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SENT VIA TELEFAX: (503) 326-7280

May 18, 2008

Roselyn Tso, Director
Indian Health Service
Office of Tribal & Service Unit Operation
Portland Area Office
1220 S.W. Third Street, Room 476
Portland, OR 97204

Dear Ms. Tso:

On behalf of our forty-three Tribes, I have been requested to follow up on the Tribal Consultation session conducted on May 14, 2008. The consultation session was to solicit Tribal leader input on co-payment issues associated with Tribes billing beneficiaries for services. Several Tribal leaders were concerned about the lack of representation by those Tribes that were not able to attend, the timeline announcing and conducting the consultation, and policy issues that were discussed during the consultation session. Our comments on these areas are as follows:

1. Tribal Consultation Concerns:

A count of Portland Area Tribes during our caucus indicated that only nineteen out of the forty-three Portland Area Tribes were present. Tribal leaders were concerned about the lack of representation from all forty-three Tribes in the Portland Area. Tribal leaders indicated that such a significant issue warrants a more concerted effort to include a broader representation of Tribes. Tribal leaders indicated that the timing to conduct Tribal consultation on this issue may have contributed to the lack of participation from Portland Area Tribes.

It was noted by Tribal leadership during the consultation meeting, that if the Agency is in the process of developing a policy on this issue, that this consultation session should be the first step in the process. Also, that a more reasonable timeline should be developed for conducting Tribal consultation on this issue so the more Portland Area Tribes may be represented.

2. The basis in which Tribal consultation was conducted was not transparent or clearly understood:

Tribal leaders wanted to know what the objective was for conducting consultation and how the information would be used. They further requested that IHS clarify its position on the co-payment issue in light of the fact that it had decided not to appeal the Susanville decision. Questions included how IHS would handle negotiations (approve/disapprove funding agreements) if a Tribe elected to exercise

its authority under the Indian Self-Determination and Education Assistance Act (ISDEAA). These issues were not adequately addressed or answered and the Agency should respond to these Tribal leader's requests prior to making any decision on this matter.

The position of the Agency has direct bearing on the nature of Tribal leader comments and recommendations that would be provided on this issue. And certainly if the Agency is deliberating changing its policy it would have helped to facilitate dialogue during Tribal consultation. Tribal leaders felt that there was a "hidden agenda" and were requested to provide input on an issue without knowing the full ramifications of the policy. If the Agency is considering changing its position or developing a policy on this issue, it would have been more beneficial to share the proposed policy in which Tribes could have provided comment.

Eventually, the Agency did acknowledge that its policy on this issue continues to be the position it defended in the Susanville case, which is as follows:

"IHS position of record – the Director does not have the authority to enter into ISDEAA contracts, compacts, or funding agreements where a tribe or tribal organization is billing or charging eligible beneficiaries."¹

The manner in which this unfolded set up a process of distrust in which some Tribal leaders felt that the IHS was seeking information that could be used to develop a policy against Tribes on this issue. Or, that IHS may have decided not to appeal the Susanville case in order to preserve its opportunities to challenge the co-pay issue in another District Court. Thus, the IHS is eliciting Tribes to determine the extent that Tribes may pursue their authority to charge co-pays in anticipation of defending a future case with the hope that another District Court would render a different decision than Susanville. While this may not be the case, the Agency's continued position taken together with references made by IHS that the Susanville decision has "no procedural effect outside of the eastern district of California" and "applies only to IHS and Susanville," easily allows a conclusion to be drawn that the Agency is preparing for a similar challenge in another IHS Area.²

We strongly recommend that the IHS continue to consult with Indian Tribes on this very important issue. This recommendation is made in accordance with IHS Tribal Consultation Policy, Section 4, Parts (A), (B), and (D). The May 14, 2008 consultation on this issue should be the first step in the process of engaging Tribes to develop a policy around this issue.

3. Tribal leaders want to clarify their concern on the position that the IHS Director does not have authority to approve ISDEAA agreements charging beneficiaries:

Tribal leaders and health directors felt that the Agency's position—that it does not have the authority to enter into contracts, compacts, or funding agreements where a Tribe may charge a co-payment to an eligible beneficiary—is inconsistent with the Susanville decision. This position stems from a misinterpretation of the ISDEAA on the part of IHS that is a misperception of inherent Tribal

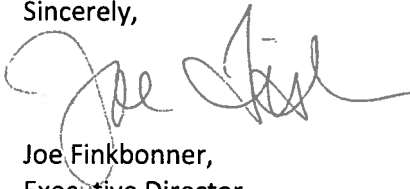
¹ See IHS PowerPoint at slides Nos. 6 and 9, "Tribes Charging Eligible Beneficiaries for Health Care Services," May 14, 2008.

² Id. at slide No. 7.

sovereignty under the policy of self-determination and self-governance. Clearly, the Susanville decision rejected the IHS position on this issue by ruling that Tribes have authority to charge co-payments under the ISDEAA and that future contract, compacts, and funding agreements should not be declined on this basis. This is a Tribal sovereignty issue allowed under the self-determination and self-governance policies and IHS should not interfere in the authority of a Tribe to carry out these policies.

We thank you for conducting the Tribal consultation session and the opportunity to provide our comment on this issue. If you should have any questions concerning our letter, please feel free to contact me directly.

Sincerely,

A handwritten signature in black ink, appearing to read "Joe Finkbonner". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Joe Finkbonner,
Executive Director

cc: Robert McSwain, IHS Director
Ron Demery, Acting Director, Office of Tribal Programs
Hankie Ortiz, Director, Office of Self-Governance