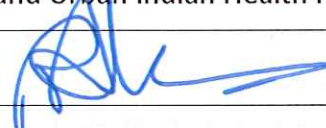


<b>Title:</b>	Tribal Consultation and Urban Indian Health Program Confer Policy
<b>Effective Date:</b>	3-1-18 
<b>Nine Federally Recognized Tribes of Oregon:</b>	Burns Paiute Tribe Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians Confederated Tribes of Grande Ronde Confederated Tribes of Siletz Indians Confederated Tribes of the Umatilla Indian Reservation Confederated Tribes of Warm Springs Coquille Indian Tribe Cow Creek Band of Umpqua Tribe of Indians Klamath Tribes
<b>Urban Indian Health Program:</b>	Native American Rehabilitation Association

**I. Purpose**

The State of Oregon and the Oregon Health Authority (OHA) share the goal to establish clear policies establishing the tribal consultation and urban confer requirements to further the government-to-government relationship between the State and the nine federally recognized Tribes of Oregon (Tribes) as well as strengthen the relationship with the Urban Indian Health Program (UIHP).

This policy:

- Identifies individuals within OHA who are responsible for developing and implementing programs that affect Tribes.
- Establishes a process to identify the OHA programs that impact Tribes.
- Promotes communication between OHA and the Tribes.
- Promotes positive government-to-government relations between OHA and Tribes.
- Establishes a method for notifying OHA employees of ORS 182.162 to 182.168 and this policy.

Meaningful consultation between tribal leadership and or designee and agency leadership shall result in information exchange, mutual understanding, and informed decision-making on behalf of the Tribes and the State. The goal of this policy includes, but is not limited to: eliminating health and human service disparities of Indians; ensuring that access to critical health and human services is maximized; advancing and enhancing the social, physical, behavioral and oral health of Indians; making accommodations in State programs when possible to account for the unique nature of Indian health programs and ensuring that the Tribes are consulted to ensure meaningful

and timely tribal input as required under Federal and State law when health and human service policies have an impact on Indians and the Tribes. To achieve this goal, and to the extent practicable and permitted by law, it is essential that the Tribes, and OHA engage in open, continuous, and meaningful consultation.

This policy applies to OHA and all its divisions, programs, services, projects, activities, and employees and shall serve as a guide for the Tribes to participate in OHA policy development to the greatest extent allowable under Federal and State law. The relationship between OHA and the Tribes is built on a foundation of trust and mutual respect. It is important for OHA to work closely with Tribes on issues related to Medicaid, Children's Health Insurance Program (CHIP), Oregon State Hospital, the Public Health Division the Health Insurance Marketplace (Oregon Department of Consumer and Business Services), and the Department of Human Services, Oregon Department of Housing and Community Services, Youth Development Council, Oregon Department of Veteran's Affairs to promote the participation of Indians in these programs.

## **II. Background**

The United States Government has a unique legal relationship with American Indian tribal governments as set forth in the Constitution of the United States, numerous treaties, statutes, Federal court decisions and Executive Orders. This relationship is derived from the political and legal relationship that Indian Tribes have with the federal government and is not based upon race.

Section 1902 (a) (73) of the Social Security Act which requires a state in which one or more Indian health programs or UIHP furnish 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, whether operated by the Indian Health Service (IHS), Tribes or Tribal organizations under the ISDEAA, or UIHP under the Indian Health Care Improvement Act (IHCA). Section 2107 (e)(I) of the Act was also amended to apply these requirements to CHIP.

The importance of tribal consultation with Indian tribes was affirmed through various statutes and Presidential Executive Orders including, but not limited to:

- Older Americans Act, P.L. 89-73, as amended;
- Indian Self-Determination and Education Assistance Act, P.L. 93-638, as amended;
- Native American Programs Act, P.L. 93-644, as amended;
- Indian Health Care Improvement Act, P.L. 94-437, as amended;
- Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L.104-193;

- Presidential Executive Memorandum to the Heads of Executive Departments, April 29, 1994;
- Presidential Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, November 6, 2000;
- Presidential Memorandum, Government-to-Government Relationship with Tribal Governments, September 23, 2004;
- Presidential Memorandum, Tribal Consultation, November 5, 2009;
- American Recovery and Reinvestment Act of 2009, P.L. 111-5, 123 Stat. 115, February 17, 2009;
- Children's Health Insurance Program Reauthorization Act of 2009, P.L. 111-3, 123 Stat. 8, February 4, 2009;
- Patient Protection and Affordable Care Act of 2010, P.L. 111-148, 124 Stat. 119, March 23, 2010;
- "Medicaid and CHIP Managed Care Rule CMS-2390-F, 42 CFR §438.14 and §457.1209;
- Department of Health and Human Services Tribal Consultation Policy, December 14, 2010; and
- Centers for Medicare and Medicaid Services Tribal Consultation Policy, Section 8, December 10, 2015.

In addition, there are statutory and regulatory requirements for states to consult with federally recognized tribes and to obtain advice from Indian health providers.

### **III. OHA Commitment to Tribal Consultation**

OHA was established by the Oregon State Legislature and is accountable to the people of Oregon, acknowledges this unique relationship, the statutory and regulatory framework for states to consult with Tribes, and recognizes the right of Indian tribes to self-determination and self-governance. The special government-to-government relationship between the Tribes and federal and state governments will be respected in all dealings with the Tribes and OHA. Relationship of State Agencies with Indian Tribes, ORS 182.162 to 182.168.

The State specifically acknowledges the State-Tribal consultation process for new and renewal submissions of: Medicaid and CHIP 1115 demonstration waivers; other Medicaid waivers, such as, 1915 waivers; 1332 waivers and changes to the Health Insurance Marketplace; and any amendments to the State Plan, waivers, or demonstrations that are considered to have an impact on AI/ANs and Indian health programs if the changes impact eligibility determinations, payment rates, payment methodologies, covered services, or provider qualifications and requirements that it is driven by federal law and regulations and/or guidance issued by CMS. These requirements are set forth in: Section 5006(e) of the American Recovery and Reinvestment Act; Section 1115 Transparency Regulations, as found in 42 CFR Part 431;

July 17, 2001 State Medicaid Director Letter #01-024; April 27, 2012 State Medicaid Director letter, SHO # 12-001; and CMS Regulations regarding State/Partnership Marketplaces; Department of Health and Human Services Tribal Consultation Policy, December 14, 2010; Centers for Medicare and Medicaid Services Tribal Consultation Policy, Section 8, December 10 2015.

In order to fully effectuate this consultation policy, OHA will:

1. Ensure inclusion of the Tribes prior to the development of policies and program activities that impact Tribes, utilizing a formal notice that provides descriptive content and a timeline;
2. Create opportunities for Tribes to raise issues with OHA and for OHA to seek consultation with Tribes;
3. Establish a minimum set of requirements and expectations with respect to consultation and participation of OHA leadership;
4. Conduct tribal consultation regarding OHA policies and actions that have tribal implications;
5. Establish improved communication channels with Tribes to increase knowledge and understanding of OHA programs;
6. Enhance partnerships with Tribes that will include technical assistance and access to OHA programs and resources;
7. Support tribal self-determination in programs and resources made available to the Tribes and in working with the Tribes;
8. Include tribal representatives on advisory committees and task forces when subject matter is relevant.

#### **IV. Tribal Consultation Principles**

Consultation is an enhanced form of communication that emphasizes trust, respect and shared responsibility. It is an open and free exchange of information and opinion among parties, which leads to mutual understanding and comprehension. Consultation is integral to a deliberative process that results in effective collaboration and informed decision-making, with the ultimate goal of reaching consensus on issues and better outcomes.

To establish and maintain a positive government-to-government relationship, communication and consultation must occur on an ongoing basis so that Tribes have an opportunity to provide meaningful, and timely input on issues that may have an impact on Tribes. This government-to-government relationship applies between the Tribes and the State.

Consultation with the Tribes is important in the context of health programs because the Tribes serve many roles in their communities:

- Tribes and tribal governments are sovereign nations with inherent authority over their internal affairs; have a government-to-government relationship with the federal government, state governments, and other sovereigns; and have the responsibility to ensure the health and well-being of their tribal citizens, among various other governmental responsibilities.
- Tribal governments operate businesses, are employers, and are health care providers, through administration of clinics and other health programs, which includes public health
- Tribal members are beneficiaries of services provided by the Indian Health Services (IHS), tribal health programs operating under the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, as amended, and by urban Indian health programs operating under Title V of the Indian Health Care Improvement Act.
- Tribal members are also eligible to enroll in Medicare, Medicaid, the Children's Health Insurance Program (CHIP), the Health Insurance Marketplace, (Oregon Department of Consumer and Business Services) and other health and human services programs in the state.

Tribal consultation is not invoked when this policy is not followed. For example, sending an email to Tribes is not considered tribal consultation or discussing a topic that involves Tribes without proper notice is not tribal consultation.

#### **V. Conferring with Urban Indian Health Program**

The Tribes direct OHA and all its divisions, programs, services, projects, activities, and employees to confer with the Urban Indian Health Program (UIHP) to ensure the exchange of information, mutual understanding, and informed-decision making on behalf of American Indians and Alaska Natives living in Oregon. UIHPs serve an important role in Oregon by providing critical health and wellness services to members of Oregon Tribes as well as members of other federally recognized Tribes.

UIHPs, authorized by Title V of the Indian Health Care Improvement Act P.L. 94-437, exist as a direct response to the Termination and Relocation Era policies which left American Indians and Alaska Natives displaced to urban centers across the country with few resources and little access to the Federal programs. UIHPs exist as a critical part of the Indian health system in the provision of health care to American Indians and Alaska Natives which is part of the Federal government's trust responsibility and treaty obligations to Tribes.

State agrees to notify UIHP when all Oregon Tribes are provided notice of Tribal consultation under this policy and/or as specified in Addendum A- Conferring with UIHP.

## **VI. Policy**

It is the intent of OHA to meaningfully consult with Tribes on any policy that will impact the Tribes before any action is taken.

Such policies include those that:

1. Have Indian or Tribal implications; or
2. Have implications on the Indian Health Service, tribal health programs or urban Indian health program, or
3. Have a direct effect on one or more Tribes, or
4. Have a direct effect on the relationship between the state and Tribes, or
5. Have a direct effect on the distribution of power and responsibilities between the state and Tribes; or
6. Are a federally or statutorily mandated proposal or change in which OHA has flexibility in implementation.

If the proposal or change directly affects Indians, the Indian Health Service, tribal health programs or urban Indian health program, but is federally or statutorily mandated with no state flexibility in implementation, no consultation will be required; however, the proposal or change will be communicated through written updates from OHA to individuals on Official Notification List and pursuant to communication mechanism and communication method requirements described in Section VII.

## **VII. Tribal Consultation Process**

An effective consultation between OHA and the Tribes requires trust between all parties which is an indispensable element in establishing a good consultative relationship. The degree and extent of consultation will depend on the identified Critical Event. A Critical Event must be formally identified by OHA or Tribes.

A Critical Event includes, but is not limited to:

- Policy development impacting the Tribes;
- Program activities that impacting Tribes;
- A State Plan Amendment (SPA), demonstration proposal or renewal, waiver proposal or renewal, or state Medicaid regulations changes with a compliance cost or impacting Tribes;
- Results of monitoring, site visits or audit findings impacting Tribes;
- Data collection and reporting activities impacting Tribes;
- Funding or budget developments impacting Tribes;
- Rule making impacting Tribes; or
- Any other event impacting Tribes.

Upon identification of a Critical Event impacting one or more Tribes OHA will initiate consultation regarding the event.

To initiate and conduct consultation, the following serves as a guideline to be utilized by OHA and the Tribes:

1. Identify the Critical Event: complexity, implications, time constraints, deadlines and issue(s).
2. Identify how the Critical Event impacts Tribes.
3. Identify affected/potentially affected Tribes.

***Determining Consultation Mechanism:*** The most useful and appropriate consultation mechanisms can be determined by OHA and Tribes after considering the Critical Event and Tribes affected/potentially affected. Consultation mechanisms include but are not limited to one or more of the following:

- a. Mailings, including electronic mail;
- b. Teleconferences;
- c. Webinars;
- d. Face-to-Face Meetings at SB 770 Health and Human Service Cluster Committee Meetings and other meetings;
- e. Roundtables;
- f. Annual meetings;
- g. Other regular or special OHA or program level consultation sessions.

OHA will post and maintain electronic information on the agreed upon consultation mechanism on OHA Tribal Affairs site for Indian health programs.

***Communication Methods:*** The determination of the Critical Event and the level of consultation mechanism to be used by OHA shall be communicated to affected/potentially affected Tribes using all appropriate methods and with as much advance notice as practicable or as required under this policy. These methods include but are not limited to the following:

1. Official Notification: Upon the determination of the consultation mechanism, proper notice of the Critical Event and the consultation mechanism utilized shall be communicated to affected/potentially affected Tribes using all appropriate methods including mailing and broadcast e-mail. Such notice shall be provided to:
  - a. Tribal Chairman or Chief and their designated representative(s)
  - b. Tribal Health Clinic Executive Directors of Oregon's 638/FQHC providers
  - c. IHS Clinic(s) Executive Director

- d. Tribal Organization(s) Health Director and/or designated representative(s)
- e. Tribal Organizations established to represent IHS and Tribal health programs and such as the Northwest Portland Area Indian Health Board Executive Director or designee(s)
- f. UIHP Executive Director or designee(s)

State must annually update their mailing/email list to ensure notice is being provided to designated leadership. Each Tribe is responsible for providing this information to OHA's Tribal Affairs Director to regularly update the list.

2. Correspondence: Written communications shall be issued within 14 calendar days of an identified Critical Event except that state plan amendments, waiver and rule making changes require additional notice as described below. The communication should clearly provide affected/potentially affected Tribes with detail of the Critical Event, clear and explicit instructions on the manner and timeframe in which to provide comments. A "Dear Tribal Leader Letter" (DTLL) format should be used to notify individual Tribes of consultation activities. The written notice DTLL will include, but is not limited to:

- a. Purpose of the proposal/change and proposed implementation plan;
- b. Anticipated impact on Indians and Indian health programs and the UIHP as determined by OHA;
- c. Method for providing comments/questions; and
- d. Timeframe for response.

In addition to the DTLL requirements above, state plan amendments, waivers, and rule making have additional requirements that must be included in the DTLL:

- a. **State Plan Amendments**: Prior to a State Plan submission to CMS, OHA must distribute documents describing the proposed Medicaid State Plan Amendment (SPA). The DTLL will include the proposed change; anticipated impact; method for providing comments/questions; timeframe for feedback; and an opportunity for discussion. This process will include a 90-day timeline. OHA will provide the draft SPA and related documents to Tribes 90 days prior to state's submission to CMS. This will allow Tribes 30 days to review the draft SPA and documents, 30 days to request formal consultation, if needed, and 30 days to provide written comments. For tracking purposes OHA will share a status report of pending, upcoming and approved SPAs on a monthly basis. OHA will also share an ongoing report of all SPA's that have been approved.
- b. **Waivers**: Pursuant to the CMS's transparency regulations at 42 CFR 431.408(b), State Medicaid Director Letter #01-024 and Section 8 of CMS's Tribal Consultation Policy, OHA must consult with Tribes prior to



submitting any Section 1115 and 1915 waiver request to CMS. OHA must consult with Tribes at least 60 calendar days before OHA intends to submit a Medicaid waiver request or waiver renewal to CMS. The DTLN or notification required by SMD #01-024 must describe the purpose of the waiver or renewal and its anticipated impact on tribal members. For Tribes to understand the impact on its tribal members, the notification should include the actual language from the demonstration waiver or renewal that has tribal implications and should not be in summary or outline form.

- c. **Rulemaking:** OHA must consult with Tribes at least 60 calendar days notice before OHA intends to propose new rules or changes to rules that impact Tribes. Tribes will also be invited to attend Rule Advisory Committee meetings to provide additional input on rule concepts and language. In addition, OHA will provide tribes with bi-weekly updates on new rules or changes to rules impacting tribes.
3. **Meeting(s):** OHA shall convene a meeting within 30 calendar days' notice of an identified Critical Event with affected/potentially affected Tribes (or sooner with affected/potentially affected Tribe(s) approval), to discuss all pertinent issues when the Critical Event is determined to have an impact.

*SB770 Health and Human Services Cluster Meeting:* In addition, when Tribal Consultation is scheduled at an SB 770 Health and Human Services Cluster Meeting, the agenda must clearly indicate that the item is a Tribal Consultation request and clearly state on the agenda "Tribal Consultation: [agenda item]. Such request at an SB 770 Health and Human Services Cluster meeting must provide at least 30 days' advance calendar notice.

4. **Creation of Committees/Work Group(s):** Round tables and work groups should be used for discussions, problem resolution, and preparation for communication and consultation related to a Critical Event but do not replace formal tribal consultation. Round tables and work groups will provide the opportunity for technical assistance from OHA to Indian health programs and the UIHP to address challenges or barriers and work collaboratively on development of solutions to bring to the meetings. OHA will work with Indian health programs and the UIHP to designate technical representation on special workgroups as needed or recommended.

**Reporting of Outcome:** OHA shall report on the outcomes of the consultation within 30 calendar days of final consultation by letter or email. For ongoing issues identified during the consultation, OHA shall provide status reports throughout the year to the Tribes, and prepare an annual tribal consultation report.

**Implementation Process and Responsibilities:** The process should be reviewed and evaluated for effectiveness every 3 years, or as requested.

### **VIII. Tribal Consultation Performance Evaluation**

OHA is responsible for evaluating its performance under this Tribal Consultation Policy. To effectively evaluate the results of the consultation process and the ability of OHA to incorporate tribal recommendations, OHA will assess its performance on a quarterly and annual basis in tribal consultation reports. The State will provide performance data in its reports.

### **IX. Meeting Records and Additional Reporting**

OHA is responsible for making and keeping records of its tribal consultation activity. All such records shall be made readily available to Tribes an annual tribal consultation report and all data. OHA shall make and keep records of all proceedings and recommendations, and will have these records readily available upon request and/or posted online.

### **X. Role of Tribal Affairs Director**

The OHA Tribal Affairs Director is responsible for coordinating with OHA staff including directors, Tribal Liaisons, and other designated staff in developing and implementing programs that affect Tribes. The Tribal Affairs Director will communicate with staff on a regular basis to identify the OHA programs that affects Tribes. Tribal Affairs will convene quarterly with all staff working with Tribes to assure that they are aware of the current Tribal Affairs practices, and policies as well as an opportunity to communicate about ongoing work with Tribes. Tribal Affairs will provide training to notify OHA employees of ORS 182.162 to 182.168 and this policy.

### **XI. Tribal Technical Advisory Board**

Through ongoing communications (e.g., emails) and during a standing meeting on a quarterly basis, the State will solicit advice and guidance from the Board on policies, guidelines, and programmatic issues affecting the delivery of health care for tribal members and to ensure that Indians receive quality care and access to services. The role of the Tribal Technical Advisory Board is not meant to replace the tribal consultation process.

### **XII. Definitions**

1. Indian or American Indian/Alaska Native (AI/AN). Indian and/or American Indian/Alaska Native (AI/AN) means any individual defined at 25 USC 1603(13),

1603(28), or 1679(a), or who has been determined eligible as an Indian, under 42 CFR 136.12. This means the individual:

- a. Is a member of a Federally recognized Indian Tribe;
  - b. Resides in an urban center and meets one or more of the four criteria:
    - i. Is a member of a Tribe, band, or other organized group of Indians, including those Tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the State in which they reside, or who is a descendant, in the first or second degree, of any such member;
    - ii. Is an Eskimo or Aleut or other Alaska Native;
    - iii. Is considered by the Secretary of the Interior to be an Indian for any purpose; or
    - iv. Is determined to be an Indian under regulations issued by the Secretary;
  - c. Is considered by the Secretary of the Interior to be an Indian for any purpose; or
  - d. Is considered by the Secretary of Health and Human Services to be an Indian for purposes of eligibility for Indian health care services, including as a California Indian, Eskimo, Aleut, or other Alaska Native.
2. Tribe. Tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or group or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. Oregon's nine Federally Recognized Tribes include:

Burns Paiute Tribe  
Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians  
Confederated Tribes of Grande Ronde  
Confederated Tribes of the Siletz Indians  
Confederated Tribes of the Umatilla Indian Reservation  
Confederated Tribes of Warm Springs  
Coquille Indian Tribe  
Cow Creek Band of Umpqua Tribes of Indians  
Klamath Tribes

3. Urban Indian Health Program (UIHP). Urban Indian Health Program means an urban Indian organization which is a nonprofit corporate body situated in an urban center

governed by a board of directors of whom at least 51 percent are AI/ANs, who have been contracted through Title V of Public Law 94-437. Oregon's UIHP is the:

Native American Rehabilitation Association (NARA)

4. Technical Advisory Board. This board will consist of Tribal Health Directors and or designated representatives from each of the nine federally recognized tribes, NARA, and the Northwest Portland Area Indian Health Board.

### **XIII. Disclaimer**

OHA respects the sovereignty of each of Oregon's Tribes. In executing this policy, no party waives any rights, including treaty rights; immunities, including sovereign immunities; or jurisdictions. This policy does not diminish any rights or protections afforded other Indian persons or entities under state or federal law. Through this policy, the parties strengthen their collective ability to successfully resolve issues of mutual concern. While the relationship described by this policy provides increased ability to solve problems, it likely will not result in a resolution of all issues. Therefore, inherent in their relationship is the right of each of the parties to elevate an issue of importance to any decision-making authority of another party, including, where appropriate, that party's executive office.

### **XIV. Effective date**

This policy will be effective on March 1, 2018 and may be reviewed at the request of the Tribes or OHA.

## Addendum A

### Conferring with Urban Indian Health Program (UIHP)

The objective of conferring with the UIHP is to ensure the open and free exchange of information and opinions that leads to mutual understanding and comprehension; and emphasizes trust, respect, and shared responsibility. See 25 USC §1660d (a). It is the intention of OHA] to confer with the UIHP on any policy or decision that would impact the urban Indian community before any such policy or decision is put into effect.

A policy or decision that would trigger conferring with the UIHP includes those that:

1. Have implications for the urban Indian community; or
2. Have implications on the Indian Health Service or urban Indian health program, or
3. Are a Federally or statutorily mandated proposal or change in OHA has flexibility in implementation.

If the proposal or change directly affects Indians, the Indian Health Service, the urban Indian community or urban Indian program, but is Federally or statutorily mandated with no State flexibility in implementation, conferring will not be required; however, the proposal or change will be communicated through written updates from OHA] to the UIHP Health Director within 30 days.

The basis of the conferring process is mutual trust between OHA and the UIHP. The nature of the Critical Event will determine the depth of the conferring process. A Critical Event may be identified by either OHA or the UIHP.

A Critical Event includes, but is not limited to:

- Policy development impacting the UIHP;
- Program activities that have an impact on the UIHP;
- A State Plan Amendment (SPA), demonstration proposal or renewal, waiver proposal or renewal, or state Medicaid regulations changes with a compliance cost or impact on the UIHP;
- Results of monitoring, site visits or audit findings impacting the UIHP;
- Data collection and reporting activities impacting the UIHP;
- Funding or budget developments impacting the UIHP; or
- Any other event impacting the UIHP.

Once a Critical Event has been identified by OHA or the UIHP the OHA] will initiate the conferring process.

Initiation of the conferring process by either OHA or the UIHP will be guided by the following outline:

1. Identify the Critical Event: complexity, implications, time constraints, and issue(s)
2. Identify how the Critical Event impacts the UIHP.
3. Identify affected/potentially affected the UIHP.

**Determining the method of conferring:** the process of conferring will be agreed upon by OHA and the UIHP after the determination of the Critical Event. Mechanisms for conferring will include any options that provide the opportunity for an open and free exchange of information and opinions that lead to mutual understanding and comprehension, and emphasize trust, respect, and shared responsibility.