaction relating to intergovernmental responsibilities or administration.<sup>2, 3</sup>

Under the UMFRA exemption, federal agencies are instructed to consult with heads of state and tribal governments, with state and tribal government employees and program officials institutionally responsible for the particular issue, and with Washington Representatives.

(3) Washington Representatives

It is also important that Federal agencies consult with Washington representatives, where available, of associations representing elected officials. These Washington representatives often know which local elected officials are the most knowledgeable about, interested in, or responsible for, implementing specific issues, regulations or programs, and can ensure that a broad range of government officials learn of and provide valuable insight concerning a proposed intergovernmental mandate.<sup>4</sup>

In addition, Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, and its partner, Executive Order 13132, Federalism, also closely follow UMFRA Section 204 and instruct federal agencies to consult and collaborate with state, local and tribal government officials on matters significantly affecting their decision making authority.

Within its definition of “tribal officials”, E.O. 13175 specifically includes elected or duly appointed officials of authorized intertribal organizations:

(d) “Tribal officials” means elected or duly appointed officials of Indian tribal governments or *authorized intertribal organizations*.

Similarly, the definitions within E.O. 13132 include state intergovernmental organizations:

(d) “State and local officials” means elected officials of State and local governments or their *representative national organizations*.

UMFRA, the implementing guidelines and the corresponding Executive Orders confirm that authorized intergovernmental organizations are included within the scope of its exemption from FACA. Tribal and state intergovernmental organizations fall within the UMFRA exemption from FACA because their elected officials and designated employees are authorized, appointed, and directed to act on behalf of their tribal government members under their organizational by-laws and resolutions.

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<sup>2</sup> OMB Memorandum 95-20, Implementing Section 204 as related to FACA, (September 21, 1995), pp. 6-7, 60 Fed. Reg. 50651, 50653 (Sept. 29, 1995); see Delegation of Authority to Issue Guidelines or Instructions to Federal Agencies on Consulting with State, Local and Tribal Governments, 60 Fed. Reg. 45039 (August 29, 1995).

<sup>3</sup> Cited recently in OMB Memorandum 10-33, Guidance for Implementing E.O. 13175, “Consultation and Coordination with Indian Tribal Governments,” (July 30, 2010), p. 6.

<sup>4</sup> OMB Memorandum 95-20, p.3, 60 Fed. Reg. at 50652.

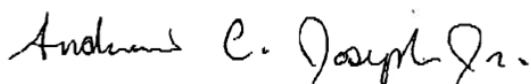
We also note that limiting the participation on IHS advisory committee will have a disruptive effect on long-standing committee or advisory groups in the Portland Area. For example, the Fund Distribution Work Group (FDWG) is an advisory body that is comprised of Tribal and health directors that provide advice and guidance to the Portland Area Director. Another committee is the Portland Area Facilities Advisory Committee (PAFAC) that also provides advice and guidance on facilities related matters and budget priorities. If participation on these types of advisory committees is restricted it will end long standing processes that Tribal leaders have established for informing the Portland Area office on critical issues. We are hopeful that your decisions around FACA will [not] disrupt or limit participation of advisory committees that have been in place since the inception of Indian self-determination.

Intergovernmental organizations also play an important role in communications with the federal government as they were created by Tribal governments. NPAIHB is a P.L. 93-638 Tribal organization that was established by our Tribes to assist to represent them on health care issues, to share information and build consensus among highly diverse and geographically divided governmental entities. The Board assists to facilitate communication with the federal government based on the priorities of their membership. Just as the Administration regularly meets with and seeks advice from the National Governors' Association or the National Conference of State Legislators.

We also believe that the IHS Director should permit a similar role for intertribal organizations such as the National Congress of American Indians, the National Indian Health Board, and the National Council on Urban Indian Health. Including intergovernmental organizations within the FACA exception is consistent with the purposes of UMFRA. A contrary interpretation undermines UMFRA's goal of increasing federal government communication and coordination with state, local, and tribal governments.

We thank you for the opportunity to provide comments on this issue and if you should have any questions, please contact Jim Roberts, Policy Analyst, at (503) 228-4185 or by email at [jroberts@npaihb.org](mailto:jroberts@npaihb.org).

Sincerely,

A handwritten signature in black ink that reads "Andy Joseph, Jr." with a stylized flourish at the end.

Andy Joseph, Jr., Chairperson  
Colville Tribal Council Member