



Terry Rambler
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June 11, 2018

RADM Michael D. Weahkee, MBA, MHSA
Assistant Surgeon General
U.S. Public Health Service
and
Acting Director
Indian Health Service
U.D. Department of Health & Human Service
5600 Fishers Lane
Mail Stop: 08E86
Rockville, MD 20857

Re: CSC "97/3 Method" Tribal Consultation

Dear Acting IHS Director Weahkee:

On behalf of the 16,600 enrolled members of the San Carlos Apache Tribe (the "Tribe") and the San Carlos Apache Health Care Corporation ("SCAHC"), by this letter I provide our comments in response to your Dear Tribal Leader Letter of April 13, 2018, regarding the Indian Health Service ("IHS") Contract Support Cost ("CSC") Policy pertaining to the proposed "97/3 Method" as a revision to Section 6-3.2E(3) of the IHS.

Your letter provides the recommendation from the IHS CSC Workgroup along with a couple additional recommendations from the Agency that did not receive the support of the workgroup. We believe that Tribal Consultation is critically important and are very disappointed in the Agency's unilateral action to suspend a provision of the IHS CSC Policy that had been included as a result of considerable effort and consultation by the Workgroup.

It is unacceptable to now send out for tribal consultation IHS's preferred *post hoc* options for tribal consultation, and to flatly ignore the unanimous result reached at the March CSC Workgroup meeting. You mentioned recently in Albuquerque that your attorneys still had concerns about the alternate language unanimously developed and approved by the Workgroup in March.

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The place for your attorneys to raise those concerns was in the March Workgroup meeting itself. Indeed, several IHS attorneys did voice their concerns, and compromises to address those concerns, as well as tribal concerns, were made. You not only sat in at those meetings, you actively participated in the substantive discussions. You did not vote "no" when the Workgroup's final product was presented for a formal vote. Indeed, not a single Workgroup member voted "no." To the contrary, all participants agreed that the language struck a balance that adequately responded to IHS's stated concerns while adhering to the core of the Manual as much as possible.

To send out anything other than the agreed-upon language is an act of bad faith, especially given that the Indian Self-Determination and Education Assistance Act requires 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).

The 97/3 Method and Agency Alternatives

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. But most tellingly, your agency colleagues had only encountered one situation—*one*—where the agency staff believed such an outcome might be possible, although they also agreed that such an outcome had actually not occurred. In any event, a few theoretical outliers simply do not justify changing the entire policy. To the contrary, only actual implementation or changes in the law and controlling court decisions should dictate when changes to the Manual are warranted.

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. For this reason, in particular, we believe 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.

Recommendation

After reviewing the options recommended in your letter, we recommend that the IHS reinstate the original language agreed to by tribes and the IHS in October 2016. That language took into account the differing positions of the Agency and Tribes but attempted to strike a compromise that would facilitate continued Contracting and Compacting. The original language adopted by the Agency mirrors the 80/20 process that the Agency has used for over 20 years. That policy has

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respected Tribal sovereignty and allows Tribes to elect which method to use. In the alternative, we would be comfortable with the revised language recommended by the IHS CSC Workgroup on March 6-7. To the extent that the Tribe and the Agency have previously negotiated and agreed to a specific level of duplication reflected in a prior funding agreement, a renegotiation of that agreement seems reasonable.

We do not agree that the IHS should be able to force all Tribes into a detailed line-by-line negotiation when a reasonable alternative like the 97/3 method exists. That appears to be the goal of each of the two Agency alternatives so we reject those emphatically.

We sincerely hope that the IHS will return to a more respectful stance in addressing and dealing with Tribes and hope that we can move forward with the original policy as soon as possible.

As we say in our Apache language, Ahi'yi'é, thank you for the opportunity to submit comments on these CSC policy issues. It is our hope that your actions moving forward respect the government-to-government relationship and that you grant due consideration for the opinions of Tribes and tribal organizations.

Sincerely,

SAN CARLOS APACHE TRIBE

Terry Rambler
Chairman

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