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January 3, 2018

Via Email

RADM Michael D. Weahkee, Acting Director
Indian Health Service
5600 Fishers Lane
Rockville, MD 20857

**RE: Tribal CSC Workgroup Objections to IHS's Unilateral
Rescission of "97/3" Option for Determining Indirect Costs
Associated with Service Unit Shares**

Dear RADM Weahkee:

As the Tribal Co-Chair of the Indian Health Service (IHS) Contract Support Cost (CSC) Workgroup, I write to express concern about your letter to tribal leaders, dated December 21, 2017, in which you announce IHS's decision to immediately rescind a key provision of the agency's CSC policy. The Workgroup objects to this unilateral decision, made without tribal consultation in violation of the policy's own requirements for adopting changes. Any amendments IHS wishes to propose should be implemented only after thorough discussion with the IHS CSC Workgroup and full tribal consultation. In preparation for this process, IHS should immediately distribute to the Workgroup the data that IHS believes support the proposed change.

The provision at issue arises from IHS's attempt to account for duplication between indirect CSC and indirect cost funding IHS believes is included in the Secretarial or program amount. When a tribe assumes a new or expanded program, function, service, or activity (PFSA), or adds staff associated with a joint venture, IHS requires a duplication review when determining the amount of CSC associated with the expansion. The rescinded provision gave tribes a choice between two methods: (1) a "case-by-case detailed analysis" of indirect costs transferred in the Secretarial amount; or (2) a 97/3 split, in which 97% of the expansion would be deemed part of the direct cost base (and thus generate indirect CSC), while 3% would be deemed indirect cost funding (and thus excluded from the direct cost base and offset against indirect CSC otherwise due).

The 97/3 option evolved from extensive and difficult negotiations between the tribal and federal representatives on the IHS CSC Workgroup in 2016. It was modeled on the longstanding 80/20 split for Area and Headquarters tribal shares. Like the 80/20 rule, the 97/3 split provides a reasonable approximation that saves much time and effort on both sides, replacing hours or days of potentially contentious negotiations with a simple computation. But now IHS proposes to unilaterally revoke, at least temporarily, this efficient option, which your letter says "may not conform in all cases with the statutory authority of the

Indian Self-Determination and Education Assistance Act (ISDEEA).”

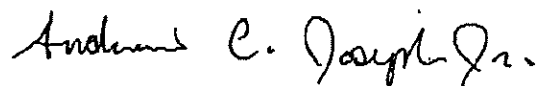
For well over a year, Tribes worked with IHS on a government-to-government basis to reach difficult compromises on contested issues such as accounting for duplication on service unit shares. The parties agreed that the policy will “be reassessed on a regular basis,”¹ but specified that “changes will only be implemented **after** Tribal consultation.”² Revoking the 97/3 option, even temporarily, fundamentally changes the agreement struck between the parties and should be implemented, if at all, only after informed discussion with the Workgroup and full tribal consultation—as IHS agreed in the policy itself.

As a first step, we respectfully request that IHS immediately distribute to the Workgroup the data which IHS relies for its conclusion that the 97/3 split may not “in all cases” conform to the ISDEEA. This should include the annual CSC Funding Report called for in the policy,³ as well as data specific to the composition of service unit funding. To enable meaningful discussion, tribes need to conduct their own analysis of all information that, in IHS’s view, mandates re-opening this issue. IHS should then convene the CSC Workgroup, comprised of tribal leaders and technical experts, to develop a shared interpretation of the data. Finally, any changes agreed to by the Workgroup must be vetted through full tribal consultation.

Throughout this process, and until a final decision is made, IHS should continue to carry out its CSC policy as written, including the 97/3 option. If, in some individual case, IHS can show that the 97/3 split clearly and demonstrably conflicts with the ISDEEA, the policy already recognizes that the statute supersedes it in the event of a conflict.⁴ A complete revocation of the 97/3 option is not necessary. More importantly, it disregards the bargain struck in government-to-government negotiations and ignores the deliberative process for amendments set forth in the policy itself.

Thank you for your prompt attention to this matter. We look forward to working with IHS as the conversation on this issue develops.

Sincerely,



Andrew C. Joseph Jr.
Tribal Co-Chair, IHS CSC Workgroup

cc: IHS CSC Workgroup members

¹ Indian Health Manual, § 6-3.1B(18).

² Indian Health Manual, § 6-3.1D (emphasis added).

³ Indian Health Manual, § 6-3.5B.

⁴ Indian Health Manual, § 6-3.1C.