



USET

SOVEREIGNTY PROTECTION FUND

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Transmitted via email to:
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RADM Michael D. Weahkee, MBA, MHSA
Assistant Surgeon General, U.S. Public Health Service
Principal Deputy Director
Indian Health Service
5600 Fishers Lane
Mail Stop: 08E86
Rockville, MD 20857

Re: FY 2019 Funding for ISDEAA 105(l) Leases

Dear Principal Deputy Director Weahkee,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write to provide comment to the Indian Health Service (IHS) on the Tribal consultation initiated via Dear Tribal Leader Letter (DTLL) on March 12, 2019 requesting input on meeting the short- and long-term requirements of the Indian Self-Determination and Education Assistance Act (ISDEAA) at 25 U.S.C. § 5324(l), also referred to as "105(l)." IHS is required to make additional funds available for the growing 105(l) requests as a result of *Manilaq Association v. Burwell*, where the Supreme Court ruled that section 105(l) leases must be fully paid. Tribal Nations have increasingly turned to section 105(l) leasing agreements in response to the chronic underfunding of facility maintenance, repair, and replacement costs. According to IHS, the agency has received 100 105(l) lease proposals from Tribal Nations and Tribal organizations totaling approximately \$39 million for Fiscal Year (FY) 2019. While an initial \$30 million has been identified, the full requirements for FY 2019 remain unknown.

USET SPF is a non-profit, inter-tribal organization representing 27 federally recognized Tribal Nations from Texas across to Florida and up to Maine¹. Both individually, as well as collectively through USET SPF, our member Tribal Nations work to improve health care services for American Indians. Our member Tribal Nations operate in the Nashville Area of the Indian Health Service, which contains 36 IHS and Tribal health care facilities. Our citizens receive health care services both directly at IHS facilities, as well as in Tribally-operated facilities under contracts with IHS pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93-638.

¹ USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

USET SPF previously provided comment to IHS in July 2018 when the agency sought input on a “difficult funding decision” to meet immediate 105(l) lease funding requirements. At that time, IHS proposed to reprogram \$13 million of the unallocated FY 2018 inflation increases to cover costs associated with lease proposals. Less than a year later, IHS remains without a plan to meet the funding requirements for rapidly growing 105(l) lease applications. Despite receiving comprehensive recommendations from Indian Country on meeting 105(l) obligations last year, IHS is coming to Tribal Nations with yet another untenable proposal to reprogram from within the IHS budget.

USET SPF is deeply disappointed to learn that IHS has done nothing to avoid a shortfall in funding for this legal obligation and has, in fact, requested that Congress instead limit its liability. While the agency assured Tribal Nations that last year’s reprogramming would be conducted on a one-time basis, IHS is again seeking to cannibalize other line items to address its own failure to project 105(l) lease costs. This remains an unacceptable, unsustainable, and careless solution to a systemic problem at IHS. We reiterate that IHS cannot fund its own legal obligations on the backs of other critical programs. It is particularly disturbing that the agency is proposing to fund these leases by taking from the services line—reducing funding for direct health care services to Native people. It is offensive for IHS to suggest that Tribal Nations would recommend that any of the lines in the services appropriation be reduced, as well as for the agency to seek to circumvent the *Maniilaq* decision through Congressional action.

When it comes to meeting the legal requirements of 105(l) leases, IHS cannot continue to ignore its obligation to implement guidance from Indian Country. USET SPF, along with Tribal Nations and organizations from across the country, was clear in calling for both short- and long-term solutions to this “dilemma” that respected and upheld treaty and trust responsibilities and obligations when we responded to the 2018 DTLL. Our position has not changed. We remind IHS that consultation is meaningless if the expectations and desires of Tribal Nations are not honored.

Funding 105(l) Leases in FY 2019

In order to meet the short-term 105(l) funding obligations, IHS must immediately seek a supplemental appropriation from Congress. This is the only acceptable method of meeting this requirement on a short-term basis. It ensures that funding for each of the other critical lines in the IHS budget is protected, while allowing the agency to pay legal obligations in full. USET SPF expects the agency to work with Congress to see that this is realized.

Funding 105(l) Leases Beyond FY 2019

Once again, USET SPF calls upon IHS to support a separate, indefinite appropriation to meet long-term obligations for 105(l) leasing. This includes support for appropriations language that would make “such sums as may be necessary” available for 105(l) lease funding obligations. This language has ensured that Contract Support Costs (CSC) obligations are paid in full without reducing other IHS program funds. By IHS’ own admission, 105(l) lease costs are difficult to predict due to a multitude of factors, including negotiated costs changing from year to year. A separate, indefinite appropriation would provide much needed certainty for long-term funding obligations. As in our previous letter, USET SPF asserts that these types of line items must be made mandatory as a logical next step in pursuing funding for the agency that is more reflective of the federal government’s trust responsibility and obligations.

Further, IHS must work to provide an accurate estimate of 105(l) leasing costs to Congress in its Congressional Justification each year. Prior to issuing the DTLL in March 2019, IHS acknowledged that 105(l) leases are expected to rise in the coming years, yet IHS still has not found a mechanism to project or estimate costs associated with these funding requirements. IHS must work with Tribal Nations on a solution, so that this obligation can be more accurately funded during the appropriations process.

Conclusion

As Congress moves to formulate federal appropriations for FY 2020, IHS must use this opportunity to seek short- and long-term solutions to 105(l) leasing shortfalls that avoid reductions to the rest of its budget. The agency cannot continue to bury its head in the sand each year, while its legal obligations continue to accumulate. USET SPF continues to urge IHS to engage in meaningful consultation with Tribal Nations, as well as work with Congress to ensure funding responsibilities and trust obligations are fully met by the federal government. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 202-624-3550.

Sincerely,



Kirk Francis
President



Kitcki A. Carroll
Executive Director