



JUL 29 2015

Dear Tribal Leader:

I am writing to provide an update on my May 22 letter to you regarding a settlement that Indian Health Service (IHS) reached with employee unions. Specifically, I want to address three questions about the settlement that have been raised frequently in various forums since then.

The first question that is often asked is why the settlement payment is not being paid through the Judgment Fund? Because the settlement was reached through an administrative settlement of a Union grievance in arbitration, the Judgment Fund is not available to pay the costs of settlement. The authorizing statute for the Judgment Fund makes clear that it is only available for the payment of claims brought through a judicial (as opposed to Union grievance/arbitral) proceeding, or which are settled under the authority of specifically identified statutes (e.g., the Federal Tort Claims Act). The Fair Labor Standards Act is not one of the statutes identified in the Judgment Fund's authorizing legislation.

The second question I hear a lot is, if IHS must pay the settlement, why are service unit third party collections funds being used for the payment? The answer to this question is tied to the type of costs associated with the settlement. The \$80 million settlement is comprised of two categories of costs: 1) \$60 million for back pay and back pay-related costs (e.g., payroll taxes); and 2) \$20 million for administrative costs and attorney's fees.

The claimants in this settlement are largely service unit employees, consistent with IHS's organizational structure in which approximately 90 percent of its workforce is at the service unit level. Therefore, the settlement payment is borne largely by the service units. In addition, the settlement covers Fiscal Years (FY) 2005 through 2014. Under requirements of Federal appropriations laws, the agency must charge back pay owed to an employee to the fiscal year in which the pay was earned. Past year appropriated funds for FY 2005-2009 that could have been used to pay the overtime are no longer available (as past year unspent appropriations are cancelled after five fiscal years). Consequently, the only funds which could be used to pay the overtime for those years, and which are available now, are third party collections. The agency has identified roughly \$10 million in expired appropriated (but not yet cancelled) funds that may be used for the back pay from the FY 2010-2014. These funds will decrease the amount of third party collections needed to meet the settlement obligations. Therefore, the settlement will be paid from third party collections (\$50 million) and expired appropriations (\$10 million). Third party collections are only collected and spent at the service unit level so these funds must come from the service units. IHS has made an initial estimate of the amounts that would be owed by each service unit, for purposes of making the payment of the \$60 million to the union. The union will provide quarterly reports to IHS of actual payments to claimants, which will then be used to adjust the initial estimated amounts contributed by each service unit to ensure each IHS service unit, Area Office, and Headquarters is charged as appropriate. From a legal perspective, these are not new obligations. Rather these are obligations that should have been recorded and paid in the appropriate Fiscal Year. Also, IHS is paying the \$20 million in administrative costs and attorney's fees from current FY 2015 appropriations.

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The third most asked question about the settlement is why Tribes were not consulted about the payment ahead of time? The settlement arose from a group grievance filed by the union. Information about employee grievances is generally an internal agency matter, and the agency does not disclose such information without consent of the aggrieved party. IHS communicated with Tribes and offered an opportunity to comment and ask questions as soon as it was practicable to do so.

Finally, I understand you are keenly interested in knowing how your service unit funding is impacted by this settlement. I have asked the Area Directors to ensure this information is available by August 14, 2015, when IHS must make the payment to the union. However, as described above, the initial amounts paid by each service unit will be reconciled as the union makes payments to individual employees. Area Directors will provide updated information once a final reconciliation has been completed.

I trust this update is helpful. Please do not hesitate to contact me with any additional questions.

Sincerely,

/Robert G. McSwain/

Robert G. McSwain
Deputy Director