

State-Tribal Consultations

A SUMMARY OF BEST PRACTICES

DEPARTMENT OF HEALTH & HUMAN SERVICES · USA

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES

State-Tribal Consultations: A Summary of Best Practices from Washington, Oregon & Minnesota

August 20, 2013

Submitted to:
Kitty Marx
Tribal Affairs Group/CMS/OPE
7500 Security Blvd. S1-20-20
Baltimore, MD 21244
(410) 786-8619
Kitty.Marx@cms.hhs.gov

Submitted by:
Kauffman & Associates, Inc.
South 165 Howard St., Suite 200
Spokane, WA 99201
(204) 863-0371

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Executive Summary

Purpose of the Project

The Centers for Medicare & Medicaid Services (CMS) conducted a series of descriptive case studies examining how certain states engage in consultation with tribes and obtain the advice and input from programs operated by the Indian Health Service, tribes, or tribal organizations under the Indian Self-Determination and Education Assistance Act (Pub.L. 93-638), or urban Indian health organizations under Title V of the Indian Health Care Improvement Act. Pursuant to federal law, states are required to consult with tribes and obtain advice from IHS, tribally operated, and urban programs (I/T/Us) regarding implementation of changes to its Medicaid and Children's Health Insurance Program (CHIP). This consultation is required by Section 5006 of the American Recovery and Reinvestment Act of 2009 (ARRA) and 1115 Medicaid waiver transparency regulations.

These case studies examined tribal consultation State Plan Amendments (SPAs) established by each state as required by ARRA. They did not focus on issues or consultation policies regarding 1115 Medicaid waiver regulations or state-based insurance marketplaces. The studies highlight the perceptions of both the state and tribal participants interviewed for this project on successful and unsuccessful consultation efforts in implementing policy changes to the Medicaid and CHIP programs. Through these case studies, the best practices and lessons learned and other strategies may provide the foundation for implementing successful state-tribal consultation plans in other regions.

Methodology

The case studies focused on Washington, Oregon, and Minnesota as three states with a perceived history of successful state-tribal consultation. CMS conducted guided discussions with state and tribal representatives in these three locations. Discussion participants were asked to describe their state's tribal consultation process, its strengths and weaknesses, and the lessons that other states could take from their consultation experience. Results are presented in one case study for each state (three in total) and in this executive summary, which identifies best tribal consultation practices across all three states.

To conduct the case studies, CMS first completed all federally required protocols (e.g., written supervisory/administrative permission or agency IRB approval). It then reviewed the Medicaid Tribal Consultation State Plan Amendment (SPA) and other tribal consultation policies effective in each state.

Working with the Governor's Office of Indian Affairs located in each state, 21 representatives from the following entities were identified and contacted:

- the Oregon Health Authority,
- the Washington Health Care Authority,
- the Washington Department of Social and Health Services,

- the Native American Rehabilitation Association,
- the Northwest Portland Indian Health Board,
- the Minnesota Department of Human Services,
- the Oregon Legislative Commission on Indian Services, and
- multiple tribes located throughout the Washington, Oregon, and Minnesota regions.

CMS conducted guided discussions with identified points of contact to discuss tribal consultation policies and processes. These exchanges consisted of a series of probes to guide discussion regarding:

- Stakeholders' understanding and perception of the tribal consultation policy or process, including:
    - Perceived successes or strengths,
    - Perceived failures or weakness, and
    - Aspects of the process that may be missing or in need of further development;
- Stakeholders' perceptions of the outcomes and effectiveness of the consultations; and
- Stakeholders' recommendations to others regarding the creation of successful state-tribal consultation policy and practices.

Federal Consultation Requirements

In 2009, Congress enacted section 5006 of the American Recovery and Reinvestment Act of 2009 (ARRA), codified at Section 1902(a)(73)of the Social Security Act, *Protections for Indians under Medicaid.* Section 5006 requires a state in which one or more Indian health programs or urban Indian organizations furnishes health care services to establish a process for the state Medicaid agency to seek advice on a regular, ongoing basis from designees of Indian health programs. This includes programs operated by the Indian Health Service (IHS), tribes, or tribal organizations under the Indian Self-Determination and Education Assistance Act, or Urban Indian Organizations under the Indian Health Care Improvement Act. Section 2107(e)(I) of the Social Security Act was also amended to apply these requirements to CHIP.

State Medicaid and CHIP programs are required to develop a process for obtaining the advice and input from I/T/Us and to submit the process as a SPA for review and approval by CMS. A synopsis of the tribal consultation SPA for each of the three states included in the case studies can be found in the appendix of this report. Of the 50 states, 37 states have an I/T/U located within their borders and are required to submit a Medicaid Tribal Consultation SPA. All 37 SPAs can be found at https://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/StateTribal-RelationsonHealthcare.html.

States must consult on Medicaid and CHIP issues that directly impact I/T/Us. Such impacts can include Medicaid or CHIP changes that further restrict eligibility determinations; reductions in payment rates or service coverage; changes in I/T/U provider payment methodologies,

payment methodologies for services reimbursed to I/T/U providers, or consultation policies; and proposals for demonstrations or waivers that may impact Indians or I/T/U providers. Thus, depending on the issue, states must consult with tribes and I/T/Us regarding SPAs, waiver proposals, waiver extensions, waiver amendments, waiver renewals, and proposals for demonstration projects. SPAs must include information about the frequency, inclusiveness (i.e., individuals, groups or organizations included from whom advice will be sought), and process for seeking such advice from tribes and I/T/Us.

The tribal consultation requirements of ARRA are intended to acknowledge the sovereignty of American Indian and Alaska Native governments and the importance that decisions regarding implementation of Medicaid and CHIP policies might have on the Indian health programs operated by these tribal governments. Tribal consultation, although not perfect, provides a venue through which tribes and states can discuss and address policies and issues affecting tribal communities within the state. Procedures for consultation vary between states, with subsequently differing levels of success and efficacy. These case studies demonstrate an effort to understand the strategies used by certain states that could possibly be used to improve state-tribal consultation policies nationwide.

Strengths, Barriers, and Recommended Strategies for Effective Consultation

Overall, participants interviewed in each state described the state-tribal consultation process positively. Respondents noted various attributes that contribute to the success of these interactions, including:

- Involvement and support of tribal and state leadership,
- An established state-tribe relationship, and
- Genuine, meaningful, and open communication.

In contrast, barriers to effective consultation reflected issues such as:

- Obstacles created by consultation requirements, including overdemand for consultation,
- State or tribal staff turnover, and
- Resource limitations preventing participation in consultations.

The experiences in these areas, however, have helped identify several best practices that can serve as building blocks for states attempting to establish similar successful state-tribal consultation processes. These lessons include:

- Establish a formal consultation policy that holds specific agencies or actors responsible for designated activities. This policy should be developed with tribal stakeholders and should be available for public comment and review.
- Regularly monitor and evaluate the consultation process, amending it as necessary to maintain effectiveness.

- Working with state and tribal stakeholders, review consultation protocol to ensure that requirements foster efficiency and effectiveness. Attempt to limit formal consultation requests to relevant, significant matters, rather than requiring consultation for every issue.
- Acknowledge the sovereignty of tribal nations by engaging collaboratively in consultation as equal partners. Identify and work toward shared goals and outcomes.
- Ensure ongoing training in tribal history, state-tribal relations, and consultation protocol for state and tribal staff, particularly those involved in the consultation process.
- Provide consultation participants with the necessary information to prepare for the consultation event. Allow an appropriate amount of time before the event to review the material.
- Tailor communication so that the appropriate method is used for the intended audience. While reaching out via telephone or email may be suitable for some contacts, such avenues may be inappropriate when contacting tribal chairpersons.
- Encourage and engage in regular, informal communication with consultation participants (such as email, phone discussions, etc.).
- Invite and include state and tribal leadership to participate in the consultation process. This acknowledges the sovereignty of participating governments by ensuring that figures of equal authority from both governments are involved during consultations.

Appendix

Synopsis of Tribal Consultation Policy State Plan Amendments

Minnesota

Date of Submission: December 28, 2010

Approval Date: March 28, 2011

Effective Date of Amendment: October 1, 2010

Inclusiveness: The SPA describes consultation with tribal chairs, tribal health directors of federally recognized tribes, IHS representatives, and urban Indian providers.

Process for Seeking Advice: The state agency meets quarterly with tribal health directors of federally recognized tribes, IHS representatives, and urban Indian health care providers. Additional separate meetings, conference calls, or other mechanisms are also possible. Representatives of the tribes are appointed to the Medicaid Citizens' Advisory Committee. The state agency liaison sends electronic written notification to tribal chairs, tribal health directors, tribal social services directors, the IHS Area office director, and the director of the Minneapolis Indian Board Clinic of anticipated actions. When an Indian health care provider requests changes, the state agency liaison reports back on whether or not the change was included in the submission.

Length of Time for Notification: 60 days before submission

Process for Seeking Expedited Advice: Same process for notification set forth above

Length of Time for Expedited Notification: Longest practicable notice

Consultation with Tribe Concerning the SPA: On October 21, 2009, the 11 tribes, IHS, and the Minneapolis Indian Health Board Clinic received electronic notification of the new consultation requirements. On November 17, 2009, the consultation requirements were discussed at the quarterly tribal health directors' meeting. On February 2, 2010, a draft consultation policy went to all Indian health care providers with a request for comments. On February 18, 2010, a discussion occurred at the quarterly tribal health directors' meeting. On May 2, 2010, a revised draft policy was sent to providers. At the May 12, 2010 meeting, the revised draft policy was discussed and since no one requested additional comments, the policy was considered final.

Process will be used for CHIP: Yes

Process will be used for Waivers: Yes

Oregon

Date of Submission: September 29, 2010

Approval Date: March 21, 2010

Effective Date of Amendment: October 1, 2010

Inclusiveness: The SPA describes consultation with IHS representatives, Urban Indian Programs, and Oregon's nine federally recognized tribes. These entities and individuals include tribal governments (e.g., Tribal Executive Council, Tribal Business Council), tribal chairman or chief or their designated representatives, tribal health clinic executive directors of Oregon's 638/FQHC providers, IHS representatives, tribal organizations established to represent IHS and tribal health programs (such as the Northwest Portland Indian Health Board), and Urban Indian Program(s) Executive Director(s) or designees.

Process for Seeking Advice: Senate Bill 770 establishes a consultation process which the Oregon Health Authority (OHA) implements. On a quarterly basis, 770 meetings occur between OHA and the tribes, urban programs, and IHS representatives. The tribes, urban programs, and IHS representatives suggest the agenda items. The tribes and Indian Organizations select their representatives to attend the meeting. Representatives of all three types of programs are invited to attend all Rule Advisory Committee meetings to provide input on rule concepts and language.

Length of Time for Notification: Documents describing a proposed SPA are distributed 30 days prior to a SPA submission. The meeting agenda is distributed 10 days prior to a quarterly meeting.

Length of Time for Response: Not specified

Process for Seeking Expedited Advice: Correspondence when policy changes are required more quickly than 770 meetings permit. When a SPA requires consultation prior to a regularly scheduled 770 meeting, electronic mail or conference calls may be used.

Length of Time for Expedited Notification: 10 days prior to submission

Length of Time for Expedited Response: Not specified

Consultation with Tribe Concerning the SPA: The consultation policy is written into state law

Process will be used for CHIP: Yes

Process will be used for Waivers: Yes

Washington

Date of Submission: September 26, 2011

Approval Date: December 21, 2011

Effective Date of Amendment: July 1, 2011

Inclusiveness: The SPA describes consultation with tribal leaders, tribal clinic directors, tribal health administrators as requested by the tribe, the IHS chief executive officer, the urban Indian health organization directors, the American Indian Health Commission (AIHC), the Portland Area IHS office, the Northwest Portland Area Indian Health Board (NPAIHB), and the Senior Director for the Office of Indian Policy (to forward on to Indian Policy Advisory Committee [IPAC] delegates).

Process for Seeking Advice: State Medicaid staff attends the bimonthly meetings of AIHC, ad hoc AIHC groups, quarterly IPAC meetings, and IPAC subcommittee meetings on specific topics. It also disseminates program information to interested parties, including NPAIHB, which each week sends the information to health board delegates. In addition to these processes, the state uses a "Dear Tribal Leader" letter to notify tribes, Indian health programs, and urban Indian health organizations of impending changes. Hard copies are automatically mailed to tribal leaders and to others by email. Others may receive a hard copy if they request it. Both verbal and written responses are documented, and if requested, in-person meetings are scheduled.

Length of Time for Notification: 60 days before submission

Length of Time for Response: 30 days

Process for Seeking Expedited Advice: The SPA implies expedited meetings are possible

Length of Time for Expedited Notification: 10 days before submission

Length of Time for Expedited Response: 7 days

Consultation with Tribe Concerning the SPA: The draft Policies and Procedures were sent electronically to AIHC on June 6, 2011. These documents were then presented at the AIHC meeting on June 10, 2011. The draft was distributed to tribal leaders at a meeting on June 9, 2011. Electronic and written notification and a copy of the SPA were sent on July 28, 2011, to the individuals and entities noted above in the statement about inclusiveness.

Process will be used for CHIP: Yes

Process will be used for Waivers: Yes

Best Practices in State-Tribal Consultations

FINDINGS FROM MINNESOTA

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Introduction

The Centers for Medicare & Medicaid Services (CMS) conducted a series of descriptive case studies examining how certain states engage in consultation with tribes and obtain the advice and input from programs operated by the Indian Health Service, tribes or tribal organizations under the Indian Self-Determination and Education Assistance Act (Pub.L. 93-638), or urban Indian health organizations under Title V of the Indian Health Care Improvement Act. Specifically, these case studies examined the tribal consultation State Plan Amendments (SPAs) established by each state as required by Section 5006 of the American Recovery and Reinvestment Act of 2009 (ARRA). The project seeks to highlight best practices and lessons learned, as perceived by both state and tribal participants, stemming from both successful and unsuccessful consultation efforts on Medicaid and Children's Health Insurance Program (CHIP) policies and mandates. Such strategies may provide the foundation for similar, successful consultation plans in other states.

Guided discussions were held with seven state and tribal representatives from the state of Minnesota, including representatives from the Minnesota Department of Human Services (DHS) and the directors and commissioners of the health and human services divisions of two tribes located within the state and centered on consultation policy as required by ARRA. They did not focus on issues or consultation policies regarding 1115 Medicaid waiver regulations or state-based insurance marketplaces.

Analysis of data from these discussions revealed a continually developing consultation process that benefits from the continued use of face-to-face consultations. Quality consultation was also supported by a positive and established relationship between the state and tribes, one that emphasizes collaboration and partnership. Barriers, however, continue to exist. Like other states, the DHS and tribes struggle with consultation overload that can trivialize significant issues. Consultation participants with the ability to make decisions for tribes or the state are often missing from the process. Still, by improving the efficiency of consultation events, and by increasing information access and transparency, Minnesota demonstrates the possibility and potential of successful state-tribal consultations.

Consultation in the State of Minnesota

While the most recent state-tribal consultation plan has been in place in Minnesota since late 2010, Minnesota has had a formal tribal consultation policy in place since 1999. To comply with federal requirements under ARRA, the state Medicaid agency meets quarterly with tribal health directors, Indian Health Service (IHS) representatives, and urban Indian health care providers on matters related to Medicaid and CHIP. These meetings provide a forum from which the state can obtain tribal government and tribal health provider input on relevant matters.

The DHS-designated Medicaid office liaison maintains communication with IHS, tribally operated, and urban programs (I/T/Us) throughout the consultation process. The liaison mails written notification of proposed state plan amendments, waiver requests, renewals, or amendments to tribal chairpersons at least 60 days (or the longest practicable amount of time

possible) before submission. Tribal health directors, tribal social services directors, the IHS Area Office director, and the directors of the Minneapolis Indian Health Board Clinic (now known as the Indian Health Board of Minneapolis, which provides medical and dental care and counseling services to urban Indians) receive the same notification via email. This notice describes the proposed action, its potential impact on tribal health care providers or tribal communities, and how comments can be made on the proposed item.

I/T/U input can be received during the quarterly consultation meetings. Alternatively, the state Medicaid liaison can arrange separate meetings or conference calls between tribal health care providers and, if necessary, appropriate state agency policy staff. The liaison forwards all received comments to the appropriate state agency staff for response; tribal health care providers then receive a report on the state's response to their comments, including any proposed changes. The liaison's report must describe what tribal health care provider input has been accepted and provide an explanation for any omissions. The liaison also informs tribal health care providers of CMS approval or disapproval of the state's submission and the reasoning behind CMS's decision.

The state also seeks advice from the Minnesota Medicaid Citizen's Advisory Committee. Tribal representatives have been appointed by the state Medicaid director to serve on the committee and thus this presents an additional opportunity for tribal input.

Findings from Guided Discussions

Perceptions of the Minnesota Consultation Process

While participants described the state-tribe relationship in Minnesota positively, perceptions of the effectiveness of state-tribal consultations were mixed. A few tribal health program and DHS participants acknowledged that the consultation process may need more time to mature before an accurate assessment of effectiveness can be made, as consultation in some health areas currently seems more effective than in others:

> I think [consultations on health care are] very effective. In other areas that are new to the tribal consultation, I think it's going to take some time. – *Tribal health participant*

That said, participants did not, or could not, comment on the impact of consultation outcomes. DHS respondents noted that tribal populations throughout Minnesota demonstrate significantly poorer health outcomes than the general population:

> [The health impact of these consultations are] pretty hard to measure, and frankly we have horrible, horrible health statistics, especially for American Indians. For the entire non-white population, but in particular for Native Americans, it's abysmal. – *DHS participant*

Tribal health program participants, too, noted the persistent poor health standings of tribal communities. These respondents, however, stated that more time and more consultation would be needed to see long-term health improvements. Additionally, efforts to accurately measure and evaluate health outcomes still need to be made.

Strengths of the Minnesota Consultation Process

An established stakeholder relationship

Both state and tribal participants noted that state engagement with tribes began well before federal orders mandated such activity:

> [The state has] been pretty open and that whole culture has really helped, has really been seen in tribal consultation. I think before tribal consultation became tribal consultation, I think Minnesota started to engage tribes as they started to see some of the health disparities and some other issues pop up. – *Tribal health participant*

Even where respondents see specific consultation processes fail or falter, the strength of the state-tribe relationship provides the necessary foundation to encourage open discussion and implement change. Respondents repeatedly referred to the quality of this relationship, and the trust and sense of collaboration it generates.

Collaboration and partnership

Multiple participants described both the current and ideal consultation process in terms of collaborative interaction. Successful consultation includes working in partnership to define and work toward shared goals and outcomes. This approach avoids wasted attempts at communication and outreach, encourages active stakeholder participation during formal consultations as well as other informal discussions, and leads to the development of solutions and outcomes designed to meet the unique needs of individual tribes. Such cooperation and partnership, when present, benefits both state and tribal entities, and fosters a positive relationship between the state and tribes.

> I think [that] a concern that tribes have…with consultation is if tribes are engaged in consultation, then is their advice or their needs, are they truly taken into account when the programs are put together by the state or by the feds. – *Tribal health participant*

Uncategorized strengths

Additional strengths of the consultation process discussed by participants included:

- *Continued development of the consultation process*. State participants described the need to continually adapt the consultation process. One goal is to design a practice that will successfully address the particular, individual needs and issues of the 11 tribes located within the state:

  > I really believe that until we do consultation on a government-to-government basis, we're not going to make the headway that we need to make. [Consultation needs to be] very individually tailored, which takes time. – *DHS participant*

- *Continued use of in-person consultation events*. In some cases, technology enables more immediate communication and can encourage increased participation. Many participants in Minnesota, however, emphasized the value of continued in-person gatherings to conduct consultation with the state:

> I think most of the face-to-face consultation is the most effective way to go. All these emails and letters are not so effective…A face-to-face could be followed with a letter or an email, but there needs to be more of that. – *Tribal health participant*

In this situation, face-to-face meetings continue to increase the sense of stakeholder ownership and contribute to more open sharing of information in ways that correspondence or virtual meetings do not.

Barriers to Effective Consultation

Lack of decision-maker participation

Tribal health program and DHS respondents both described an environment where state and tribal leaders support the consultation process. However, those who attend consultation events may not have the authority to make decisions on behalf of the tribe or state. Several tribal health program individuals commented that when participants with decision-making authority were not included in or did not attend these gatherings, consultative effectiveness suffered:

> I wouldn't see it as consultation, because those people are not in a position to make decisions on behalf of the tribe. They are there to advise the state on how decisions, [impact tribes] from the program standpoint, are impacting tribes, what they're able to do with the funding, or [if] it's not enough funding or their needs aren't being identified…[But] unless the tribe's elected leaders are at the table making the decisions, being consulted, then it's not true consultation. – *Tribal health participant*

States could address this issue by identifying and reaching out to appropriate tribal authorities. Tribes could address this issue by increasing the attendance of tribal leaders or by authorizing consultation delegates with more executive authority.

Trivialization of significant issues

Tribal respondents commented frequently about the burdens created by too-frequent requests for consultation. Such frequency taxes the already limited time and resources of tribal officials. In addition, this kind of bureaucracy risks trivializing significant health issues by addressing them with the same level of importance and urgency as discussions of unimportant issues:

> What happens is you end up denigrating the serious issues by disguising them in a forest of nonissues...It has a potential of trivializing everything by over-importanizing everything. – *Tribal health participant*

Effectively addressing this issue would require both state and tribal stakeholder input to further develop consultation policies within the region. An honest evaluation of current policy could create an opportunity to address areas of inefficiency that prevent successful consultation from taking place.

State vs. tribal perceptions

State and tribal officials differed in what each group identified as barriers to consultation. For example, state representatives felt that current consultation procedures provided tribes with

ample time and support to participate in these consultations, and did not perceive an interest from tribes in submitting additional comments:

> [P]eople say what they want to say at the meetings and then either that's what they've said or they're busy and don't get around to [submitting formal comments] for whatever reason. But it's very rare that we get comments beyond that. – *DHS participant*

In contrast, tribal participants described a system that presented some level of difficulty when attempting to provide comments on state proposals. Where state respondents highlighted the importance of tribal feedback in their comments, tribes reported a lack of response from the state, and a feeling that feedback was not valued:

> [Y]ou know, sometimes the email would come through and we'll have a week's time. Yet my commissioner's unaware of it, because the letter never came through, or if my commissioner takes it to the elected officials, they are unaware of it. And [there's] not enough time for us to get together to respond to it, and even if we do respond/comment we don't get a response to that. [We don't get] that, "Okay, your comment was valuable," or "Your input is important." You know, acknowledging [it]. – *Tribal health participant*

Lessons Learned: Strategies for Building the Consultation Process

Strategy 1: Take steps to ensure more efficient, effective consultation events.

- Allow consultation participants adequate time to review and discuss consultation agenda topics in preparation for the formal event.
- Provide necessary information and resources so participants can attend consultation event with an appropriate amount of education and comprehension of agenda topics.

When describing formal consultation events, several tribal participants commented on the difficulty of preparing for these gatherings. Most attributed this to a lack of time between presentation of the agenda or meeting content and the actual event itself. A few tribal respondents particularly noted that this inability to prepare before the meeting then required more time spent on education and background discussion at the meeting. This left less time for substantive participant exchange and solution design. Providing tribes with consultation agendas and necessary background information for each topic in a timely manner could result in more efficient use of the time and opportunities available at each consultation event.

Strategy 2: Strive to generate consultation outcomes.

Effective consultation requires more than discussion; it requires follow-through. Tribal respondents, in particular, emphasized a need for consultation that lead to actions and results:

> It's nice to hear everybody's opinion, but if you can't arrive at a conclusion to a problem that is in front of you, why are you talking? – *Tribal health participant*

One way to achieve effective consultation outcomes is through a SMART module:

- ***S***: Specific: Clearly define goals expectations, the reasons for their importance, involved participants, and timelines.
- ***M***: Measureable: Determine how progress toward outcomes will be measured (quantity, cost, cycle time, percentage increase, etc.).
- ***A***: Achievable: Outcomes should be reasonable, feasible, and attainable given available support, resources, and timeframes.
- ***R***: Relevant: Outcomes should link to goals and interests and address the matters at hand.
- ***T***: Time-based: Identify a target date for outcome completion or for achieving certain milestones working toward said outcome.

Thus, effective consultation should identify actions to be taken and delegate responsibility and accountability for those actions to specific individuals or organizations. More succinctly: Consultation participants should know who will be responsible for which actions. Measureable outcomes also provide a baseline from which state and tribal consultation participants can evaluate the success or failure of implementing these outcomes. If participants plan to evaluate consultations to assess consultative effectiveness, these baselines may provide a way to link activities and outputs in relation to measureable longer-term health outcomes.

Strategy 3: Increase information access and transparency.

- Provide access to consultation schedules and content (e.g., calendars, agendas, or an inventory of consultation event minutes posted on a department website).
- Communicate with consultation participants regularly, providing accurate, timely information.
- Provide feedback to participants who comment or respond to consultation requests.

State respondents often cited strengths of the consultation process, highlighting an established, positive relationship between the state and tribes. Tribal representatives, in contrast, focused on the availability of and access to pertinent information about both state and tribal activities and consultation input. Several individuals felt this information should be accessible through such avenues as state-hosted websites:

> [A] strength that all of the other [state government] departments should have is some type of website that documents those tribal consultations and catalogs [them]. – *Tribal health participant*

This contrast emphasizes the need to continue development of the consultation process in order to maintain the state-tribe relationship. Tribal participants did not question the strength or value of this relationship during guided discussions; instead they stressed a desire to develop a more open partnership moving forward—one marked by transparency, honest communication, and the open sharing of information between the state and tribes.

Additional recommended strategies

- States must make an effort to work in partnership with tribal consultation participants to develop shared goals and outcomes.
- While technology has its uses, continue to use face-to-face consultation when possible.
- Attempt to limit formal consultation requests to relevant, significant matters, rather than requesting consultation for every issue.
- Identify and include state and tribal leaders for participation in the consultation event.

Best Practices in State-Tribal Consultations

FINDINGS FROM OREGON

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Best Practices in State-Tribal Consultations: Findings from Oregon

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Baltimore, MD 21244
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Guided discussions were held with seven state and tribal representatives from the state of Oregon, including representatives from the Oregon Health Authority (OHA), the state Legislative Commission on Indian Services, Northwest Portland Area Indian Health Board (NPAIHB), administration and directorship from the health departments of two tribes located within the state, and a large nonprofit organization in the area that provides education, health, and treatment services to American Indians and Alaska Natives. These discussions centered on the consultation as required by ARRA and did not focus on issues or consultation policies regarding 1115 Medicaid waiver regulations or state-based insurance marketplaces. Analysis of data from these discussions revealed a consultation process generally well regarded by both state and tribal respondents.

In Oregon, a mutually respectful relationship rooted in open, honest communication contributed to a general feeling of trust among stakeholders. Still, like other states, Oregon struggles with consultation overload that puts particular strain on tribes' ability to effectively participate in the process. When consultation does take place, it can be difficult for the state to follow through on agreed-upon outcomes. That said, continued maintenance of a formal consultation policy and more efficient communication provide a stable foundation upon which Oregon has established a successful state-tribe consultation process.

Consultation in the State of Oregon

Like Minnesota and Washington, consultation policy in Oregon predates the requirements set out by Section 5006 of ARRA and Section 1115 of the Social Security Act (SSA). In fact, state legislation passed in 1975 created the Legislative Commission on Indian Services in order to improve services to tribal communities throughout Oregon. All nine federally recognized tribes in Oregon have a representative on the Commission and engage with the state in consultations on various issues affecting tribal communities.

To meet federal consultation requirements outlined in ARRA, the state established Senate Bill 770 (SB 770). SB 770 stipulates that OHA meet quarterly with state tribes and representatives

from Indian Health Service (IHS), tribally operated, and urban Indian programs (I/T/Us). Tribal stakeholders largely set the agenda for discussion for these meetings. Consequently, tribal stakeholders designate and send representatives who best represent their interests given the topics under discussion for the particular consultation event. In expedited circumstances, OHA may communicate with tribal representatives and stakeholders outside of the regular quarterly meeting.

The state requires consultation on any proposed SPA, rule-making change, or proposal or amendment to a waiver or demonstration project that may have a direct impact on tribal communities or I/T/Us. Thirty days prior to any submissions to CMS, the state distributes information regarding any Medicaid SPAs. Discussions surrounding the proposed SPA are normally scheduled during the SB 770 meetings. Ten days prior to the meeting, the state staff tribal liaison sends out the meeting agenda and documents describing proposed action to I/T/Us. Email and conference calls 10 days in advance of submission to CMS are used in expedited circumstances to provide written notification and offer tribes the opportunity to request feedback meetings. Tribal stakeholders are also invited to attend all Rule Advisory Committee meetings to provide input on rule concepts and language.

Findings from Guided Discussions

Perceptions of the Oregon Consultation Process

State and tribal participants agreed that consultations as they are currently carried out seem effective. Consultations provide tribes with a platform from which they can work with the state to discuss and develop solutions to health issues affecting the community:

> So it kind of brings into reality and real life what's happening within tribes, out in the field, within our service areas, and it brings it to a level that they're saying, "Oh, okay we're making the policies here. We're pushing stuff through legislature; how is that in direct conflict or how is that not working for the tribes?" So really it bridges that. – *Tribal health participant*

Participants also noted that consultation in Oregon went beyond formal gatherings or consultations. Consultation also includes regular communication and meetings throughout the year. Similar to respondents in Washington, Oregon participants referred to these more informal exchanges as "Little C," while formal consultation events were dubbed "Big C." Both Big C and Little C-caliber exchanges contribute to the continued success of the state-tribe consultation process:

> [A] lot of times we're not doing a waiver…We're not doing a new State Plan Amendment or anything, so there's actually no official reason that we would have to get together, but we do. And you can call them tribal consultations if you want to, but they're there to also help maintain and continue that good working relationship that we have. – *OHA participant*

Other informal exchanges can include everything from email messages and sharing publications of interest to phone calls and unscheduled discussions. They encourage more regular, open

communication between state and tribal stakeholders, and help maintain a positive government-to-government relationship.

Strengths of the Oregon Consultation Process

Honest, open, and meaningful conversation

Both state and tribal participants made repeated references to the need for meaningful conversation during the consultation process. This includes providing tribes with necessary information and the time needed to review it. Discussions consist not only of speaking, but also active listening. Disagreements or limitations do not derail consultation efforts; as a result, both good and bad news can be shared and discussed openly. As one participant summarized:

> [T]o my way of thinking, the most critical thing for effective consultation is you make sure that you create enough opportunities where the appropriate people have a chance to talk to each other, have a chance to learn from each other, and it is two way. – *State Commission participant*

Involvement and support of tribal and state leadership

Several respondents commented on the significance of tribal and state leader presence and the importance of bringing tribal and state leadership representing sovereign nations to engage in the consultation process:

> Call it a largely ceremonial day, because that's really what it is. The governor gives a speech and all the tribal chairs give a pitch and then we have kind of workshops. It's not a productive one to where we're going and meet[ing] on various needs for health care in that meeting, but it's a bigger picture. [It's] a huge message. [I]t's a real good sense of symbolism of drawing those two separate sovereigns together and outlining the importance of working together and partnershiping. – *OHA participant*

The active presence of tribal and state leaders contributes to meaningful, informed discussion during consultations and further strengthens the government-to-government relationship by demonstrating the involvement of members with policy-making authority from both the state and tribes.

Relationship marked by mutual respect and trust

Similar to open and honest communication, participants frequently commented on the respect and trust upon which the state-tribe relationship is built:

> Yeah, go tribes and go state, because that's the deal. It's a two-way relationship based on mutual respect that's organic and that is changing all the time, so you have to keep at it, and there will be some bumpy times, but again we've got a way that there's enough underlying trust that they can work things out, [along with] learning about each other too, nonstop." – *State Commission participant*

This level of trust and respect, participants noted, is the result of years of efforts to build the relationship between the state and tribes. It is characterized by transparent, accurate, and open communication, as well as a high degree of accountability.

Barriers to Effective Consultation

Overburden brought by consultation efforts

Overburden refers to the strain that consultation requirements place on both tribal and state stakeholders. Tribal participants noted that tribal leaders' busy schedules leave little time open for participation in consultations. Continual requests for consultation by the state, then, can sometimes fail to take limited time and resources into account. Both tribal and state participants expressed similar perspectives:

> There's something called consultation overload that a lot of tribes are suffering from right now. – *Tribal health participant*

> [A]s we got more and more engaging, we almost saturated the tribes with wanting to participate in everything we did in this building, and we were inviting them into everything on the planet Earth. "Come and participate and help us hire this person. Help us hire that person. Come to this meeting. Come to that meeting." And the tribes really had to push back and say, "We can't be there 24 hours a day. We've got a tribal program to run and we've got [a] finite amount [of] employees, and we can't spend 60 days a year in Salem." – *OHA participant*

Uncategorized barriers

The majority of barriers described by state and tribal respondents lacked categorization. Some of the additional issues of note discussed by participants included:

- *Delay in moving forward with consultation outcomes*. Tribal participants noted that at times the state appeared to delay any action from consultations. Respondents attributed this hesitancy to waiting for every tribe to comment on a proposal or other internal barriers:

  > I think sometimes there are delays because [the state doesn't] have the answer. They're not ready and so we spend a little bit longer than we need to, but we eventually get there. – *Tribal health participant*

- *New federal health policy*. The implementation of the Affordable Care Act has already changed the health landscape nationally. Within Oregon, the time and resources required for the state to roll out this legislation have detracted from their ability to consult with tribes about the new program and its impact on tribal communities.

Lessons Learned: Strategies for Building the Consultation Process

Strategy 1: Use effective and efficient communication approaches.

- Tailor communication strategies to ensure that the appropriate method is used for the intended audience. (For example, send printed notices via postal mail to tribal leaders to indicate a higher degree of formality.)
- Identify the specific, appropriate recipient for your message. If necessary, create an organizational chart for agencies and tribes to help in this process.

Effective communication must reach the proper audience. Tribal respondents noted that tribal organization varies across the state; the state, then, is responsible for identifying the appropriate point of contact within each tribe when reaching out during consultation:

> Not always do you communicate with the appropriate person or office on an issue; that…takes multiple tiers of communication…to recognize the importance of tribal organization in the role of that communication. So, for example, when a state sends something to a tribe—whether it be a tribal leader or tribal health director or administrator of a health and human services program—depending on how the tribe is organized, not always does it make [to] the right person. – *NPAIHB participant*

Effective communication also refers to the method used to convey information. Respondents acknowledged that effective consultation must use appropriate means of communication, which may vary depending on the intended recipient. Wherein some cases email communication may suffice, a more formal means of delivery—reflecting the official nature of the message—may be more appropriate:

> It's not an email to a health director; I guess that's all I can say. – *Tribal health participant*

Strategy 2: Establish and maintain a formalized consultation policy and process.

- Develop a formalized policy that clearly defines expectations and responsibilities for specific actions. Such a policy should also assign a degree of accountability for failure to follow through on designated responsibilities.
- Ensure that the formalized policy is reviewed, evaluated, and amended as necessary to ensure continued effectiveness.
- Include tribal stakeholders as equal government partners in the development of this policy.

The benefit of a formal consultation policy, as noted by participants, is that it establishes responsibility. Consequently, it also establishes levels of transparency (defining what actions to expect during the consultation process) and accountability (defining the parties responsible for carrying out those actions). By formalizing the consultation policy, the state demonstrates a public commitment to engaging with tribal governments, and tribes have a more significant

process to call on during consultation efforts, thus providing a platform for true government-to-government interaction between the state and sovereign tribal nations. For example:

> A governor does not necessarily support tribes, but the process will always support the tribes. A legislature, one person may not support tribes, but the process supports the tribes, and the more it's embedded within government, the more it's embedded within the tribes and the way that it happens [won't depend on one person or one office] because it will become part of the process. – *Nonprofit organization participant*

Additional recommended strategies

- Encourage and engage in regular, informal communication with consultation participants (such as email, phone discussions, etc.).
- Involve state and tribal leadership throughout the consultation process. This acknowledges the sovereignty of participating governments.
- Provide consultation participants with the necessary information to prepare for the consultation event. This information must be provided in advance of the event with an appropriate amount of time to review the material.
- Review consultation protocol to ensure that requirements do not place undue burden on participants (in terms of time or resource commitments). Develop or amend consultation protocol to allow state and tribal participants to effectively address issues of significance or priority.

Best Practices in State-Tribal Consultations

FINDINGS FROM WASHINGTON

DEPARTMENT OF HEALTH & HUMAN SERVICES · USA

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES

Best Practices in State-Tribal Consultations: Findings from Washington

August 20, 2013

Submitted to:
Kitty Marx
Tribal Affairs Group/CMS/OPE
7500 Security Blvd. S1-20-20
Baltimore, MD 21244
(410) 786-8619
Kitty.Marx@cms.hhs.gov

Submitted by:
Kauffman & Associates, Inc.
South 165 Howard St., Suite 200
Spokane, WA 99201
(204) 863-0371

Contents

Introduction

The Centers for Medicare & Medicaid Services (CMS) conducted a series of descriptive case studies examining how certain states engage in consultation with tribes and obtain the advice and input from programs operated by the Indian Health Service, tribes or tribal organizations under the Indian Self-Determination and Education Assistance Act (Pub.L. 93-638), or urban Indian health organizations under Title V of the Indian Health Care Improvement Act. Specifically, these case studies examined tribal consultation State Plan Amendments (SPAs) established by each state as required by Section 5006 of the American Recovery and Reinvestment Act of 2009 (ARRA). The project seeks to highlight best practices and lessons learned as perceived by both state and tribal participants, stemming from both successful and unsuccessful consultation efforts on Medicaid and Children's Health Insurance Program (CHIP) policies and mandates. Such strategies may provide the foundation for similar, successful consultation plans in other states.

Guided discussions centered on the consultation as required by ARRA. They did not focus on issues or consultation policies regarding 1115 Medicaid waiver regulations or state-based insurance marketplaces. CMS met with seven state and tribal representatives in the state of Washington, including representatives from the Washington Health Care Authority (HCA), the Department of Social and Health Services (DSHS), the regional Centers for Medicare & Medicaid Services (CMS) office, and the vice chairpersons from 2 of the 29 tribes located within the state. Input from the Indian Policy Advisory Committee (IPAC) and the American Indian Health Commission (AIHC), two organizations specifically listed in the state's tribal consultation plan as included participants, were also represented by these participants. IPAC was created by DSHS to guide implementation of state policy regarding and interaction with tribes. AIHC is a tribally run nonprofit that provides a collective forum of tribal viewpoints to address tribal-state health issues.

Analysis of data from these discussions revealed a consultation process based on a collaborative partnership and mutual respect between tribes and the state. This partnership receives support from high-level tribal leaders and state offices, including the state governor. However, Washington still struggles with issues of staff turnover and consultation requirements that negatively impact consultation effectiveness. Through the improved use of technology, demonstrated respect for tribal culture and tradition, and continued use of open and honest communication, Washington serves as a model of effective state-tribal consultation policy.

Consultation in the State of Washington

Washington had already established a consultation process prior to the federal mandates established by Section 5006 of ARRA and Section 1115 of the Social Security Act (SSA). The Centennial Accord, established in Washington in 1989, recognizes and provides a framework for government-to-government relations and interaction between tribes and the state.

Washington created an additional State Plan Amendment (SPA) to satisfy the ARRA requirements requiring advice and input from health programs operated by the Indian Health

Service (IHS), tribes and tribal organizations, and urban Indian health organizations regarding issues having tribal implications related to Medicaid and the Children's Health Insurance Program (CHIP). HCA and CMS participants described the most recent consultation plan, approved in 2011. The current consultation process has established a number of regular meetings, including:

- State staff-attended bimonthly AIHC meetings and ad hoc workgroups, and
- State staff-attended quarterly IPAC meetings and subcommittee meetings.

The state also regularly shares information via email with the tribal health officials and the Northwest Portland Area Indian Health Board, a nonprofit tribal advisory organization that serves federally recognized tribes throughout Washington, Oregon, and Idaho.

Within its SPA, Washington also established a process to notify tribes, Indian health programs, and urban Indian health organizations about new or amended SPAs, waivers, or demonstration projects. The state sends a notification letter, in a form of a "Dear Tribal Leader" letter to the aforementioned to tribes and IHS, tribally operated, and urban Indian programs (I/T/Us) at least 60 days prior to submitting the relevant change or policy. In expedited cases, 10-day notice is required. Tribal chairpersons receive a hard copy of the letter, while other parties (including tribal clinic directors, AIHC, the IHS Portland Area Office, and the state Office of Indian Policy) receive copies via email.

The letter describes the purpose of the item, such as a SPA or waiver, being submitted and any possible impact on tribes. Should no impact be identified, the state explains how it reached such a conclusion. A review document containing the text of the proposed SPA or waiver is provided, if available.

All hard copy and emailed letter recipients have 30 days (7 days in expedited cases) to respond with comments or to request in-person meetings or formal consultations. The state documents, reviews, and incorporates (if appropriate) any responses in a revised document. Any requested meetings are also scheduled.

Findings from Guided Discussions

Perceptions of the Washington Consultation Process

Both state and tribal participants agreed that consultations in Washington proved effective in bringing attention to various tribal health issues. One participant noted that issues affecting tribes often reflected similar, possibly unidentified health matters in the general state population as well:

> In many ways I think tribes are like the canary in the mine, because we do have an elevated responsibility to work with tribes, and so when something is not working well with us, it always begs me to ask, "How is it not working for the rest of society?" – *DSHS participant*

Tribal respondents recalled a greater number of positive consultative experiences during discussions than state respondents, including consultations about premium cost exemptions for tribal members enrolled in the state's Basic Health program.

Several respondents, particularly state HCA participants, made reference to the value and frequency of informal consultations ("Little C," as several individuals referred to it) in maintaining successful formal consultations (or "Big C"), as well as the state-tribal relationship overall. Little C—which consist of individual workshops and presentations, emails, and phone calls—enables and maintains a more open, proactive channel of communication between stakeholders.

Strengths of the Washington Consultation Process

Collaboration and partnership

With some 29 different tribes located throughout Washington, participants acknowledged the need to approach the consultation process as partners. This allows both tribes and the state to engage as equal partners, each able to contribute individual and diverse tribal perspectives to the process, as well as addressing relevant interactions between the state and federal government. Participants noted that the failure to include tribes and I/T/Us as collaborative partners often resulted in ineffective consultation and poor tribal health outcomes. Policy or program decisions that fail to incorporate tribal input cannot effectively address tribal health issues. Such shortcomings then fail to impact or have a negative impact on tribal health outcomes.

> Probably not all states have that Centennial Accord, government to government... connection to begin with. I think that's really [what] this whole partnership [is]…it's a cultural partnership. – *HCA participant*

Involvement and support of tribal and state leadership

Both state and tribal respondents agreed that much of the success of the state-tribal consultation process is rooted in a succession of supportive government officials on the part of the state. These individuals established a precedent for respect of tribal sovereignty and fostered working government-to-government relationships with tribes. The continued involvement and support of state and tribal leaders during consultation increases the perceived significance of the consultation process:

> It's something that starts at the very...top end of leadership at both the tribal level and the executive of the state. – *HCA participant*

> [The tribes] are our partners. We are in partnership with this, because we serve the citizens of Washington and so we need to go together. – *DSHS participant*

Mutual respect for all participants

Mutual respect includes acknowledgement of tribal culture and sovereignty as well as approaching these consultations as government-to-government interactions and understanding

the significance of that relationship. It includes open, transparent communication and an established history of respect for the input and integrity of stakeholders from all sides of the table. Both state and tribal participants noted that such trust and commitment contributes greatly to the success of these consultations throughout the state.

> I mean if it's government to government, that means respect to respect. – *Tribal participant*

Barriers to Effective Consultation

Overburden brought by consultation efforts

Overburden refers to the strain that consultation requirements place on both tribal and state stakeholders. For example, respondents commented on the requirement to continually notify and consult with all tribes on a large number of issues that may lack relevance or significance to tribes. The effort to meet consultation policy requirements detracts from consultation effectiveness. As one participant described:

> It's like a formality bordering on ridiculous. – *HCA participant*

State and/or tribal staff turnover

The state of Washington recently appointed new Health Care Authority (HCA) administrative leaders and support staff, including the HCA tribal liaison. Similar personnel changes recently took place in the governor's administration and within tribal leadership and tribal councils. This turnover presents a particular challenge: respondents commented that incoming individuals—particularly those in high-level positions—often lack knowledge and understanding of the consultation process and the importance of the state-tribal relationship to consultative success:

> [W]hen change happens, like our having a new governor, it takes time again to…reeducate all the new people about the tribes of Washington. Although we've always been here, everything changes within the state all the time. – *Tribal participant*

Based on participants interviewed, it requires considerable time and effort to provide new staff, both at the state and tribal level, with the education and training necessary to continue building and contributing to the consultation process.

Uncategorized barriers

Some of the barriers described by state and tribal respondents did not fit into one particular category. Additional issues of note discussed by participants included:

- *The need to provide comprehensive information in a tangible format*. Due to historically negative experiences—where tribal leaders were provided only summaries or portions of text rather than full documents, leading to confusion and misinformation—more than a few tribal leaders prefer to receive formal, printed information during the consultation process, rather than receiving documentation electronically.

- *The need for discussion and information sharing prior to the consultation event.* Tribal participants discussed the need for tribes and tribal technical advisors to meet prior to the formal consultation event. This gives participants the chance to educate each other on unique tribal perspectives or positions, share information and prepare for the formal consultation encounter. Preparation prior to the consultation session allows more time to discuss pertinent tribal-specific issues and results in better and more consistent tribal presentations during the formal consultation event.

Lessons Learned: Strategies for Building the Consultation Process

Strategy 1: Share information in an accurate, timely manner.

- Individuals, particularly state government actors, should communicate regularly (via email, phone, etc.) with state and tribal stakeholders.
- Accurately present information, including hard or objectionable material.
- Encourage open discourse as well as active listening during communication exchanges.

Both tribal and state participants emphasized the significance of consultation as a means of engaging in genuine discussion regarding issues affecting tribal health. It provides both sides with a forum from which to speak. It also requires active listening by all parties in order to understand differing positions, actions, and perspectives. It does not, as many participants noted, require that the state meet every tribal demand or that tribes accept every proposal made by the state:

> One of the big sticking points that the tribes really wanted us to be mindful of...is consultation, especially in the Northwest, has to be meaningful. – *DSHS participant*

> You know I don't have to always tell you "yes" for us to have a good relationship, but I have to be honest with you, and I have to be open with you, and I can't mislead you. And then we have a good relationship. – *DSHS participant*

Such communication requires a high degree of transparency in terms of information and activity. It also requires a willingness to openly discuss issues or proposals that some may find unpleasant or contentious without misleading or misrepresenting the facts.

Strategy 2: Use technology to increase access to and participation in the consultation process.

- Use video- and tele-conferencing technology, particularly in remote areas.
- Use webinars to increase participation and share information with participants.

The geographic distribution of tribes across any state, especially in Washington, mandates the concentrated effort to address transportation difficulties that may prevent tribal access to and participation in the consultation process. Respondents specifically mentioned the use of webinar technology as a way to provide tribes with a more convenient means of attending

formal and informal consultation events. State participants reported increased tribal participation in consultations after making webinar technology available:

> We started doing webinars. I mean I'll be honest: we started doing webinars somewhat [out] of a self-preservation technique to be sure we got the information out, but they just took off. So we've had one each month so far this year and gone from a handful of people, [of] tribes represented, to more than half of them. – *HCA participant*

For tribes that lack the onsite capacity to host such technology, DSHS provides access to individual videoconference centers throughout the state. Access to these centers has enabled tribal stakeholders to participate in consultations without straining limited time and financial resources.

Strategy 3: Demonstrate respect for tribal sovereignty, culture, and tradition.

- Tailor communication to reflect the sovereign status of participating tribes.
- Acknowledge and engage in tribal customs or traditions during consultation events as appropriate.

State participants in these discussions regularly referred to instances where the state demonstrated (or attempted to demonstrate) respect for the culture and traditions of the tribes with whom they consult. For example, the state rescheduled several formal consultation events to accommodate tribal activities that were not initially factored into the state meeting calendar. The state makes an effort to tailor communication efforts to be appropriate for the intended tribal recipient (for example: sending more formal communication to tribal chairmen rather than, or in addition to, email outreach). One state respondent recalled a consultation event that began and ended with a tribally led invocation:

> The very first consultation I was ever participating in was going to be a difficult issue. It started with the tribes doing an invocation. The tribal leadership did an invocation and it just set this tone of collaboration and honesty and integrity that I have never seen in any kind of a nontribal engagement. – *DSHS participant*

Such actions contribute to increased ownership of the consultation process by tribal stakeholders and can contribute to the continued development of the tribe-state relationship.

Additional recommended strategies

- Encourage and engage in regular informal communication with consultation with tribes and I/T/Us. This includes phone call and email exchanges, workshops, and presentations.
- Include and involve state and tribal leadership during consultation events. Obtain the expressed support of leadership in the consultation process.
- Ensure regular training and education for new state and tribal personnel about consultation processes and relationships.

- Allow adequate time for information sharing and discussion in preparation for the consultation event.