

VANAMBERG, ROGERS, YEP, ABEITA & GOMEZ, LLP

RONALD J. VANAMBERG (NM)
CARL BRYANT ROGERS (NM, MS)**
DAVID R. YEP (NM)
CAROLYN J. ABEITA (NM)**
DAVID GOMEZ (NM, NAVAJO NATION)**
**NEW MEXICO BOARD OF LEGAL SPECIALIZATION
CERTIFIED SPECIALIST IN THE AREA OF FEDERAL
INDIAN LAW

ATTORNEYS AT LAW
P.O. BOX 1447
SANTA FE, NM 87504-1447
(505) 988-8979
FAX (505) 983-7508

347 EAST PALACE AVENUE
SANTA FE, NEW MEXICO 87501

ALBUQUERQUE OFFICE
1201 LOMAS BOULEVARD, N.W.
SUITE C
ALBUQUERQUE, NEW MEXICO 87102
(505) 242-7352
FAX (505) 242-2283

May 10, 2018

Via Email: consultation@ihs.gov

RADM Michael D. Weahkee, Acting Director
Indian Health Service
5600 Fishers Lane
Rockville, MD 20857

Re: *Response to IHS Request for Comments on Proposal to Amend "97/3 Method" for Determining Indirect Costs in Service Unit Shares*

Dear RADM Weahkee:

This letter is submitted on behalf of our client, the Taos Pueblo, a Title V Self-Governance Tribe.

This letter submits comments in response to the Secretary's request for tribal views on the IHS's prior unilateral action to rescind that portion of the IHS CSC policy issued in 2016 which addressed adoption of the 97/3 method for determining indirect costs in service unit shares.

We write to express several concerns. First, once IHS has adopted a policy such as this, the government is bound by that policy until and unless it is lawfully changed in accordance with its terms and compliance with all the government's tribal consultation obligations. This is well-settled law as expressly affirmed in *Morton v. Ruiz*, 415 U.S. 199 (1974), but was not followed by the IHS when it made this unilateral rescission without carrying out any prior tribal consultation.

The IHS's conduct in unilaterally rescinding this portion of the CSC policy is not cured by an after-the-fact consultation opportunity. The correct course (as a matter of law and policy) is to vacate the prior unilateral rescission and then address the issue of proposed changes in the policy through tribal consultation before any additional action to change the policy is implemented.

Turning to the substance of the dispute about the 97/3 method, our client joins in and adopts the comments submitted on behalf of the Susanville Indian Community by its comment letter of April 18, 2018. (Copy enclosed).

The Taos Pueblo thus requests that the IHS adopt the Workgroup recommendation for addressing IHS's concerns regarding the 97/3 method as set out in the second paragraph of the Acting Director's letter of April 13, 2018. The Pueblo opposes adoption of the other alternatives set out in that letter.

Sincerely,

~~C. BRYANT ROGERS~~

CBR/jt

Enclosure: as indicated

Cc: Governor, Taos Pueblo
War Chief, Taos Pueblo
Andrew G. Joseph, Co-Chair, IHS CSC Workgroup
(All by email)

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SUSANVILLE INDIAN RANCHERIA

April 18, 2018

Via Email to consultation@ihs.gov

RADM Michael D. Weahkee, Acting Director
Indian Health Service
5600 Fishers Lane
Rockville, MD 20857

***RE: Response to IHS Request for Comments on Proposal to Amend "97/3 Method"
for Determining Indirect Costs in Service Unit Shares***

Dear RADM Weahkee:

On behalf of the Susanville Indian Rancheria, I write in response to your "Dear Tribal Leader" letter dated April 13, 2018. In that letter, you announce a 30-day consultation and comment period on proposed changes to a key provision of the Indian Health Service (IHS) contract support cost (CSC) policy: the so-called 97/3 method for determining indirect costs included in service unit shares. The consultation begins some five months after IHS unilaterally rescinded the 97/3 option, drawing widespread criticism from around Indian country—some of which you heard in person at the CSC Workgroup meeting in Albuquerque in March. At that meeting, the Workgroup developed compromise language to salvage the 97/3 method while addressing the key IHS concern. We strongly recommend that IHS adopt the Workgroup's proposal and not the additional or alternative changes described in your letter.

The 97/3 option is meant to avoid, or at least minimize, duplication between indirect CSC and indirect cost funding in the Secretarial or program amount. When a tribe assumes a new or expanded program, function, service, or activity, or adds staff associated with a joint venture, the policy requires a duplication review when determining the amount of CSC associated with the expansion. The rescinded provision gave tribes a choice between two methods: (1) a "case-by-case detailed analysis" of indirect costs transferred in the Secretarial amount; or (2) a 97/3 split, in which 97% of the expansion would be deemed part of the direct cost base (and thus generate indirect CSC), while 3% would be deemed indirect cost funding (and thus be excluded from the direct cost base and offset against indirect CSC otherwise due).

The 97/3 option evolved from extensive and difficult negotiations between the tribal and federal representatives on the IHS CSC Workgroup in 2016. It was modeled on the longstanding 80/20 split for Area and Headquarters tribal shares. Like the 80/20 rule, the 97/3 split provides a reasonable approximation that saves much time and effort on both sides, replacing hours or days of potentially contentious negotiations with a simple computation. Both the 80/20 and the 97/3 methods sacrifice a certain amount of accuracy as a small price to pay for simplicity and

efficiency. Both comport with Congress's command—and the IHS CSC Policy's stated goal—to simplify the process of CSC estimation and payment.

IHS temporarily revoked this common-sense option because it determined that the 97/3 split may not “in all cases” conform to the Indian Self-Determination and Education Assistance Act (ISDEAA)—by which IHS means the 97/3 split occasionally results in a tribe being paid more than IHS would have considered the full amount had a full detailed analysis been done. Even if that is true, the data IHS presented indicate there are other instances in which the 97/3 method results in an *underpayment* to the tribe. Of the 13 cases presented by the IHS in its data sample at the Workgroup meeting, perhaps 6 showed significant differences unfavorable to IHS between the 3% and “known” amounts; the rest were either in IHS's favor or a virtual wash. IHS's own data demonstrates that the 97/3 method generally works. The point of a default option like the 80/20 or 97/3 split is not to hit every number perfectly but to provide a simplified method that is fair in the aggregate and saves time and effort for everyone.

At the Workgroup meeting, IHS explained that its concern with the 97/3 option focused on one relatively narrow scenario: when IHS and the tribe or tribal organization had already negotiated and agreed on a duplication offset number, but the tribe or tribal organization comes back and proposes the 97/3 option instead of the negotiated (“known”) amount. The Workgroup crafted language, quoted in your letter, that removes the tribe's ability to unilaterally elect the 97/3 option in this scenario. Instead, the parties would have to agree on the method and negotiate a new duplicate amount. Although it appears that the Workgroup's proposal is still under consideration, your letter proposes other options that would take away tribes' ability to elect the 97/3 method in *any* scenario requiring a duplication analysis. In practice, this would likely result in IHS running the numbers in every instance and only agreeing to 97/3 if it would result in a duplication offset greater than the “known” amount. The 97/3 method—an option meant to protect tribes, especially smaller ones—would effectively be nullified.

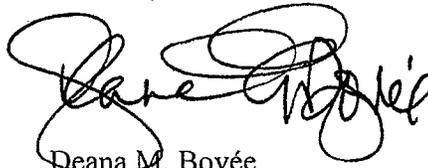
Therefore we agree with tribal representatives on the Workgroup that the best approach would be to leave the policy as it was agreed to and as it is currently written. But if IHS is determined to address the relatively rare scenario where the 97/3 method diverges significantly from a “known” duplication amount, the next best option is to adopt the Workgroup's compromise language. The other options raised in your April 13 letter would not so much amend the 97/3 method as render it moot, departing still further from the original deal agreed to by the parties.

Finally, we oppose IHS's proposal to change the applicability of the duplication options in subsection E(3). Currently they apply “to the negotiation of indirect CSC funding in or after FY 2016.” Your letter proposes that they apply “to the negotiation of indirect CSC funding for **ISDEAA agreements entered into in or after FY 2017**” (new language in bold). This would be a mistake. The current language indicates the policy applies to negotiations taking place in FY 2016 or later, including negotiations on funding due in earlier years that have yet to be closed out. IHS has not completed the reconciliation process for many tribes going back to FY 2016,

2015, and even 2014. The new policy should continue to apply to these negotiations, as the former policy provides little guidance on duplication and lacks a streamlined option like the 97/3 method.

Thank you for the opportunity to comment on this matter. As always, we look forward to working with IHS to promote tribal self-determination and self-governance and advance the health and well-being of our people.

Sincerely,

A handwritten signature in black ink, appearing to read "Deana M. Bovée". The signature is fluid and cursive, with the first name "Deana" being the most prominent part.

Deana M. Bovée
Tribal Chairwoman

Cc: IHS CSC Workgroup