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May 18, 2018

VIA E-MAIL
consultation@ihs.gov

RADM Michael Weahkee, Acting Director
Indian Health Service
5600 Fishers Lane
Mail Stop: 08E86
Rockville, MD 20857

Re: CSC "97/3" Method Tribal Consultation

Dear Acting Director Weahkee,

We submit the following comments on behalf of the Kenaitze Indian Tribe regarding the agency's proposed revisions to Section 6-3.2E(3) of the Indian Health Service (IHS) Manual addressing contract support cost (CSC) issues (the so-called "97/3 method").

--The Need for Tribal Input--

Before commenting on the merits of the proposals laid out in your Dear Tribal Leader Letter of April 13, 2018, we must comment on the need for tribal input before imposing any changes to the policy. As you mention in your letter, the 2016 policy was developed after years of CSC Workgroup meetings and only after a period of tribal consultation in which tribal comments were not only considered, but also incorporated into the policy. The policy represented a compromise between the Tribes' views of what the law commands and the agency's competing views at the time. While neither the agency nor Tribes found it perfect, both recognized that it respected the differing perspectives on certain key issues—including duplication—and was developed in accordance with the government-to-government relationship. We believe the agency's desire to make changes now is contrary to the outcome reached during the workshop meetings.

Both Tribes and IHS also recognized that trust would be integral to effective implementation. And, both sides committed to a joint process for future changes. Your actions—considered in unilaterally rescinding policy provisions in December 2017 and now sending out options for tribal consultation that were never formally proposed by the full CSC Workgroup—fail to fulfill this collaborative process and legal requirement for government-to-government consultation. There unilateral decision undermine the trust necessary for effective implementation of this policy.

It is unacceptable to call for tribal consultation on IHS's preferred *post hoc* options flatly ignoring the unanimous result reached at the March CSC Workgroup

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The IHS is acting in bad faith if it sends out anything other than the agreed-upon language coming out of the workshop. The Indian Self-Determination and Education Assistance Act *commands* that IHS must interpret the Act's provisions "liberally" and in favor of the Tribes. 25 U.S.C. §§ 5329(c), sec. 1(a)(2); 5392(f): That is not happening with these proposed changes in IHS cost accounting.

--The Data Behind the Change—

In your letter you explain that "the IHS became aware that section 6-3.2E(3) may not conform in all cases with the statutory authority of the [ISDEAA]." We do not agree with that conclusion, especially as many of the "past negotiations" you speak of were based off of estimates that do not accurately reflect how tribal programs are run.

For instance, you sent a letter to CSC Workgroup Co-Chair Andrew Joseph dated March 5, 2018, which included several data points under the categories "Secretarial Funds for Service Unit Shares", "Application of 97/3" and "Known IDC Associated with Service Unit Shares." (Emphasis added.) One of those examples and one that was supposed to demonstrate one of the more egregious disparities resulting from the 97/3 method was our Tribe's data. However the word "known" is a complete misnomer. In our case, the "known" amount was apparently set at some point but never applied at the time. In fact, we were never informed of this offset until years later when IHS sought to reconcile our CSC calculations for 2014, 2015 and 2016. And even though we have submitted several questions to IHS regarding that amount, we still have questions about its accuracy. Here is what we do "know" about that duplication amount:

- It was calculated based on a number of positions that could have been put in our indirect cost pool, many of which were never actually put in the pool.

- IHS staff explained it was calculated using an average salary amount so the amount deducted for an administrative position, such as an accounting clerk, was the same amount attributed to a provider

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- We have been unable to reproduce how this amount was constructed when referring to actual documents, including our indirect cost rate documentation for the years in question.
- The impact of this duplication amount is to effectively cancel out our entire health-only indirect cost rate.
- Other sources of administrative support are counted on their ACC tool and in the indirect rate but not for the duplication amount.

I could go on, but as you can deduce, the only thing we "know" about this duplication offset is that Kenaitze got a bad deal as a result of this earlier "negotiation." We have disputed this amount ever since 2016 when IHS first imposed it through a presentation of ACC tools. Thus, we are offended that IHS now attempts to assert this number as a "known" or certain amount and justification for this major policy change. If anything, the only thing we can learn from our situation is that IHS's line-by-line review for duplication is applied inconsistently and may not be tied to actual numbers. If anything, this supports upholding the original 97/3 method, not eliminating it in favor of the line-by-line alternative.

Finally, the agency already has ample safeguards to deal with any situation where it believes applying the policy would cause a violation of the law. Indeed, since the policy's release in 2016, there have been several instances, included several leading to lawsuits, involving situations where IHS decided that applying the policy as written would result in an excessive amount of CSC owed to a Tribe. IHS in these instances has never asserted that the policy prevented the agency from applying the law as it believes it should be applied. Again, this supports our assertion that the 97/3 provision should remain as originally published in October 2016. If the agency identifies outliers where it believes a Tribe would be paid more than the law permits, the agency remains free to pursue that position. After all, the Manual already makes plain that the law takes supremacy.

--The Proposed Alternatives to the 97/3 Provision--

We understand you do not agree with this assessment and plan to implement one of the three options set forth in your letter. We want to make clear that **the unanimous Workgroup recommendation is the only acceptable option.** This option responds to IHS's concern about previously negotiated amounts, while otherwise retaining as much of the original policy, and tribal autonomy, as possible. The other two IHS-proposed options contain several subtle changes that drastically curtail the authority of Tribes, while making CSC calculations subject to the whims of the agency rather than the result of the joint collaborative process it was meant

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The two agency options are unsatisfactory for several additional reasons. First, the duplication provision was meant to apply to the negotiation of funding in or after FY 2016. But the two new IHS options would make these options available only for agreements that are entered into in or after FY 2017. This change would impact our Tribe's right to renegotiate our questionable duplication amount because we were contracting before FY 2017 even though we were not asked to reconcile these calculations or negotiate until FY 2016. We cannot support any of the agency alternatives for this reason.

Second, the two new agency options strip a Tribe of the right to choose which method to use, and instead makes it a choice both Tribes and IHS must agree on. The clear result of this rewrite are far more instances where the agency will be in a position to force a Tribe into a contentious negotiation that would lead to litigation if the Tribe does not capitulate—the exact opposite of the policy's goals. In fact, when we have attempted to meet with IHS representatives and review our financial documents to renegotiate this offset, the conversation was so complicated that even IHS embraced the 97/3 shortcut. That is because the whole point of the CSC policy was to make CSC calculations easier, more efficient, and less contentious. The two new agency-drafted options are guaranteed to do the opposite.

Finally, the whole point of the 97/3 method was to provide an efficient compromise in cases where it was already clear IHS and Tribes could not or would not reach agreement on duplication. The agency's two new options would not help if the option to use the shortcut method would be subject to agency approval. In sum, the agency's proposed unilateral changes nullify one of the few provisions in the policy that represented a true, and truly historic, compromise between Tribes and the IHS.

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Thank you for the opportunity to submit comments on these CSC policy issues and we hope that your actions moving forward respect the government-to-government relationship and grant due consideration for the opinions of Tribes and tribal organizations.

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Kenaitze IndianTribe

Bart Garber, Executive Director