



JAMESTOWN S'KLALLAM TRIBE

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Sent Via Email: Yvette.Roubideaux@ihs.gov
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Original Sent USPS

March 8, 2012

Dr. Yvette Roubideaux, M.D., M.P.H.
Director, Indian Health Service
U.S. Department of Health and Human Services
801 Thompson Avenue, Room 440
Rockville, MD 20852

Re: Consultation on Issues Regarding the Federal Advisory Committee Act

Dear Dr. Roubideaux:

This is in response to your letter of February 2, 2012, requesting input regarding how to make Indian Health Service (IHS) advisory groups, workgroups, and committees compliant with the Federal Advisory Committee Act (FACA). You note that almost all the input from Tribes that you have received so far takes the position that IHS is trying to limit the participation of Tribal employees and technical experts. You state that this is not the case since the intergovernmental exemption to FACA provides authority for an elected Tribal officer to delegate an employee of his/her Tribe to act on the Tribal officer's behalf and that IHS is not proposing to limit this authority.

We must, however, take a step back to put this issue in perspective. We cannot assume that IHS advisory groups, workgroups, and committees must be compliant with FACA unless the intergovernmental exemption applies. That is not the case. In fact, FACA does not apply to these groups as they currently function and this was determined long ago. The IHS has used these groups for decades as a practical means of consulting with Tribes and Tribal organizations because the courts have interpreted the FACA definition of an "advisory group" narrowly, so as not to include every formal and informal consultation between an agency and a group rendering advice.

The FACA defines an advisory group as "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is—(A) established by statute or reorganization plan, or (B) established or utilized by the President, or, (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . ." Although this language, read unqualifiedly, would extend FACA's requirements to any group of two or more persons, or at least any formal group, from which the President or an

Executive agency seeks advice, courts have not interpreted it that way. Instead, courts have considered FACA's purposes and origins to determine what was actually intended by Congress.¹

First, it is not enough that the agency played a role in creating the committee and agency officials and employees meet regularly with the committee to discuss policy recommendations. The courts have held that the agency does not directly form or "establish" an advisory committee when the agency itself does not select the committee's members. The fact that the government names some of the committee's members and supports the committee financially is not enough to conclude that the government directly "established" the committee.²

Second, if the committee is not "established" by the agency, but is instead organized by a non-governmental entity, the courts have held that the word "utilize" in the FACA context is a stringent standard denoting that the agency actually manages and controls the committee. The fact that agency officials or employees have "significant influence" over the committee is not enough. A committee must be so closely tied to the agency as to be amendable to strict management and control by agency officials.³ It is only when the committee is created by a "quasi-public" organization such as the National Science Foundation (created and funded by Congress) that this element of agency control is not necessary.⁴

IHS committees and workgroups do not come within these strict judicial interpretations. Thus, it is not the intergovernmental exemption that takes these committees and workgroups outside FACA, but rather that FACA itself does not apply to the IHS committees and workgroups in the first place. The IHS does not select every member of each committee and workgroup—the Tribes and Tribal organizations select the non-governmental members. Nor, if we would view the committees and workgroups as organized outside the IHS, does the IHS exercise the requisite management and control over them. That is enough to exempt the committees and workgroups from FACA.

I hope that this letter is helpful. I suggest that before reversing longstanding practice, IHS carefully consider the need for FACA compliance and the ramifications of such compliance on Tribal consultation.

If you have questions, please contact me at (206) 369-6699 or email at rallen@jamestowntribe.org. Thank you.

Sincerely,



W. Ron Allen, Tribal Chairman/CEO
Jamestown S'Klallam Tribe

Cc: Randy E. Grinnell, Deputy Director, IHS
Hankie Ortiz, Director, Office of Tribal Self-Governance, IHS
Jefferson Keel, President, National Congress of American Indians
Cathy Abramson, Chairperson, National Indian Health Board
Andrew Joseph, Chairman, Northwest Portland Area Indian Health Board
Lynn Malerba, Chairwoman, Tribal Self-Governance Advisory Committee

¹ See, *Public Citizen v. U. S. Department of Justice*, 491 U.S. 440, 452-456 (1989).

² See, *Byrd v. U.S. Environmental Protection Agency*, 174 F.3d 239 (D.C.Cir. 1999); *Judicial Watch, Inc., v. U.S. Department of Commerce*, 736 F.Supp.2d 24, 32-34 (D.D.C. 2010).

³ *Washington Legal Foundation v. U.S. Sentencing Commission*, 17 F.3d 1446 (D.C.Cir. 1994)

⁴ *Judicial Watch, supra*, and cases cited.



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Sent Via Email: annie.bradley@usdoj.gov
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March 8, 2012

The Honorable Eric Holder, Jr.
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW, Room 5111
Washington, DC 20530-0001

Re: Tribal Consultation and the Federal Advisory Committee Act

Dear Attorney General Holder:

Over the past few months Tribes have had discussions with Dr. Yvette Roubideaux, Director of the Indian Health Service (IHS), regarding whether IHS advisory groups, workgroups, and committees are subject to and must comply with the Federal Advisory Committee Act (FACA). I write you about this issue because I understand that the Department of Justice (DOJ) has been asked to look into this question and I want to make sure that you and your staff have the benefit of our views on this very important question as you proceed with your review.

We believe that IHS advisory groups, workgroups, and committees are not subject to FACA because that statute does not apply to these groups as they currently function. The IHS has used these groups for decades as a practical means of consulting with Tribes and Tribal organizations because the courts have interpreted the FACA definition of an "advisory group" narrowly, so as not to include every formal and informal consultation between an agency and a group rendering advice.

The FACA defines an advisory group as "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is—(A) established by statute or reorganization plan, or (B) established or utilized by the President, or, (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . ." Although this language, read unqualifiedly, would extend FACA's requirements to any group of two or more persons, or at least any formal group, from which the President or an Executive agency seeks advice, courts have not interpreted it that way. Instead, courts have considered FACA's purposes and origins to determine what was actually intended by Congress.¹

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I hope that this letter is helpful as the Department of Justice looks into these questions. We would appreciate it if you could weigh in on these questions to help us and IHS understand that the Agency’s longstanding practice and legal conclusion about FACA’s inapplicability are correct.

If you have questions, please contact me at (206) 369-6699 or email at rallen@jamestowntribe.org. Thank you.

Sincerely,



W. Ron Allen, Tribal Chairman/CEO
Jamestown S’Klallam Tribe

cc: Dr. Yvette Roubideaux, Director, IHS
Tony West, Acting Associate Attorney General, DOJ
Virginia Seitz, Assistant Attorney General for the Office of Legal Counsel, DOJ
Jefferson Keel, President, National Congress of American Indians
Cathy Abramson, Chairperson, National Indian Health Board
Andrew Joseph, Chairman, Northwest Portland Area Indian Health Board
Lynn Malerba, Chairwoman, Tribal Self-Governance Advisory Committee
Members of the Department of Justice Tribal Nations Leadership Council

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