NORTHWEST PORTLAND AREA INDIAN HEALTH BOARD

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Yakama Nation

2121 SW Broadway
Suite 300
Portland, OR 97201
(503) 228-4185
(503) 228-8182 FAX
www.npaihb.org

July 25, 2018

Via email to: consultation@ihs.gov

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

RE: Section 105(l) Lease Funding "Dilemma"

Dear RADM Weahkee:

The Northwest Portland Area Indian Health Board (NPAIHB) is a P.L. 93-638 tribal organization[1] that represents forty-three federally recognized Tribes in Idaho, Oregon, and Washington. On behalf of our member Tribes, I am writing in response to your letter dated July 10, 2018, in which you initiated tribal consultation on how to fund leases under section 105(*l*) of the Indian Self-Determination and Education Assistance Act (ISDEAA). You propose to fund a $13 million FY 2018 shortfall by reprogramming funding from unallocated inflation increases, which would deny tribes needed program increases to keep pace with the cost of living. A better solution is to immediately seek a supplemental appropriation from Congress. In the long term, the Indian Health Service (IHS) must do a better job of tracking and projecting section 105(*l*) lease compensation requirements and obtain a separate appropriation dedicated to these costs.

As established in the *Maniilaq* case,[2] section 105(*l*) requires IHS, upon tribal request, to enter into a lease for a facility owned or leased by the Tribe or Tribal Organization and used to carry out its ISDEAA agreement. As acknowledged in your letter, IHS must compensate the Tribe or Tribal Organization fully for its reasonable facility expenses. The letter also recognizes that IHS has no separate appropriation or other funding source for 105(*l*) leases, but that the entire $3.95 billion Services appropriation is legally available to pay these mandatory obligations. But with most of that money already committed to ISDEAA agreements and other obligations, and with 105(*l*) leases comprising a

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[1] A "tribal organization" is recognized under the Indian Self-Determination Education Assistance Act (P.L. 93-638; 25 U.S.C. § 450b(1)) as follows: "[T]he recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities."

[2] *Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243 (D.D.C. 2016).

significant new (and growing) expense, IHS finds itself, as you say, in "a funding dilemma." With lease proposals totaling $18 million, and only $5 million identified as available, IHS faces a 105(*l*) lease funding shortfall of $13 million.

This dilemma is largely of the agency's own making. While the total cost of 105(*l*) leases has increased significantly in the last two years, an increase was predictable, and IHS should have done a better job of tracking and projecting lease costs. Worse, the Administration actually sought to *decrease* the supplemental tribal clinic appropriation that IHS has used to fund 105(*l*) leases and Alaska's Village Built Clinics (VBCs) from $11 million to $2 million. Congress retained the FY 2017 funding level of $11 million in FY 2018, but obviously that was not nearly enough to cover the 105(*l*) leases, let alone provide sufficient increases for the chronically underfunded VBCs.

IHS proposes to address the problem by reprogramming unallocated FY 2018 inflation increases. While this would avoid any program cuts, it would also reduce badly needed program increases. Reprogramming is always divisive, creating "winners" and "losers," as we saw in FY 2014 when IHS had to reprogram funds to cover contract support cost shortfalls. Direct service tribes rightly complained that they were being penalized, through no fault of their own, for the agency's failure to estimate and obtain the needed amounts. Similar tension can be expected if the proposed reprogramming of inflation funding goes forward.

There is a better solution: to seek and obtain a supplemental appropriation of $13 million (at least) from Congress. IHS can make the case that an unforeseen (though foreseeable) new cost arose following a recent court decision and IHS needs supplemental funding as a bridge to a permanent, long-term solution starting in FY 2019.

We understand that this consultation is focused on FY 2018 and that an additional consultation will be held on "sustainable options" for FY 2019 and beyond. But with the FY 2019 appropriations bills working their ways through Congress with only modest increases for tribal clinics, we would like to make a few brief points on long-term solutions.

First, the Administration should cease proposing appropriations act language that seeks to overturn the *Maniilaq* decision and essentially nullify section 105(*l*) by making lease compensation discretionary. This backdoor attempt to revoke a provision of the ISDEAA through an appropriations rider is contrary to Congressional intent in the ISDEAA and the trust responsibility to Tribes.

Second, IHS must get a handle on these lease costs and ensure that the appropriations committees are well informed. IHS should submit annually an estimate of its need for 105(*l*) lease compensation early in the budget cycle—not ¾ of the way through the fiscal year—so

that the committees have solid numbers to take into account as the appropriation process unfolds each year.

Third, as you discussed with Senator Murkowski at the recent hearing of the Senate Interior Appropriations Subcommittee, section 105(*l*) lease costs can be expected to rise in the coming years. There is no way around it: more resources will be needed. We recommend that IHS advocate for a separate funding line for 105(*l*) leases, as you suggested at the hearing, rather than being lumped in with the VBCs in the "tribal clinics" appropriation. Given the difficulty in predicting lease costs, ultimately the best solution may be a separate, indefinite appropriation such as Congress created for contract support costs. This would ensure full funding for 105(*l*) leases without cutting programs and hurting patients. It would also avoid tension and possibly litigation between IHS and Tribes regarding allocation of funding.

Thank you for the opportunity to comment on this important funding issue. We stand ready to assist IHS in advocating with Congress for additional resources to address this issue.

If you have any questions about the information provided above, please contact Laura Platero, NPAIHB Governmental Affairs/Policy Director at lplatero@npaihb.org or by phone at 503.407.4082.

Sincerely,

Andrew C. Joseph Jr.

Andy Joseph, Jr., Chair
NW Portland Area Indian Health Board
Vice Chair, Colville Tribal Council