UNITED SOUTH AND EASTERN TRIBES, INC
Established 1969

USET
SOVEREIGNTY PROTECTION FUND

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Transmitted via email

July 18, 2018

The Honorable Lisa Murkowski
Chairman
Senate Interior Appropriations Subcommittee
131 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Tom Udall
Ranking Member
Senate Interior Appropriations Subcommittee
131 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Ken Calvert
Chairman
House Subcommittee on Interior Appropriations
2007 Rayburn House Office Building
Washington, DC 20515

The Honorable Betty McCollum
Ranking Member
House Subcommittee on Interior Appropriations
1016 Longworth House Office Building
Washington, DC 20515

Dear Chairmen Murkowski and Calvert, Ranking Members Udall and McCollum,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write to express our concerns with the strong possibility of insufficient levels of funding in the Indian Health Services (IHS) fiscal year (FY) 2019 appropriation for facilities leasing under the section 105(l) of the Indian Self-Determination and Education Assistance Act (ISDEAA). This insufficient funding will impact IHS' ability to meet its trust and legal obligations, as the agency has already proposed to reprogram critical FY 2018 funding to cover the rising costs of leases for Tribal facilities used to carry out section 105(l) agreements.

USET SPF is a non-profit, inter-tribal organization representing 27 federally recognized Tribal Nations from Texas across to Florida and up to Maine[1]. 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.

While USET SPF is pleased that both the House and Senate FY 2019 appropriations proposals contain funding expressly for 105(l) lease agreements, we are concerned that IHS may be underestimating the amount required to fulfill this obligation. In light of the *Maniilaq* decision, there is a very real possibility that

[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).

funding shortfalls will impact other programs and patient care, as the agency seeks to meet its legal responsibility, reminiscent of shortfalls in the Contract Support Costs line item. As it stands, IHS is currently faced with a shortfall for FY 2018 leases and is consulting with Tribal Nations on a proposal to reprogram unallocated inflation increases. Below, USET SPF provides an overview of section 105(l) lease agreements as well as recommendations to the Committees for FY 2019 appropriations to meet funding obligations and to address funding shortfalls as a result of a lack of adequate estimation by IHS.

105(l) Leases and the Maniilaq Decision

Section 105(l) of the ISDEAA requires IHS, at the request of a Tribal Nation or Tribal organization, to enter into a lease for a facility that is owned or leased by the Tribal Nation or Tribal organization that is used for administration or delivery of services under the Act. Tribal Nations have increasingly turned to section 105(l) leasing agreements in response to the chronic underfunding of facility maintenance, repair, and replacement costs. As established in the *Maniilaq Association v. Burwell* litigation in 2016 (Maniilaq II), the Supreme Court ruled that section 105(l) leases must be fully paid by the IHS. Under these leases, the IHS must compensate a Tribal Nation or Tribal organization for reasonable facility expenses that include rent, principal and interest paid or accrued, operation and maintenance expenses.

In a Dear Tribal Leader Letter (DTLL) dated July 10th, IHS announced that the agency would be initiating Tribal consultation to determine how the agency can reprogram funding from other IHS programs to cover costs under 105(l) lease agreements to minimize the impact to current 105(l) leasing activities for which IHS is legally obligated to provide funding. This is similar to steps taken by IHS under the Contract Support Costs (CSC) program prior to the enactment of language providing, “such sums as may be necessary.” According to IHS, the agency is faced with a “difficult funding decision” to meet immediate funding requirements that are expected to grow over time. The number and size of these leases has grown substantially over the last two years, and IHS has been unable to adequately estimate necessary funding for this growth and plan accordingly by securing or requesting additional funding from Congress, in spite of its legal obligations under Maniilaq and the failure to accurately estimate funding in the first place .

IHS has stated the agency has received fifty-five lease proposals totaling $18 million in FY 2018 but has only identified $5 million in available funding. IHS must identify $13 million to cover costs associated with lease proposals either within its existing appropriation or in a supplemental appropriation from Congress. In the DTLL, IHS indicated the agency is considering reprograming a portion of the new unallocated FY 2018 inflation increases as the “best option” in the short-term to protect existing base funding allocations and minimize the impact to current activities within IHS for the remainder of FY 2018. These increases were appropriated for the express purpose of attempting to ensure funding levels for IHS keep pace with inflation, as this negatively impacts purchasing power in a compounding manner year after year. It is inappropriate for IHS to reprogram dollars because of its own error in estimating Tribal interest in 105(l) leasing.

Addressing Shortfalls in FY 2019 Appropriations and Beyond

USET SPF is very concerned that IHS has identified this funding shortfall for FY 2018 only now, almost at the end of the fiscal year. It is imperative that IHS better project these funding needs in the future so that the House and Senate Committees can better understand prior to a fiscal year beginning how much is needed to fund these section 105(l) lease obligations. As such, USET SPF urges the Committees to direct in legislation the IHS to report on estimated section 105(l) lease needs in the Administrations proposed budget.

In addition, to avoid reprogramming critical IHS funding in FY 2019 and beyond, USET SPF strongly recommends the House and Senate Appropriations Committees consider enacting language within FY

2019 appropriations and future appropriations legislation that makes full funding of CSC needs mandatory. For a number of years the current appropriation language that makes “such sums” available as IHS and BIA need to fully funds CSC needs has helped ensure that CSC costs are paid in full without reducing other IHS program funds. Making that CSC language mandatory is a logical next step that will ensure that these costs are covered without impacting program funds in the future. And extending this language to costs associated with Section 105(l) leases would further ensure that these fixed costs legally must be paid for by the Agencies are paid without negatively impacting patient care and other critical IHS programs.

Conclusion
USET SPF thanks you for your consideration regarding crucial IHS funding. We are very concerned that, unless a permanent full funding solution is found, funding shortfalls for 105(l) leases are likely to lead to ongoing friction between Tribal Nations and IHS, similar to CSC, including litigation, as well as the subsequent disagreements regarding funding negotiations and allocations. USET SPF urges the Subcommittees to help address these funding shortfalls within IHS by enacting language to ensure funding responsibilities and trust obligations are fully met by the federal government. In the long term, we strongly support mandatory and full funding for all federal Indian programs, including those within IHS. We urge you to consider how this might someday be achieved. 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