

CHAIRMAN
John A. Barrett

VICE CHAIRMAN
Linda Capps

SECRETARY-TREASURER
D. Wayne Trousdale



Jbarrett@potawatomi.org

Lcapps@potawatomi.org

Dtrousdale@potawatomi.org

CITIZEN POTAWATOMI NATION

May 14, 2018

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

VIA E-MAIL
consultation@ihs.gov

Re: CSC "97/3" Method Tribal Consultation

Dear Acting Director Weahkee,

The Citizen Potawatomi Nation (CPN) opposes the proposed Indian Health Service (IHS) revisions to the duplication section in the contract support costs (CSC) policy. Duplication of CSC was an issue we had to resolve with litigation, yet here we are again because of your continued misinterpretation of CSC duplication provisions.

Duplication Issue.

IHS's misinterpretation of duplication as described in footnote 1 of the CSC policy is at the heart of this consultation. Many tribes have already provided input or opinions on this subject through consultation on the 2016 policy or through litigation. That said, the issue of duplication is not difficult—the law is clear, and even if it were ambiguous, the law directs IHS to interpret the provisions "liberally" in favor of the Tribes.

The Indian Self-Determination and Education Assistance Act (ISDEAA) says that CSC cannot duplicate any funding already provided under the Secretarial amount. For example, if a Tribe required \$100,000 for a given item of administrative contract support costs for facility support, and if the Secretarial amount paid to the Tribe already included \$10,000 for this support, then the CSC amount should be reduced by the \$10,000 because it was already transferred to the Tribe. IHS will then owe \$90,000 in CSC. Yet, when IHS conducts a "line by line" review for CSC duplication, it deems costs categorically unallowable rather than applying an offset of the previously-provided dollar amount. IHS's interpretation only makes sense if the ISDEAA said: CSC funding will not duplicate any *categories of funding* provided under the Secretarial amount. But the law does not say this so the agency's position is unfounded. Using the same example above, under the IHS's misinterpretation, the entire \$100,000 for facility support would be disallowed since IHS previously transferred some amount in that *category* of funding under the Tribe's Secretarial amount. If IHS continues to implement their CSC policy using this inaccurate

legal interpretation, Tribes stand to lose a significant amount of administrative CSC funding. The result is that Tribes will be forced to use program funding to cover these costs and services to their Indian population will be reduced, which is the exact result Congress attempted to avoid by adding the CSC provisions in the first place.

The CSC Policy, 97/3 Issues & Workgroup Process.

In your April 13th letter you expressed concern about implementing the 2016 CSC policy because of the “legal and financial impact on the Federal Government”. This statement is offensive and antagonistic. It would serve your agency well to first consider the legal and financial impact on tribal governments and organizations that have had to file years of claims and litigation in an attempt to recover the CSC to which they are entitled by law. In the very least you should consider the substantial negative legal and financial impact CSC litigation has already had on the Federal Government. This latest policy concern will only make such matters worse.

When the CSC policy was agreed-upon, it represented a compromise of tribal and agency legal positions. The differing perspectives on certain key issues—especially duplication—were developed in accordance with the government-to-government relationship. Both sides also recognized that trust would be integral to effective implementation. Importantly, both sides also committed to a collaborative process for future changes. Your actions—both in unilaterally rescinding the 97/3 provisions and in now sending out options for tribal consultation that were never even formally discussed nor adopted by the full CSC Workgroup—fail to respect this collaborative process and legal requirement for government-to-government consultation.

The whole point of the CSC policy was to make CSC calculations less contentious. If the agency and the Tribe disagree on policy application, IHS has always had the option to apply its interpretation of the law. **For this reason in particular, we believe the 97/3 provision should remain as originally agreed-upon by the CSC Workgroup.** The 97/3 method was to provide an efficient middle ground in cases where it was already clear IHS and Tribes could not or would not reach agreement on duplication. **The only other acceptable option is the unanimous Workgroup recommendation.** 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 two new agency-drafted options are guaranteed to make the CSC calculation process far more complicated, contentious and ultimately unfair. These alternatives contain several subtle changes that eliminate the decision-making authority of the Tribe. Our concern with the agency’s newly proposed options is that Tribes will be forced into a contentious negotiation because IHS is likely to evaluate CSC line-by-line and disallow entire categories of CSC that IHS deems “duplicative”. When Tribes do not agree, they will have no choice but to sue the IHS for the CSC to which they are entitled by law. While wasting additional time and resources to pursue litigation, Tribes will also be forced to use other health funding to cover these administrative contract support costs, causing a reduction in direct services to their Indian population.

We hope that your actions moving forward respect the government-to-government relationship and the opinions of Tribes and tribal organizations.

Sincerely,

John A. Barrett
Tribal Chairman