

## **REPORT ON THE TRIBAL CONSULTATION FOR THE INDIAN HEALTH SERVICE CONTRACT SUPPORT COSTS POLICY**

On April 13, 2018, the Indian Health Service (IHS) formally initiated Tribal Consultation on section 6-3.2E(3) – *Alternative Methods for Calculating Indirect Costs Associated with Recurring Service Unit Shares* (“97/3 Split” or “97/3 Method”) of the contract support costs (CSC) policy in the Indian Health Manual, Part 6 – *Services to Tribal Governments and Organizations*, Chapter 3 – *Contract Support Costs*. The Tribal Consultation included a 30-day comment period, to solicit input on replacing the existing language within section 6-3.2E(3) of the CSC policy.

A copy of the April 13, 2018, letter to Tribal Leaders is available on the IHS website at: [https://www.ihs.gov/newsroom/includes/themes/responsive2017/display\\_objects/documents/2018\\_Letters/DTLL\\_CSC\\_04132018.pdf](https://www.ihs.gov/newsroom/includes/themes/responsive2017/display_objects/documents/2018_Letters/DTLL_CSC_04132018.pdf)

The Tribal Consultation on the draft policy statement concluded on May 18, 2018. After careful review of all comments received from the Tribal Consultation, the IHS made a decision to update the IHS CSC policy.

### **Background**

Building off of the CSC Tribal Consultation activities between the years of 2012-2015, the Federal and Tribal members of the IHS CSC Workgroup worked aggressively and diligently in 2016 to review and make policy recommendations for IHS to consider in updating a 10-year-old policy. This required extensive consideration of major critical events such as the Supreme Court’s decision in *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012) and subsequent legislation, e.g., Fiscal Year 2014 Consolidated Appropriations Act. The IHS considered the CSC Workgroup’s recommendations based on the best, available facts and information used to make a fair and impartial policy decision. The IHS fully engaged in Tribal Consultation on the draft CSC policy prior to making final policy decisions and published the revised CSC policy on October 26, 2016.

### **Critical Event**

After a year of implementing the revised CSC policy, IHS became aware that section 6-3.2E(3) may not conform in all cases with the statutory authority of the Indian Self-Determination and Education Assistance Act (ISDEAA) at 25 U.S.C. § 5325(a). As a result of this critical event, the IHS notified Tribal leaders on December 21, 2017, by letter, that effective immediately, the IHS temporarily rescinds section 6-3.2E(3) of the CSC policy.

A copy of the December 21, 2017, letter to Tribal Leaders is available on the IHS website at: [https://www.ihs.gov/newsroom/includes/themes/responsive2017/display\\_objects/documents/2017\\_Letters/59018-1\\_DTLL\\_12212017.pdf](https://www.ihs.gov/newsroom/includes/themes/responsive2017/display_objects/documents/2017_Letters/59018-1_DTLL_12212017.pdf)

In accordance with the IHS Tribal Consultation policy, as a preliminary step in the Tribal Consultation process, the IHS sought the advice and recommendations of its joint Federal-Tribal Workgroup – the IHS CSC Workgroup. The CSC Workgroup, is established to develop recommendations on policy and address technical aspects of its implementation on an on-going basis.

The IHS CSC Workgroup met on March 6-7, 2018, in Albuquerque, New Mexico. At the beginning of the meeting, the IHS reiterated its charge to this workgroup to address issues and complete work needed to further develop and/or modify the IHS CSC policy and practices. Specifically, on whether to amend, reinstate, or permanently rescind section 6-3.2E(3) of the CSC policy.

### **Announcement**

The IHS considered the CSC Workgroup recommendations and formally initiated Tribal Consultation on April 13, 2018, by sending out a letter to Tribal Leaders, with a 30-day comment period, to solicit input on replacing the existing language within section 6-3.2E(3) of the CSC policy (that is temporarily rescinded) with the revised language – changes are in **bold** text:

3. Alternative Methods for Calculating IDC Associated With Recurring Service Unit Shares. The provisions of this section E(3) shall apply to the negotiation of indirect CSC funding in or after FY 2016 and to the calculation of duplication under 25 U.S.C. § 5325(a)(3), when: i) an awardee assumes a new or expanded PFSA or added staff associated with a joint venture (in which case the review is limited to those new or expanded PFSA or those additional staff); ii) an awardee includes new types of costs not previously included in the IDC pool that is associated with IHS programs, resulting in a change of more than 5% in the value of the IDC pool (in which case the review will be conducted under Alternative A and will be limited to those new types of costs); or iii) an awardee proposes and renegotiates the amount.

**Limited to the above circumstances**, the awardee shall elect the method for determining the amount of IDC associated with the Service Unit shares and the remaining IDC that may be eligible for CSC funding, to identify duplication, if any, pursuant to 25 U.S.C. § 5325(a)(3), using one of two options listed below **or any other mutually acceptable approach**. **In connection with 3.iii, above, if an earlier funding agreement reflects a prior identification of duplicated Service Unit costs, then the parties shall negotiate a new duplicate amount considering the alternatives available under Alternative A, Alternative B, or any other mutually acceptable approach.**

In addition, the Tribal Consultation offered additional options, to address concerns that were not addressed by the IHS CSC Workgroup's proposal. For example, to account for those instances in which the 97/3 Split provision of the 2016 CSC policy will not conform to the requirements of the ISDEAA, a bilateral decision, rather than a unilateral decision, should be jointly made to ensure compliance with the ISDEAA. Changes are in **bold** text:

- Alternative Methods for Calculating IDC Associated With Recurring Service Unit Shares. The provisions of this section E(3) shall apply to the negotiation of indirect CSC funding **for ISDEAA agreements entered into in or after FY 2017** and to the calculation of duplication under 25 U.S.C. § 5325(a)(3), when: i) an awardee assumes a new or expanded PFSA or added staff associated with a joint venture (in which case the review is limited to those new or expanded PFSA or those additional staff); ii) an awardee includes new types of costs not previously included in the IDC pool that is associated with IHS programs, resulting in a change of more than 5% in the value of the IDC pool (in which case

the review will be conducted under Alternative A and will be limited to those new types of costs); or iii) an awardee proposes and renegotiates the amount.

Two options to consider for the following paragraph:

**Option 1:** Pursuant to the above circumstances, the awardee **and IHS** shall **negotiate** the amount of IDC associated with the Service Unit shares and the remaining IDC that may be eligible for CSC funding, to identify duplication, if any, pursuant to 25 U.S.C. § 5325(a)(3), **using** one of two options listed below, **or any other mutually acceptable approach.**

**Option 2:** Pursuant to the above circumstances, the awardee **and the Area Director or his or her designee** shall **jointly determine, on a case-by-case basis, the appropriate method** for determining the amount of IDC associated with the Service Unit shares and the remaining IDC that may be eligible for CSC funding, to identify duplication, if any, pursuant to 25 U.S.C. § 5325(a)(3), **using** one of two options listed below, **or any other mutually acceptable approach.**

### Gather Input

In order to ensure that Tribes and Tribal organization were able to provide meaningful input, the IHS opened a 30-day comment period. The IHS accepted input by e-mail or postal mail. In addition, the IHS provided updates during the following events:

- April 23, 2018 – Annual Tribal Self-Governance Conference – Albuquerque, New Mexico
- April 30 – May 1, 2018 – IHS Direct Service Tribes Advisory Committee Meeting – Albuquerque, New Mexico
- May 14, 2018 – IHS All Tribal and Urban Indian Organization Leader Call

The IHS received 37 unique letters providing comments (7 of which are from Tribal organizations, consortia or health boards representative of multiple Tribal views). In summary, comments carried two central themes:

- Majority of comments recommend to immediately reinstate 97/3 policy provision
- All disagree with Agency's process of notification of policy change via letter notification to Tribal leaders (i.e., lack of Tribal Consultation prior to making decision to temporarily rescind 97/3)

Table 1.1 Tribal Consultation Summary Table provides a summary matrix of comments received during the 30-day comment period by Tribe or Tribal organization and comments.

### Decision

The IHS communicated its final decision on the CSC policy to the IHS CSC Workgroup by teleconference in parallel to notifying Tribes and Tribal organizations Leaders by letter.

## **Reporting**

The IHS meets the Tribal Consultation policy reporting requirements by reporting Tribal Consultation activities annually through the HHS Tribal Consultation Report.

The IHS has prepared this report and will post the summary of comments that were gathered during the 30-day comment period on the IHS CSC website, located at:  
<https://www.ihs.gov/odsct/contract-support-costs>.

Table 1.1 Tribal Consultation Comment Summary Table

	Tribe or Tribal Organization	Comment
1	Alabama-Coushatta Tribe of Texas	<p>Recommendations:</p> <ol style="list-style-type: none"> <li>1) The Tribe recommends IHS reinstate the original language agreed to in 2016.</li> <li>2) Alternatively, the tribe would be comfortable with the revised language by the CSC Workgroup on March 6-7.</li> </ol> <p>Additionally, the Tribe does not agree and rejects that the IHS force a line-by-line when 97/3 exists.</p>
2	Alaska Native Health Board	<p>Recommendations:</p> <ol style="list-style-type: none"> <li>1) 97/3 provision should remain as originally published in October 2016.</li> <li>2) If a choice is required between the 3 options outlined in the letter the CSC WG recommendation is the only acceptable option.</li> </ol> <p>The Health Board rejects the two IHS proposed options in the DTLL.</p> <p>The Health Board believes that limiting the option for negotiations will result in putting the Agency in a position to force tribes into contentious negotiations and lead to litigation.</p>
3	Alaska Native Tribal Health Consortium (ANTHC)	<p>Recommendations:</p> <ol style="list-style-type: none"> <li>1) 97/3 provision should remain as originally published in October 2016.</li> <li>2) If a choice is required between the 3 options outlined in the letter the CSC WG recommendation is the only acceptable option.</li> </ol> <p>The Health Board rejects the two IHS proposed options in the DTLL.</p>

	Tribe or Tribal Organization	Comment
		<p>The Health Board believes that limiting the option for negotiations will result in putting the Agency in a position to force tribes into contentious negotiations and lead to litigation.</p>
4	Arctic Slope Native Association	<p>Recommendations:</p> <ol style="list-style-type: none"> <li>1) The CSC WG recommendation is the only acceptable option. Arctic Slope Native Association considers the other two options unsatisfactory.</li> </ol> <p>The Association believes that the options are unsatisfactory because it will lead to a contentious negotiation and litigation, which, they believe is the opposite goal of the policy.</p>
5	California Rural Indian Health Board	<p>Recommendations:</p> <ol style="list-style-type: none"> <li>1) The ISDEAA and OMB define and determine the calculation of Indirect and indirect type costs.</li> <li>2) CRIHB wants clarification under 25 U.S.C 5325a of the options for Chapter 3, Section 6-3.2E3 iii of the IHM for the 2016 CSC policy.</li> <li>3) IHS must clearly state that its new CSC rule does not apply to annual re-issuances, including those of negotiated “indirect-type costs.” (Believes that the new 97/3 rule would only be applied to new and expanded contracts).</li> <li>4) CRIHB approves the CSC WG recommendation for changes to the 2016 policy offered at the March 6-7 meeting, but wants to add the following: If earlier funding agreements did not indicate duplicated Service Unit Costs, as in the case of California IHS Area Tribes and Tribal Organizations, the Tribe or Tribal Organizations would have the option of a previously acceptable method, or any other mutually acceptable approach.</li> <li>5) Disagrees with IHS’s concern about the proposed language not accounting for all instances in which</li> </ol>

	Tribe or Tribal Organization	Comment
		<p>the 97/3 will not conform to the requirements of ISDEAA.</p> <p>Wants to know what specific provision of the ISDEAA does IHS cite to require the IHS a mutually acceptable approach, rather than the method elected by the awardee?</p>
6	Cherokee Nation	<p>Recommendations:</p> <ol style="list-style-type: none"> <li>1) IHS reinstate the original language agreed to by the tribes and IHS in October 2016 and the minor changes approved by the WG in March 2018.</li> </ol> <p>The Nation agrees with the WG recommendation but not the IHS proposed options</p>
7	Chickasaw Nation	<p>Recommendations:</p> <ol style="list-style-type: none"> <li>1) IHS reinstate the original language agreed to by tribes in October 2016.</li> <li>2) Alternatively, would be comfortable with the revised language recommended by the CSC WG on March 6-7, 2018.</li> </ol> <p>Oppose IHS's proposal to change the applicability of the duplication options in subsection E(3).</p>
8	Chippewa Cree Tribe of the Rocky Boy's Reservation	<p>Recommendations:</p> <ol style="list-style-type: none"> <li>1) Rejects the two IHS proposed options and accepts the CSC WG recommendation.</li> </ol> <p>Believes that the two IHS proposed options are unsatisfactory because it will lead to increase litigation, complications, and make the process more contentious.</p>
9	Choctaw Nation of Oklahoma	<p>Recommendations:</p> <p>Agrees with the CSC WG recommendations and disagrees with the other proposed recommendations</p>
10	Citizen Potawatomi Nation	<p>Recommendations:</p> <ol style="list-style-type: none"> <li>1) 97/3 should remain as originally agreed upon by the CSC WG.</li> <li>2) The only other acceptable option is the unanimous CSC WG recommendation.</li> </ol>

	Tribe or Tribal Organization	Comment
		Disagrees with IHS's view and understanding of duplication. Believes the IHS proposed options will lead to more litigation.
11	Confederated Tribes of Siletz Indians Tribal Council	Recommends that IHS adopt the CSC Workgroup's (Albuquerque meeting in March 2018) proposal and not the additional or alternative changes described in the "Dear Tribal Leader" letter dated April 3, 2018.
12	Cowlitz Indian Tribal Council	Recommendations:  <ol style="list-style-type: none"> <li>1) Wants the 97/3 that was originally agreed upon in the 2016 policy to remain the same.</li> <li>2) However, if IHS is determined to change the policy then accepts the CSC WG recommendation.</li> </ol> Oppose IHS's proposal to change the applicability of the duplication options in subsection E(3).
13	Gila River Indian Community and Gila River Health Care	Gila River comments include (1) 97/3 should be reinstated, (2) extended Tribal consultation on alternative methods, and (3) CSC should include options for negotiation based on Tribes' different needs.
14	Hoopa Valley Tribal Council	<ol style="list-style-type: none"> <li>1. Reinstate</li> <li>2. Enact proposed language from CSC Workgroup</li> <li>3. Oppose "for ISDEAA agreements entered into in or after FY2017"</li> </ol>
15	Inter-Tribal Council of the Five Civilized Tribes (ITC); Cherokee, Chickasaw, Choctaw, Muscogee (Creek) and Seminole Nations via Cherokee Nation	<ol style="list-style-type: none"> <li>1. Strongly opposes proposed alternatives to revise CSC policy</li> <li>2. Supports the limited changes to section 6-3.21 (3) of the CSC Policy recommended by the IHS CSC Workgroup and urges the Acting IHS Director to implement it immediately upon close of the Tribal Consultation period.</li> </ol>
16	Jamestown S'Klallam Tribe	<ol style="list-style-type: none"> <li>1. Enact proposed language from CSC Workgroup</li> <li>2. Reinstate</li> <li>3. Oppose "for ISDEAA agreements entered into in or after FY2017"</li> </ol>
17	Kenaitze Indian Tribe	<ol style="list-style-type: none"> <li>1. Enact proposed language from CSC Workgroup</li> </ol>
18	Laguna Pueblo	Supports Option 2 – allows for a case by case determination
19	Little River Band of Ottawa Indians	<ol style="list-style-type: none"> <li>1. Enact proposed language from CSC Workgroup</li> </ol>

	Tribe or Tribal Organization	Comment
20	Lummi Indian Business Council	<ol style="list-style-type: none"> <li>1. Enact proposed language from CSC Workgroup</li> <li>2. Oppose “for ISDEAA agreements entered into in or after FY2017”</li> </ol>
21	MATCH-E-BE-NASH-SHE-WISH Band of Pottawatomi Indians aka Gun Lake Tribe	<ol style="list-style-type: none"> <li>1. Enact proposed language from CSC Workgroup</li> </ol>
22	Menominee Indian Tribe of WI	<ol style="list-style-type: none"> <li>1. Reinstate</li> <li>2. Enact proposed language from CSC Workgroup</li> <li>3. Oppose “for ISDEAA agreements entered into in or after FY2017”</li> </ol>
23	Mississippi Band of Choctaw Indians	<ol style="list-style-type: none"> <li>1. Reinstate</li> <li>2. Enact proposed language from CSC Workgroup</li> <li>3. Oppose “for ISDEAA agreements entered into in or after FY2017”</li> </ol>
24	Muscogee Creek Nation	<ol style="list-style-type: none"> <li>1. Reinstate</li> <li>2. Enact proposed language from CSC Workgroup</li> <li>3. Opposes IHS recommendations</li> </ol>
25	Navajo Nation	IHS decision to rescind provisions of 97/3 is inappropriate without Tribal consultation, Navajo Nation requests (1) IHS to reinstate October 26, 2016 CSC Policy, (2) supports the IHS CSC WG recommendation: “Limited to the above circumstances, the ...or any other mutually acceptable approach.” (3) Two new Agency options strip a Tribe of the right to choose, and (4) does not agree to a detailed line-by-line negotiation, prefers alternative method like 97/3.
26	Northwest Portland Area Indian Health Board	Recommend the IHS adopt the WG’s proposal and the additional or alternative changes described in the April 13, 2018 DTLL letter. Oppose IHS proposal to change the application of duplication in subsection E(3).
27	Oneida Nation	Concerns include (1) IHS responsibility to uphold Government-to Government relations with Tribes, (2) policy changes are based on hypotheticals, and (3) IHS amend CSC policy to and incorporate the WG’s recommendation that requires the awardee to elect the method for determining the amount of indirect costs associated with the Service Unit Share and the remaining indirect cost that may be eligible for CSC funding, to identify duplication, pursuant to 25 U.S.C. § 5325(a)(3), using the two options that IHS proposes or any other mutually acceptable approach.

	Tribe or Tribal Organization	Comment
28	Sac and Fox Nation	Tribe (1) opposes Agency's unilateral action to suspend IHS CSC Policy pertaining to 97/3 method and (2) supports CSC WG revised language recommended on March 6-7, 2018.
29	Southcentral Foundation, Alaska Native Tribal Organization, Cook Inlet Region, Inc.	Emphasize the importance of Tribal consultation and request that IHS leave the current Manual language unchanged or use language developed by the CSC Workgroup.
30	Southeast Alaska Regional Health Consortium	Comments include (1) process and importance of Tribal Consultation, (2) 97/3 provisions should remain as originally published in October 2016, and (3) WG recommendation is the only acceptable option.
31	Spirit Lake Tribe	Comments include (1) process and importance of Tribal Consultation, (2) 97/3 provisions should remain as originally published in October 2016, and (3) WG recommendation is the only acceptable option.
32	Suquamish Tribe	Tribe (1) agree with Tribal representatives on CSC WG to leave the policy as it is currently written, (2) adopt WG's compromise language and (3) oppose IHS proposal to change the applicability of the duplication option the subsection E(3).
33	Susanville Indian Rancheria via VanAmberg, Rogers, Yepa, Abeita & Gomez, LLP	Tribe (1) agree with Tribal representatives on CSC WG to leave the policy as it is currently written, (2) adopt WG's compromise language and (3) oppose IHS proposal to change the applicability of the duplication option the subsection E(3).
34	Taos Pueblo via VanAmberg, Rogers, Yepa, Abeita & Gomez, LLP	Concerns include (1) Agency's unilateral action to rescind portion of CSC Policy, i.e., 97/3, (2) adopts comments submitted on behalf of Susanville Indian Community in letter of April 13, 2018, and (3) requests IHS adopt the WG recommendation for addressing IHS's concerns regarding the 97/3 method as set out in the second paragraph of the IHS April 13, 2018, letter.
35	Ysleta de Sur Pueblo	Comments include (1) disappointment with Agency's unilateral action to suspend IHS CSC policy, (2) recommend IHS reinstate original language agreed to by Tribes and IHS in October 2016, and (3) support revised

	Tribe or Tribal Organization	Comment
		language recommended by the CSC WG on March 6-7, 2018.
36	San Carlos Apache Tribe	<p>Recommendations:</p> <ol style="list-style-type: none"> <li>1) Reinstate the 97/3 that was originally agreed upon in the 2016 policy.</li> <li>2) As an alternative, Tribe is comfortable with policy recommendation made by CSC WG in March 2018.</li> </ol>
37	Tribal Self-Governance Advisory Committee	Supports the CSC Workgroup recommendation and urge for Tribal consultation. The TSGAC does not support alternatives outlined in the IHS April 13, 2018, letter.