

**Janice K. Brewer, Governor**  
**Thomas J. Betlach, Director**

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ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM

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September 14, 2012

Gloria Nagle  
Associate Regional Administrator  
Division of Medicaid & Children's Health Operations  
Centers for Medicare and Medicaid Services  
90 Seventh Street, Suite 5-300 (5W)  
San Francisco, CA 94103-6706

Dear Ms. Nagle:

The State is in receipt of your letter dated July 20, 2012 in which you address the requirement that non-IHS/non-638 providers operating on or off reservation land would need to obtain State licensure per Federal regulation. The letter also raises the discussion around this topic between the State and CMS in the summer of 2010.

While the letter is accurate in explaining that the State acknowledged this issue during our discussions in 2010, your letter fails to address that this requirement reflects a change to longstanding policy for Arizona's facilities operating on reservation land and that the State believed that federal tribal consultation policies required tribal consultation be held by CMS. The State invited CMS at that time to include this issue in a tribal consultation agenda, which CMS declined and advised the State to add at a later date. Since that time, the State has held over 20 tribal consultations and CMS has not once requested to be added to the agenda to discuss this change to policy.

The State is holding its next tribal consultation on September 27, 2012, which is being hosted by the Pascua Yaqui tribe in Tucson, Arizona. My staff sent you the information for this consultation and you have expressed that you will make every effort to attend telephonically. We appreciate those efforts and acknowledge you are working toward a positive resolution on this matter.

CMS tribal consultation is clear: "An action that triggers consultation is any policy that will significantly affect Indian Tribes." Longstanding CMS policy on this issue has required Arizona to obtain a certification from the tribe attesting that the non-IHS/non-638 entity operating on reservation meets state licensure requirements. The State has sent these tribal attestations to CMS for receipt and those attestations have been acknowledged by the Regional Office. This has been the practice since before I began working at AHCCCS over 11 years ago. Moreover, the State believes that an attestation on the part of a tribe is the equivalent of state licensure. Yet, your letter describes the attestation of a sovereign nation as "not serv[ing] any purpose." The State finds this remark and this viewpoint inexplicable and believes that changing this tribal certification practice and requiring the State to go onto reservation land to license private entities operating on reservation is a change in policy that triggers CMS consultation with the tribes.

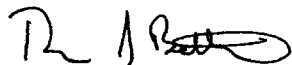
When AHCCCS staff raised the question of when CMS would hold a consultation on this policy change, the response was one of surprise and annoyance. In the meantime, states are required to hold consultation on essentially every change in policy or State Plan Amendment or waiver even when there is no direct impact on tribes. Nevertheless, Arizona holds consultations regularly because this State values its partnership with tribal governments and believes, as is stated in the CMS policy, that “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.”

These policies are derived out of respect for the government-to-government relationship between the federal government and tribes. For the State, it is a policy derived out of that same respect – a government-to-government relationship between tribes and the State. It is difficult to believe that CMS cannot see the need for consultation regarding a policy change that potentially impacts tribal member’s access to care and directly impacts the very nature of that government-to-government relationship and impinges upon the sovereignty of tribal nations. The State of Arizona will move forward once CMS agrees to discuss this change with Arizona’s 22 tribes.

After consultation is concluded, the State’s plan to comply with this requirement will be to send a notice to the six non-IHS/non-638 facilities impacted by the new requirement and to simultaneously contact the three tribes on whose lands these facilities are currently operating. AHCCCS will then coordinate with its sister state agency, the Arizona Department of Health Services, Licensure, to discuss opportunities for review and licensure of these facilities should the impacted tribes agree to move forward once tribal consultation is completed.

We look forward to working with you in addressing this matter with Arizona’s tribal nations.

Sincerely,



Thomas J. Betlach  
Director