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May 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 Northwest Portland Area Indian Health Board or NPAIHB, 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 The consultation begins some five months after IHS unilaterally rescinded the 97/3 option, drawing widespread criticism from around Indian country—some of which you heard in person at the CSC Workgroup meeting in Albuquerque in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 The rescinded provision gave tribes a choice between two methods: (1) a "case-by-case detailed analysis" of indirect costs transferred in the Secretarial amount; or (2) a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,

Andy Joseph, Jr., Chairperson
NW Portland Area Indian Health Board
Colville Tribal Council Member