Southcentral Foundation

April 19, 2019

VIA E-MAIL
consultation@ihs.gov

RADM Michael D. Weahkee, Acting 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,

The Southcentral Foundation (SCF) submits the following comments on short- and long-term options to ensure the Indian Health Service (IHS) meets its obligations to fully fund Section 105(*l*) leases.

While the full extent of the lease increases each year were difficult to predict when the agency first developed its budgets for FY 2019 and prior years, the agency knew long ago that the funds dedicated for tribal leases would be insufficient. Just last year (in 2018), Alaska Tribes and tribal organizations provided a report indicating the need for additional lease funds in Alaska alone was approximately $15.7 million over the additional $13 million the agency already knew was needed for 105(*l*) leases and the $11 million increase in tribal clinic lease funds that had occurred up until that point.[1] This report only examined facilities historically funded through the VBC lease program, and not the myriad of other tribal facilities that are eligible for 105(*l*) leases, including both those in Alaska and the Lower 48. The fact that the $25 million increase for tribal clinic lease funding in FY 2019 would still come up short was therefore entirely foreseeable. As we stated last year, the only tenable solution going forward is for the agency to seek a separate appropriation for payment of 105(*l*) leases. We provide further detail below.

Short-Term Solutions for FY 2019

Ideally, IHS would approach Congress about its true facilities funding need and ask for a supplemental appropriation to address this shortfall for FY 2019. However, we understand that as a practical matter, this request is unlikely to be granted and so the agency needs a solution that does not depend on congressional action.

First, we recommend IHS tap into discretionary funds to make up the shortfall. Particular funds that might be available are those from the Director's Emergency Reserve, the Director's Management Initiative Fund, the OSTG Shortfall Fund, tribal management grants, and prior-year unobligated balances that may be reprogrammed. SCF also suggests considering whether some of the FY 2019 increases to the Indian Health Professions fund might be available to fund these facilities costs. SCF continues to strongly oppose any reprogramming solution that cuts into direct service funding. As a last resort, SCF recommends the agency use undisbursed increases meant for inflation as it did in FY 2018, but notes that this solution heavily burdened Tribes across the board.

[1] *See* "Village Built Clinics (VBCs) in Crisis" Report, May 22, 2018.

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Long-Term Solutions to Address Facilities Funding

First, we strongly urge IHS to stop proposing annual appropriations language seeking to reduce or prohibit the statutory entitlement to fully-funded 105(*l*) leases. These leases are not a "windfall" for Tribes, but are a reimbursement for expenses tribal programs incur to operate federal health care programs. The fact that these costs have been underfunded for years and in many cases decades does not make them any less valid or less deserving of full funding today.

In line with this suggestion, SCF recommends IHS begin reporting to Congress on the full projected cost of 105(*l*) leases and VBC funding. We understand IHS believes it is impossible to predict the number of new leases that will be proposed in any given year, but many of these facilities are already receiving M&I or other facilities dollars and are already listed in IHS's facilities databases. Moreover, IHS could ask its Area offices to reach out to Tribes and ask if any of them plan to propose new leases in the coming fiscal year so it has an idea of the anticipated increase. Lastly, IHS could start funding leases from the date the proposal is received instead of retroactive to the beginning of the fiscal year in which they are proposed. Changing this practice would likely lessen the funding impact for year 1 of these leases and eliminate or reduce the large shortfalls that occur in the middle of each year due to the high growth in the numbers of new leases. Being able to more accurately predict the true need would allow IHS to ask for the appropriate amount for Congress in its budget justifications.

Lastly, the most sustainable option would be to ask the appropriations committees to establish a separate appropriation line for 105(*l*) leases and to propose an indefinite appropriation for that line item, like the one in place for contract support costs. This would mean that 105(*l*) lease funds are no longer commingled with funds intended to cover VBC needs and would reduce pressure on the agency to devise accurate estimates well in advance of each fiscal year. It would also ensure that Tribes receive the facilities funding they need without having to use funds intended for direct services.

* * *

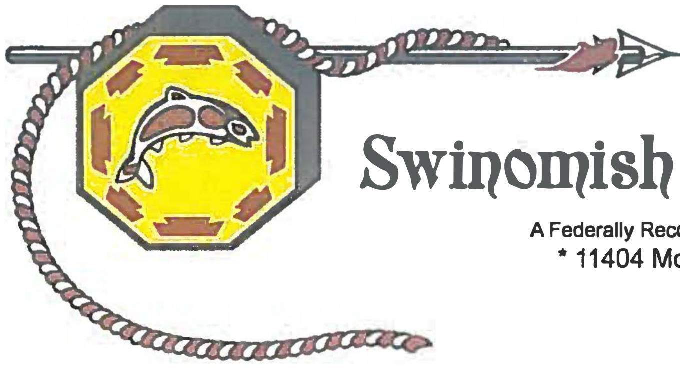
Thank you for your consideration of SCF's comments on short- and long-term solutions to meet the Secretary's obligations to fully fund 105(*l*) leases in a predictable manner that both avoids future reprograming actions and eliminates undue burdens on direct services. Please also share our comments on the IHS website and with other Tribes and tribal organizations.

Sincerely,

SOUTHCENTRAL FOUNDATION

/S/

Katherine Gottlieb, MBA, DPS, LHD
President/CEO



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Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
* 11404 Moorage Way * La Conner, Washington 98257 *

April 25, 2019

Via Email to: consultation@ihs.gov

RADM Michael D. Weahkee, MBA, MHSA
Assistant Surgeon General, U.S. Public Health Service
Principal Deputy Director
Indian Health Service
5600 Fishers Lane
Rockville, MD 20857

RE: FY 2019 Funding for ISDEAA 105(l) Leases and Long-Term Solutions

Dear Rear Admiral Weahkee:

This letter is in response to your March 12, 2019 letter announcing that the Indian Health Service (IHS) will conduct consultation on how to fund leases under section 105(*l*) of the Indian Self-Determination and Education Assistance Act (ISDEAA). Section 105(*l*) mandates full payment of leasing costs when tribal facilities are used to operate IHS programs under the ISDEAA. Your letter asks tribes and tribal organizations for ideas on how best to meet the demand for 105(*l*) lease compensation both in FY 2019 and long-term.

The Swinomish Indian Tribal Community is a federally recognized tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 5123, which occupies the Swinomish Indian Reservation established by the Treaty of Point Elliott, 12 Stat. 927 (1855), located on Fidalgo Island in Skagit County, Washington, and is an "Indian tribe" eligible to contract and compact with IHS under the ISDEAA. *See* 25 U.S.C. § 5304(e). The Tribe carries out a range of health care programs, functions, services and activities at its medical and dental clinics on the Swinomish Reservation. Since 1997, the Tribe has compacted with the IHS under the ISDEAA to carry out these functions.

Funding 105(l) Leases in FY 2019

The Swinomish Indian Tribal Community agrees that funding these leases is an issue of major importance and growing concern. Despite a $25 million increase in appropriations for tribal clinics in FY 2019, IHS anticipates having to reprogram additional funds, as it did in FY 2018. Last year, IHS filled the gap by transferring funds intended for inflation increases from a variety of Services budget lines, as detailed in Figure 1 enclosed with your letter. This resulted in depriving these programs of much-needed increases. By listing those same line items as the only options for closing the shortfall in FY 2019, your letter assumes IHS will again rob Peter to pay Paul, but invites tribes to choose which programs will be the Peters. But of course all of these line items are underfunded, and another reprogramming will be unpopular and potentially divisive. Allowing tribes to "pick their poison" should not be the only option up for consultation, so we provide other ideas.

A better solution than reprogramming would be to seek a supplemental appropriation from Congress. The appropriators are aware that recent litigation has created an unforeseen and significant new cost,[1] and that IHS needs a bridge to a permanent, long-term solution. Since the magnitude of these costs, even in FY 2019, is difficult to predict, we recommend that IHS acknowledge this fact in its supplemental appropriation request to Congress, so appropriators may provide such sums as may be necessary for obligation through the end of FY 2019. Although your letter says that in FY 2018 supplemental appropriations "were not feasible," it is not clear why that was so, or if it is still the case.

If reprogramming is unavoidable, we recommend that most, if not all, of the funding come from Headquarters administrative funds rather than tribal shares. In the past, IHS has held tribes harmless when faced with a deficit of even greater magnitude. In FY 2014, faced with a projected contract support cost shortfall of $48 million, IHS proposed that "half of the reprogramming would be accomplished with Headquarters funds and half would be accomplished with Area funds."[2] Ultimately IHS had to reprogram "only" $25.1 million, with about 80% of that coming from Headquarters in order to minimize impacts on direct service tribes and tribal providers. IHS can and should take a similar approach to the current funding challenge if supplemental funds are not appropriated.

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[1] *See Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243 (D.D.C. 2016).

[2] IHS, "Dear Tribal Leader" letter, at 2 (Sept. 2, 2014).

Long-Term Solutions

In the long term, the best solution is to establish a separate, indefinite appropriation for 105(*l*) lease compensation like that for contract support costs (CSCs). That would ensure full funding of lease costs while protecting program funding from the annual threat of reprogramming. An indefinite appropriation would also save IHS and Congress from the impossible task of identifying specific amounts needed in a given year to fully fund 105(*l*) leases. As the past two years have shown, predicting the activity of hundreds of tribes and tribal organizations is simply not feasible, and can be expected to result in more painful reprogramming. Section 105(*l*) lease costs share much in common with CSCs: the legal mandate to pay in full, the difficulty in projecting the full need, and their central roles in health program administration. A separate, indefinite appropriation makes sense for 105(*l*) leases, just as it does for CSCs.

The Swinomish Indian Tribal Community adamantly opposes any "solution" that would involve amending the ISDEAA to remove or limit section 105(*l*). For example, the Administration's FY 2018 and FY 2019 budgets included proposed appropriations act language that would have effectively nullified section 105(*l*) by making all lease compensation discretionary. IHS should cease making this improper request to amend substantive law through an appropriations bill—which Congress has rejected for two years running—and should not seek to amend the ISDEAA through other means. Removing or limiting 105(*l*) would be extremely disruptive to tribal health providers that have come to rely on this much-needed source of facilities funding. Instead, IHS should work with tribes and Congress on a final solution that ensures lease funding meets the projected increase in need without chipping away at IHS programs.

Conclusion

Thank you for the opportunity to comment on this pressing issue. If you have any questions about this letter, or if we can provide additional information, please contact Stephen LeCuyer at (360) 466-1058 or slecuyer@swinomish.nsn.us. Please feel free to share these comments on the IHS website.

Sincerely,

/s/

M. Brian Cladoosby, Chairman
Swinomish Indian Tribal Community

cc: Swinomish Indian Tribal Community Senate
Stephen LeCuyer, Director, Office of Tribal Attorney, Swinomish Indian Tribal Community

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CITIZEN POTAWATOMI NATION

April 26, 2019

RADM Michael D. Weahkee
Principal Deputy Director
Indian Health Service
5600 Fishers Lane
Mail Stop: 08E86
Rockville, MD 20857

Via email to: consultation@ihs.gov

RE: FY2019 Funding for ISDEAA 105(l) Leases

Dear RADM Weahkee:

I am writing in response to your Dear Tribal Leader Letter dated March 12, 2019, where you ask tribes and tribal organizations for ideas on how best to meet the demand for lease compensation under section 105(*l*) of the Indian Self-Determination and Education Assistance Act (ISDEAA) both in FY 2019 and long-term. As we stated last July during the FY2018 105(l) lease funding dilemma, we believe this problem is of the agency's own making. Yet here we are again. Your solution to fund the FY2018 "lease" shortfall by reprogramming $25 Million from unallocated inflation increases was not acceptable to the Citizen Potawatomi Nation (CPN) then, and it remains unacceptable today. By doing so, our service programs, which are already severely underfunded, were deprived of much-needed increases. You should be reminded once again that Section 5.2, "Stable Base Funding", of our current Multi-Year Funding Agreement with the Indian Health Service (IHS) states that CPN's stable base budget amount is to include mandatory or inflationary adjustments if contained within the annual proposed IHS budget justification and subsequent congressional appropriations. Since mandatory and inflationary adjustments met these conditions again in FY2019, IHS must compensate the CPN for such adjustments.

CPN agrees that funding 105(*l*) leases is an issue of major and growing concern. While the total cost of 105(*l*) leases has increased by $35 Million in just two over years, an increase was predictable; we believe IHS should have done a better job of projecting lease costs. Because projecting such costs have proven difficult for the agency, we recommend that IHS acknowledge this fact in its supplemental appropriation request to Congress, so appropriators may provide such sums as may be necessary for obligation through the end of FY 2019. The appropriators are aware that a significant new cost has arisen with 105(*l*) lease proposals, and that IHS needs a bridge to a permanent, long-term solution. Although your letter says that in

FY 2018 supplemental appropriations "were not feasible," it is not clear why that was so, or if it is still the case.

In the long term, the IHS must do a better job of requesting a separate appropriation dedicated to 105(*l*) leases as well as projecting "105(*l*) lease need" on an annual basis through a separate indefinite appropriation like that for contract support costs (CSCs). Both Congress and IHS expect 105(*l*) lease costs to rise in the coming years. Section 105(l) lease costs share much in common with CSCs: the legal mandate to pay in full, the difficulty in projecting the full need, and their central role in health program administration. A separate, indefinite appropriation makes sense for 105(*l*) just as it does for CSCs. This would ensure full funding for 105(*l*) leases without cutting programs and hurting patients. It would also avoid tension and possibly litigation between IHS and Tribes regarding allocation of funding.

CPN adamantly opposes any "solution" that would involve amending the ISDEAA to remove or limit section 105(*l*). IHS should also cease proposing appropriations act language that seeks to overturn the Maniilaq decision that nullifies section 105(*l*) by making lease compensation discretionary, which Congress has rejected for two years running. This backdoor attempt to revoke a provision of the ISDEAA through an appropriations rider is contrary to Congressional intent in the ISDEAA and the trust responsibility to Tribes.

Thank you for the opportunity to comment on this important funding issue. We stand ready to assist IHS in advocating with Congress for additional resources to address this issue. Further, please share my comments and if you have any questions or would like our assistance, please to not hesitate to contact me.

Sincerely,

/s/

John A. Barrett
Tribal Chairman

Oneida Nation
Oneida Business Committee
PO Box 365 • Oneida, WI 54155-0365
oneida-nsn.gov

April 25, 2019

Submitted electronically to consultation@ihs.gov

RADM Michael D. Weahkee, MBA, MHSA
Assistant Surgeon General, U.S. Public Health Service
Principal Deputy Director
Indian Health Service
5600 Fishers Lane
Rockville, MD 20857

RE: FY 2019 Funding for ISDEAA 105(l) Leases and Long-Term Solutions

Dear Rear Admiral Weahkee:

On March 12, 2019, you sent a letter announcing that the Indian Health Service (IHS) will conduct consultation on how to fund leases under section 105(*l*) of the Indian Self-Determination and Education Assistance Act (ISDEAA). Section 105(*l*) mandates full payment of leasing costs when tribal facilities are used to operate IHS programs under the ISDEAA. Your letter asks tribes and tribal organizations for ideas on how best to meet the demand for 105(*l*) lease compensation both in FY 2019 and long-term.

Background

The Oneida Nation (Nation) is a Title V tribe located within the Bemidji Region. We have had a compact and funding agreement with the US Department of Health and Human Services since 1997. We own a number of facilities which are used to provide health services, these facilities include our health clinic, behavioral health facility, pharmacy, and environmental health and safety facility. Our Comprehensive Health Division serves over 14,000 patients. The Nation is developing a section 105(*l*) lease proposal which we plan to submit shortly. Because we are pursuing a section 105*(l)* lease, we have a particular interest in seeing a permanent solution for funding section 105*(l)* leases.

Funding 105(l) Leases in FY 2019

The Nation agrees that funding these leases is an issue of major and growing concern. Despite a $25 million increase in appropriations for tribal clinics in FY 2019, IHS anticipates having to reprogram additional funds, as it did in FY 2018. Last year, IHS transferred funds for inflation increases from a variety of Services budget lines, as detailed in Figure 1 enclosed with your letter. This resulted in depriving these programs of much-needed increases. By listing those same line items as the only options for closing the shortfall in FY 2019, your letter assumes IHS will again rob Peter to pay Paul but invites tribes to choose which programs will be the Peters. But of course,

all of these line items are underfunded, and another reprogramming will be unpopular and potentially divisive. Allowing tribes to "pick their poison" should not be the only option up for consultation, so we provide other ideas.

A better solution than reprogramming would be to seek a supplemental appropriation from Congress. The appropriators are aware that recent litigation has created an unforeseen and significant new cost,[1] and that IHS needs a bridge to a permanent, long-term solution. Since the magnitude of these costs, even in FY 2019, are difficult to predict, we recommend that IHS acknowledge this fact in its supplemental appropriation request to Congress, so appropriators may provide such sums as may be necessary for obligation through the end of FY 2019. Although your letter says that in FY 2018 supplemental appropriations "were not feasible," it is not clear why that was so, or if it is still the case.

If reprogramming is unavoidable, we recommend that most, if not all, of the funding come from Headquarters administrative funds rather than tribal shares. In the past, IHS has held tribes harmless when faced with a deficit of even greater magnitude. In FY 2014, faced with a projected contract support cost shortfall of $48 million, IHS proposed that "half of the reprogramming would be accomplished with Headquarters funds and half would be accomplished with Area funds."[2] Ultimately IHS had to reprogram "only" $25.1 million, with about 80% of that coming from Headquarters in order to minimize impacts on direct service tribes and tribal providers. IHS should take a similar approach to the current funding challenge.

Moving forward, IHS should follow the directive of the Senate Appropriations Committee and separate 105(*l*) lease costs from village built clinics (VBCs) in the budget process.[3] The VBCs in Alaska have their own unique history and challenges, and should not be lumped into the larger challenge of funding legally required 105(*l*) least costs.

Long-Term Solutions

In the long term, the best solution is to establish a separate, indefinite appropriation for 105(*l*) lease compensation like that for contract support costs (CSCs). That would ensure full funding of lease costs while protecting program funding from the annual threat of reprogramming. An indefinite appropriation would also save IHS and Congress from the impossible task of identifying specific amounts needed in a given year to fully fund 105(*l*) leases. As the past two years have shown, predicting the activity of hundreds of tribes and tribal organizations is simply not feasible, and will result in more painful reprogramming. Section 105(*l*) lease costs share much in common with CSCs: the legal mandate to pay in full, the difficulty in projecting the full need, and their central role in health program administration. A separate, indefinite appropriation makes sense for 105(*l*) just as it does for CSCs.

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[1] *See Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243 (D.D.C. 2016).

[2] IHS, "Dear Tribal Leader" letter, at 2 (Sept. 2, 2014).

[3] S. Rep. No. 115-276 at 91 (June 14, 2018).

The Nation adamantly opposes any "solution" that would involve amending the ISDEAA to remove or limit section 105(*l*). For example, the Administration's FY 2018 and FY 2019 budgets included proposed appropriations act language that would have effectively nullified section 105(*l*) by making all lease compensation discretionary. IHS should drop this improper request to amend substantive law through an appropriations bill—which Congress has rejected for two years running—and should not seek to amend the ISDEAA through other means. Removing or limiting 105(*l*) would be extremely disruptive to tribal health providers that have come to rely on this much-needed source of facilities funding. Instead, IHS should work with tribes and Congress on a final solution that ensures lease funding meets the projected increase in need without chipping away at IHS programs.

Conclusion

Thank you for the opportunity to comment on this pressing issue. If you have any questions about this letter, please contact Candice Skenandore, Self-Governance Coordinator at cskena10@oneidanation.org or by phone at (920) 869-4281 Please feel free to share these comments on the IHS website.

Sincerely,

/s/

Tehassi Tasi Hill, Chairman
Oneida Nation

NORTHWEST PORTLAND AREA INDIAN HEALTH BOARD

Burns-Paiute Tribe
Chehalis Tribe
Coeur d'Alene Tribe
Colville Tribe
Coos, Siuslaw, & Lower Umpqua Tribe
Coquille Tribe
Cow Creek Tribe
Cowlitz Tribe
Grand Ronde Tribe
Hoh Tribe
Jamestown S'Klallam Tribe
Kalispell Tribe
Klamath Tribe
Kootenai Tribe
Lower Elwha Tribe
Lummi Tribe
Makah Tribe
Muckleshoot Tribe
Nez Perce Tribe
Nisqually Tribe
Nooksack Tribe
NW Band of Shoshoni Tribe
Port Gamble S'Klallam Tribe
Puyallup Tribe
Quileute Tribe
Quinault Tribe
Samish Indian Nation
Sauk-Suiattle Tribe
Shoalwater Bay Tribe
Shoshone-Bannock Tribe
Siletz Tribe
Skokomish Tribe
Snoqualmie Tribe
Spokane Tribe
Squaxin Island Tribe
Stillaguamish Tribe
Suquamish Tribe
Swinomish Tribe
Tulalip Tribe
Umatilla Tribe
Upper Skagit Tribe
Warm Springs Tribe
Yakama Nation

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TRANSMITTED VIA EMAIL: consultation@IHS.gov

April 26, 2019

RADM Michael D. Weahkee
Principal Deputy Director
Indian Health Service
5600 Fishers Lane, Mail Stop 08E86
Rockville, MD 20857

Re: Comments on FY 2019 Funding for ISDEAA 105(l) Leases and Long-Term Solutions

Dear RADM Weahkee:

The Northwest Portland Area Indian Health Board (NPAIHB) submits the following comments on the Dear Tribal Leader Letter, dated March 12, 2019, announcing that the Indian Health Service (IHS) will conduct consultation on how to fund leases under section 105(*l*) of the Indian Self-Determination and Education Assistance Act (ISDEAA). Established in 1972, the NPAIHB is a non-profit, tribal organization under the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93-638, advocating on behalf of the 43 federally-recognized Indian Tribes in Idaho, Oregon, and Washington on specific healthcare issues. NPAIHB operates a variety of important health programs on behalf of our member tribes, including the Northwest Tribal Epidemiology Center[1], and works closely with the IHS Portland Area Office.

Section 105(*l*) mandates full payment of leasing costs when tribal facilities are used to operate IHS programs under the ISDEAA. Your letter asks tribes and tribal organizations for ideas on how best to meet the demand for 105(*l*) lease compensation both in FY 2019 and long-term solutions.

Funding 105(l) Leases in FY 2019

NPAIHB agrees that funding these leases is an issue of major and growing concern. Despite a $25 million increase in appropriations for tribal clinics in FY 2019, IHS anticipates having to reprogram additional funds, as it did in FY 2018. Last year, IHS filled the gap by transferring funds for inflation increases from a variety of Services budget lines, as detailed in Figure 1 enclosed with your letter. This resulted in depriving these programs of much-needed increases. By listing those same line items as the only options for closing the shortfall in FY 2019, your letter assumes IHS will again rob Peter to pay Paul, but invites tribes to choose which programs will be the Peters. But of course all of these line items are underfunded, and another reprogramming will be unpopular and potentially divisive. Allowing tribes to "pick

[1] A "tribal organization" is recognized under the Indian Self-Determination Education Assistance Act (P.l. 93-638; 25 U.S.C. § 450b(1)) as follows: "[T]he recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities."

their poison" should not be the only option up for consultation, so we provide other ideas.

A better solution than reprogramming would be to seek a supplemental appropriation from Congress. The appropriators are aware that recent litigation has created an unforeseen and significant new cost,[2] and that IHS needs a bridge to a permanent, long-term solution. Since the magnitude of these costs, even in FY 2019, are difficult to predict, we recommend that IHS acknowledge this fact in its supplemental appropriation request to Congress, so appropriators may provide such sums as may be necessary for obligation through the end of FY 2019. Although your letter says that in FY 2018 supplemental appropriations "were not feasible," it is not clear why that was so, or if it is still the case.

If reprogramming is unavoidable, we recommend that most, if not all, of the funding come from Headquarters administrative funds rather than tribal shares. In the past, IHS has held tribes harmless when faced with a deficit of even greater magnitude. In FY 2014, faced with a projected contract support costs (CSC) shortfall of $48 million, IHS proposed that "half of the reprogramming would be accomplished with Headquarters funds and half would be accomplished with Area funds."[3] Ultimately IHS had to reprogram "only" $25.1 million, with about 80% of that coming from Headquarters in order to minimize impacts on direct service tribes and tribal providers. IHS should take a similar approach to the current funding challenge.

Moving forward, IHS should follow the directive of the Senate Appropriations Committee and separate 105(*l*) lease costs from village built clinics (VBCs) in the budget process.[4] The VBCs in Alaska have their own unique history and challenges, and should not be lumped into the larger challenge of funding legally required 105(*l*) lease costs.

Long-Term Solutions

In the long term, the best solution is to establish a separate, indefinite appropriation for 105(*l*) lease compensation like that for CSC. That would ensure full funding of lease costs while protecting program funding from the annual threat of reprogramming. An indefinite appropriation would also save IHS and Congress from the impossible task of identifying specific amounts needed in a given year to fully fund 105(*l*) leases. As the past two years have shown, predicting the activity of hundreds of tribes and tribal organizations is simply not feasible, and will result in more painful reprogramming. Section 105(*l*) lease costs share much in common with CSC: the legal mandate to pay in full, the difficulty in projecting the full need, and their central role in health program administration. Our recommendation is for a separate, indefinite appropriation for 105(*l*) leases just like CSC. This is consistent with one of the National Tribal Budget Formulation Workgroup's recommendations for FY 2021. Specifically, the recommendation is to "Ensure that the [IHS] is taking adequate steps to fully anticipate and estimate its 105(*l*) leasing obligations while protecting

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[2] *See Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243 (D.D.C. 2016).

[3] IHS, "Dear Tribal Leader" letter, at 2 (Sept. 2, 2014).

[4] S. Rep. No. 115-276 at 91 (June 14, 2018).

other IHS programs for FY 2021 and work proactively with Congress to ensure its full payment as an indefinite appropriation.

We also adamantly oppose any "solution" that would involve amending the ISDEAA to remove or limit section 105(*l*). For example, the Administration's FY 2018 and FY 2019 budgets included proposed appropriations act language that would have effectively nullified section 105(*l*) by making all lease compensation discretionary. IHS should drop this improper request to amend substantive law through an appropriations bill—which Congress has rejected for two years running—and should not seek to amend the ISDEAA through other means. Removing or limiting 105(*l*) would be extremely disruptive to tribal health providers that have come to rely on this much-needed source of facilities funding. Instead, IHS should work with tribes and Congress on a final solution that ensures lease funding meets the projected increase in need without chipping away at IHS programs.

Conclusion

Thank you for the opportunity to comment on this pressing issue. If you have any questions about this letter, please contact Laura Platero, Director of Government Affairs/Health Policy, Northwest Portland Area Indian Health Board (NPAIHB), at lplatero@npaihb.org or (503) 407-4082; or Geoff Strommer at gstrommer@hobbsstraus.com. Please feel free to share these comments on the IHS website.

Sincerely,

/s/

Andrew C. Joseph, Jr.
NPAIHB Chair
Colville Tribal Council Vice Chair

April 26, 2019

Via Email to: consultation@ihs.gov

RADM Michael D. Weahkee, MBA, MHSA
Assistant Surgeon General, U.S. Public Health Service
Principal Deputy Director
Indian Health Service
5600 Fishers Lane
Rockville, MD 20857

RE: FY 2019 Funding for ISDEAA 105(l) Leases and Long-Term Solutions

Dear Rear Admiral Weahkee:

This letter responds to your March 12, 2019 letter announcing that the Indian Health Service (IHS) will conduct consultation on how to fund leases under section 105(*l*) of the Indian Self-Determination and Education Assistance Act (ISDEAA). Section 105(*l*) mandates full payment of leasing costs when tribal facilities are used to operate IHS programs under the ISDEAA. Your letter asks tribes and tribal organizations for ideas on how best to meet the demand for 105(*l*) lease compensation both in FY 2019 and long-term.

Funding 105(l) Leases in FY 2019

The Lummi Tribe agrees that funding these leases is an issue of major and growing concern. Despite a $25 million increase in appropriations for tribal clinics in FY 2019, IHS anticipates having to reprogram additional funds, as it did in FY 2018. Last year, IHS plugged the gap by transferring funds for inflation increases from a variety of Services budget lines, as detailed in Figure 1 enclosed with your letter. This resulted in depriving these programs of much-needed increases. By listing those same line items as the only options for closing the shortfall in FY 2019, your letter assumes IHS will again rob Peter to pay Paul, but invites tribes to choose which programs will be the Peters. But of course all of these line items are underfunded, and another reprogramming will be unpopular and potentially divisive. Allowing tribes to "pick their poison" should not be the only option up for consultation, so we provide other ideas.

A better solution than reprogramming would be to seek a supplemental appropriation from Congress. The appropriators are aware that recent litigation has created an unforeseen and significant new cost,[1] and that IHS needs a bridge to a permanent, long-term solution. Since the magnitude of these costs, even in FY 2019, are difficult to predict, we recommend that IHS

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[1] *See Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243 (D.D.C. 2016).

acknowledge this fact in its supplemental appropriation request to Congress, so appropriators may provide such sums as may be necessary for obligation through the end of FY 2019. Although your letter says that in FY 2018 supplemental appropriations "were not feasible," it is not clear why that was so, or if it is still the case.

If reprogramming is unavoidable, we recommend that most, if not all, of the funding come from Headquarters administrative funds rather than tribal shares. In the past, IHS has held tribes harmless when faced with a deficit of even greater magnitude. In FY 2014, faced with a projected contract support cost shortfall of $48 million, IHS proposed that "half of the reprogramming would be accomplished with Headquarters funds and half would be accomplished with Area funds."[2] Ultimately IHS had to reprogram "only" $25.1 million, with about 80% of that coming from Headquarters in order to minimize impacts on direct service tribes and tribal providers. IHS should take a similar approach to the current funding challenge.

Moving forward, IHS should follow the directive of the Senate Appropriations Committee and separate 105(*l*) lease costs from village built clinics (VBCs) in the budget process.[3] The VBCs in Alaska have their own unique history and challenges, and should not be lumped into the larger challenge of funding legally required 105(*l*) least costs.

Long-Term Solutions

In the long term, the best solution is to establish a separate, indefinite appropriation for 105(*l*) lease compensation like that for contract support costs (CSCs). That would ensure full funding of lease costs while protecting program funding from the annual threat of reprogramming. An indefinite appropriation would also save IHS and Congress from the impossible task of identifying specific amounts needed in a given year to fully fund 105(*l*) leases. As the past two years have shown, predicting the activity of hundreds of tribes and tribal organizations is simply not feasible, and will result in more painful reprogramming. Section 105(*l*) lease costs share much in common with CSCs: the legal mandate to pay in full, the difficulty in projecting the full need, and their central role in health program administration. A separate, indefinite appropriation makes sense for 105(*l*) just as it does for CSCs.

The Lummi Tribe adamantly opposes any "solution" that would involve amending the ISDEAA to remove or limit section 105(*l*). For example, the Administration's FY 2018 and FY 2019 budgets included proposed appropriations act language that would have effectively nullified section 105(*l*) by making all lease compensation discretionary. IHS should drop this improper request to amend substantive law through an appropriations bill—which Congress has rejected for two years running—and should not seek to amend the ISDEAA through other means. Removing or limiting 105(*l*) would be extremely disruptive to tribal health providers that have come to rely on this much-needed source of facilities funding. Instead, IHS should work with tribes and Congress on a final solution that ensures lease funding meets the projected increase in need without chipping away at IHS programs.

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[2] IHS, "Dear Tribal Leader" letter, at 2 (Sept. 2, 2014).

[3] S. Rep. No. 115-276 at 91 (June 14, 2018).

Conclusion

Thank you for the opportunity to comment on this pressing issue. If you have any questions about this letter, please contact Anthony Hillaire at 360-312-2100 or Geoff Strommer at gstrommer@hobbsstraus.com. Please feel free to share these comments on the IHS website.

Sincerely,

/s/

Jeremiah Julius, Chairman
Lummi Nation

cc: Geoff Strommer, Hobbs, Straus, Dean & Walker, LLP

SUBMITTED: consultation@ihs.gov

April 26, 2019

RADM Michael D. Weahkee, MBA, MHSA
Assistant Surgeon General, U.S. Public Health Service
Principal Deputy Director
Indian Health Service
5600 Fishers Lane
Rockville, MD 20857

RE: FY 2019 Funding for ISDEAA 105*(l)* Leases and Long-Term Solutions; and Village Built Clinic Lease Program

Dear Rear Admiral Weahkee:

The Alaska Native Tribal Health Consortium (ANTHC) is a statewide tribal health organization that serves all 229 tribes and more than 173,000 Alaska Native and American Indian (AN/AI) individuals in Alaska. ANTHC and Southcentral Foundation co-manage the Alaska Native Medical Center, the tertiary care hospital for all AN/AIs in Alaska. ANTHC also provides a wide range of statewide public health, community health, environmental health and other programs and services for Alaska Native people and their communities.

I am writing in response to your March 12, 2019 Dear Tribal Leader Letter (DTLL) announcing that the Indian Health Service (IHS) has initiated tribal consultation on short and long-term recommendations to fund leases under section 105*(l)* of the Indian Self-Determination and Education Assistance Act (ISDEAA). Section 105*(l)* mandates full payment of leasing costs when tribal facilities are used to operate IHS programs under ISDEAA. We provide our comments and recommendations on short and long-term solutions to this funding issue, as well as funding associated with the Village Built Clinic (VBC) Lease Program. We have no objection with sharing ANTHC's consultation comments.

Short-term recommendations for FY 2019

ANTHC is concerned about the growing need to fund 105*(l)* leases, and despite the $25 million that is provided in the FY 2019 appropriation, both short and long term funding solutions are necessary. We are concerned that last year's practice of reprogramming funds from other IHS accounts intended for inflation or other purposes erodes the base budgets of tribes. This deprives Tribes of important program and inflation increases that are necessary to meet the health care needs Alaska Native and American Indian people. The practice of reprograming certain budget line items is also very unpopular among Tribes and has the potential to be divisive. Better solutions are needed to address this ongoing and growing concern over the long-term. In addition, this process also potentially impacts funding for the VBC Lease Program.

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Last year, IHS reprogrammed funds intended for inflation increases from a variety of Services budget lines in order to fund 105*(l)* leases. IHS reported at the Tribal Self-Governance Advisory Committee (TSGAC) Conference held in Michigan that this funding was not recurring; however, it is potentially available to continue to fund 105*(l)* leases. We support continuing to use this funding, however over the long term, we recommend eventually restoring this funding to Tribes and tribal organizations. We understand the total amount of funds that IHS potentially has available to fund 105*(l)* leases is $55 million ($25 million from FY 2018; $25 million in the FY 2019 appropriation; and $5 million discussed in the DTLL). We also understand that IHS has received 105*(l)* lease proposals that approximate $54 million, which was also reported at the TSGAC Conference.

Based on this, IHS potentially has enough funding to cover the 105*(l)* leases unless additional 105*(l)* proposals are received. If additional funding is needed over the estimated $55 million available, and IHS needs to reprogram funds, ANTHC recommends that most, if not all, of the funding come from Headquarters administrative funds rather than tribal shares. In the past, IHS has tried to hold tribes harmless when faced with a deficit of similar magnitude. In FY 2014, faced with a contract support cost shortfall, IHS had to reprogram $25.1 million, with about 80% of that coming from Headquarters in order to minimize impacts on direct service tribes and tribal providers. IHS should take a similar approach to the current funding challenge.

Since the magnitude of these costs, even in FY 2019, are difficult to predict, we further recommend that IHS acknowledge that additional funding is needed for 105*(l)* leases, and make a supplemental appropriation request to Congress, so appropriators may provide such sums as may be necessary through the end of FY 2019. The appropriators are aware that recent litigation has created an unforeseen and significant new cost,[1] and that IHS needs a bridge to a permanent, long-term solution. Your letter says that in FY 2018, supplemental appropriations "were not feasible," but you do not explain why that was so, or if it is still the case.

Long-Term Solutions

In the long term, the best solution to the 105*(l)* funding dilemma is to establish a separate, indefinite appropriation for 105*(l)* lease compensation like that for contract support costs (CSCs). That would ensure full funding of lease costs while protecting program funding from the annual threat of reprogramming. An indefinite appropriation would also save IHS and Congress from the impossible task of identifying specific amounts needed in a given year to fully fund 105*(l)* leases. As the past two years have shown, predicting the activity of hundreds of tribes and tribal organizations is simply not feasible, and will result in more painful reprogramming. Section 105*(l)* lease costs share much in common with CSCs: the legal mandate to pay in full, the difficulty in projecting the full need, and their central role in health program administration. A separate, indefinite appropriation makes sense for 105*(l)* just as it does for CSCs.

We oppose any "solution" that would involve amending the ISDEAA to remove or limit section 105*(l)*. For example, the Administration's FY 2018, 2019, and 2020 budgets all contain proposed appropriations act language that would effectively nullify section 105*(l)* by making all lease compensation discretionary. Congress rejected this proposal in FY 2018 and FY 2019, and hopefully will

[1] *See Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243 (D.D.C. 2016).

do so again for FY 2020. IHS should drop this improper request to amend the ISDEAA through an appropriations bill, and should not seek to amend the ISDEAA through any other means. Removing or limiting 105*(l)* would be extremely disruptive to tribal health providers that have come to rely on this much-needed source of facilities funding. Instead, IHS should work with tribes and Congress on a final solution that ensures lease funding meets the projected increase in need without chipping away at IHS programs.

Village Built Clinics Lease Program

As you know, the first 105*(l)* lease proposals came from Alaska as a means of circumventing the chronically underfunded VBC lease program. Following the second Maniilaq decision,[2] many Alaska Tribal Health Compact Co-Signers began switching from VBC leases to 105*(l)* leases. Section 105*(l)* leasing then spread from Alaska to the lower 48, resulting in the funding challenges described in your letter and its attachments. VBCs should not be overlooked or left behind amid the explosion in 105*(l)* leasing costs.

Moving forward, IHS should follow the directive of the Senate Appropriations Committee and separate 105*(l)* lease costs from VBCs in the budget process.[3] VBCs have their own unique history and challenges, and should not be lumped into the larger challenge of funding legally required 105*(l)* least costs.

For many VBCs, section 105*(l)* leasing is not feasible due to the up-front expenses of preparing and negotiating proposals. For the sake of equity, VBC leases should be fully funded just like 105*(l)* leases. In its 2018 study, *Village Built Clinics in Crisis*, the Alaska Native Health Board (ANHB) concluded that the VBC Program needs an additional $8.8 million in recurring program funding, plus another $6.8 million for the Backlog of Essential Maintenance and Repair (BEMAR). Alternatively, legislation could be developed that would require VBC leases to be treated like section 105*(l)* leases. In recent years, the supplemental tribal clinics appropriation has helped VBCs, but much more needs to be done.

We thank you for the opportunity to provide our comment and recommendation on the 105*(l)* lease issues. Please do not hesitate to contact me if you should have any questions at (907) 729-1908, or by email at gmoses@anthc.org.

Sincerely,

/s/

Gerald Moses
Vice President, Intergovernmental
Affairs

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[2] *Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243 (2016).
[3] S. Rep. No. 115-276 at 91 (June 14, 2018).