

IHS TRIBAL SELF-GOVERNANCE ADVISORY COMMITTEE

c/o Self-Governance Communication and Education

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Via E-mail: Denise.Turk@ihs.gov

April 8, 2015

Mr. Robert G. McSwain, Acting Director
Indian Health Service The Reyes Building
801 Thompson Ave., Suite 400
Rockville, MD 20852

RE: Payment of Contract Support Costs for MSPI and DVPI funding

Dear Acting Director McSwain:

Thank you for your participation in our most recent quarterly meeting in Washington, DC on March 24, 2015. We write to confirm our understanding of our discussions on the eligibility of the Methamphetamine and Suicide Prevention Initiative (MSPI) and Domestic Violence Prevention Initiative (DVPI) funds for additional Contract Support Costs (CSC) funding. This issue was described more fully in a letter to you on March 11, 2015 from the Alaska Tribal Health Compact and in a letter to the IHS TSGAC from Lee Olson, Vice President of Finance which was provided and discussed at our meeting with you. Both letters are attached.

In our TSGAC discussion and as noted in the referenced letters, it was pointed out that in 2010, after considerable discussion with the TSGAC, the Director committed in writing that all MSPI and DVPI funds would be eligible for CSC funding on the same basis as any other new or expanded IHS program or function. The Director's letter also noted that the payment of such funding would be subject to the availability of appropriations. After that letter issued, the agency's shortfall reports prepared for Congress included CSC requirements associated with MSPI and DVPI funds. Despite these commitments, and without any prior Tribal consultation, in the 2014 funding cycle the agency reversed its position and announced that no CSC funding would be added to MSPI and DVPI funds; instead, the MSPI and DVPI programs would have to absorb such costs internally.

MSPI and DVPI funds are program funds intended to be committed to the provision of critically needed services. Adding CSC funding to the MSPI and DVPI funds allow the full amount of MSPI/DVPI program funding to be used to provide health services. Conversely, requiring that the MSPI and DVPI funds absorb all of the overhead costs usually covered by CSC funding, means that such program funds will suffer an average 25% cut. That is what occurred in 2014.

In an era of full CSC funding there is even less reason than there was before to require recipients to divert precious program dollars to fund these fixed overhead costs. There is even less reason to do so when an unappealed federal court decision (which is now final and binding on the agency) declared that the MSPI and DVPI programs are subject to the Indian Self-Determination and Education Assistance Act.

We ask that the agency review this issue and that, as you committed in our meeting, provide a final decision to Tribes on the eligibility of MSPI/DVPI for additional CSC funds within 30 days. Thank you in advance for your attention to this matter.

If you would like to discuss further, please do not hesitate to contact me at (860) 862-6192; or via email: lmalerba@moheganmail.com. Thank you.

Sincerely,

A handwritten signature in cursive script, reading "Lynn Malerba".

Chief Marilynn (Lynn) Malerba
Chair, Tribal Self-Governance Advisory Committee

cc: P. Benjamin Smith, Director, Office of Tribal Self Governance
Lee Olson, Vice President for Finance, Southcentral Foundation

Enclosures: March 11, 2015 Letter to Robert McSwain from the Alaska Tribal Compact
February 27, 2015 Letter to Lynn Malerba from Southcentral Foundation

February 27, 2015

 TB 3/11/15

Lynn Malerba, Chairwoman
IHS Tribal Self-Governance Advisory Committee
c/o Self-Governance Communication and Education
P.O. Box 1734
McAlester, OK 74501

Re: CSC associated with MSPI and DVPI awards

Dear Chairwoman Malerba,

Southcentral Foundation (SCF) writes to request TSGAC's assistance in raising an issue that is critically important for self-governance Tribes: the right to additional contract support cost (CSC) funding associated with the funds provided by IHS for the Methamphetamine and Suicide Prevention Initiative (MSPI) and Domestic Violence Prevention Initiative (DVPI) programs. We believe the agency's approach to this issue in prior years and its recent assertions that these programs are not eligible for CSC funding are concerning and undermine the goals of self-governance.

I. Background.

Congress first appropriated funds for the MSPI in 2008, and first appropriated DVPI funds in 2009. Congress directed that both of these funds "shall be allocated at the discretion of the Director of the Indian Health Service." The point of that phrase was to ensure these funds would go to the areas that needed them the most. Dr. Roubideaux echoes this sentiment in her recent "Dear Tribal Leader Letter," stating "[t]he goal of MSPI and DVPI was to ensure that the limited funding available goes to those with the greatest need." IHS distributed these funds to contracting and compacting Tribes and tribal organizations through amendments to each Tribe's annual funding agreement. These amendments always occurred late in the fiscal year after the agency had already spent its entire CSC appropriation. Therefore, the agency agreed to recognize the Tribe's CSC need associated with these programs, although it could not provide additional CSC funding at the time the amendments were issued.

TSGAC was concerned with this situation and former TSGAC Chairman Jefferson Keel wrote directly to Dr. Roubideaux in 2009, asking her to adjust the MSPI funding timeline and to provide full CSC associated with these program funds. Dr. Roubideaux responded with a letter of her own, stating "[t]he language required for the MSPI awards is the same language IHS requires for other new and expanded programs." (Emphasis added.) In other words, Dr. Roubideaux agreed these program funds were just as eligible for CSC funding support as are any other new or expanded program funds. But Dr. Roubideaux also noted the practical problem posed by the fact that the capped

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appropriation had already been spent. She said “However, in the case of the MSPI, additional contract support cost (CSC) funds were not available because the IHS had allocated all available CSC funds to existing Tribal contracts and compacts.” To be clear, the only reason Dr. Roubideaux gave for not providing more CSC funding involved the statutory cap on CSC, and that all the capped funds had already been spent. Dr. Roubideaux assured then-Chairman Keel that the “MSPI CSC need will be included in the annual CSC Shortfall Report to Congress.”

As time passed—but without any consultation with TSGAC—the agency made an about face and developed a new theory that no CSC funding was due. The agency took the position that because these programs were special initiatives they were not covered by the ISDA and therefore were not eligible for any additional CSC funding. Eventually, SCF litigated the issue to establish that these funds were definitely covered by the ISDA, and to force the agency to accept that our CSC need associated with these programs went beyond the amounts specified in our program budgets.

II. IHS’s Request for Comments

Dr. Roubideaux recently issued a “Dear Tribal Leader Letter,” requesting input on all aspects of the MSPI and DVPI programs. One portion of the letter requests comments on the funding mechanisms used to distribute these funds. The letter again proclaims that “[b]ecause these are special initiatives, they are not funded through the ‘Secretarial amount’ which comprises funding for recurring [PSFAs].” Based upon this flawed premise, Dr. Roubideaux now concludes that these funds are not entitled to CSC funding. This is, of course, 180 degrees contrary to what Dr. Roubideaux wrote to Chairman Keel in 2009.

Why is this approach problematic?

First, it is contrary to the commitments Director Roubideaux made to the TSGAC.

Second, it is contrary to the ISDA. As self-governance Tribes we have a statutory right to receive program funds and an additional award for CSC. 25 U.S.C. § 450j-1(a). Nowhere does the ISDA limit CSC funding to recurring PSFAs. Nowhere does the ISDA exempt special initiative funding from the CSC mandate. Nowhere does the ISDA grant the Secretary discretion to decide which funds are “Secretarial amount” funds and which funds do not fall in that category.

Third, this is a dangerous precedent. By IHS’s new reckoning, the agency could easily eliminate CSC funding for all new programs and for all nonrecurring programs. Just as Tribes have voiced concern that the BIA is seeking to convert new programs into “grants.gov” programs exempt from the CSC mandate, self-governance Tribes should be concerned with IHS’s attempt to do the same with MSPI/DVPI funds. Again, if IHS succeeds in establishing that these “special initiatives” are exempt from the ISDA’s funding provisions, it can easily extend that interpretation to many other types of funds.

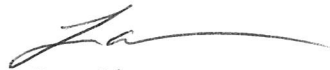
IHS is on thin ice. No doubt for that reason, last year IHS required that Tribes waive their statutory CSC rights as a condition to getting MSPI/DVPI funding—something that is absolutely antithetical to the entire principle of tribal self-governance.

IHS has clearly gone back on its 2009 commitment to the self-governance Tribes. It must be held accountable. Now that we are in an era of full funding, IHS should be compelled to pay our full CSC needs required to carry out our MSPI and DVPI programs.

III. Conclusion.

IHS's shift in the management of MSPI and DVPI programs is deeply concerning. We encourage TSGAC to raise this issue with the agency and convey to IHS that controlling law requires payment of CSC funds on these critically needed program funds.

Sincerely,



Lee Olson
Vice President of Finance

Alaska Tribal Health Compact

C/O Alaska Native Health Board
4000 Ambassador Drive, Suite 101
Anchorage, AK 99508

March 11, 2015

Robert G. McSwain, Acting Director
Indian Health Service
The Reyes Building
801 Thompson Ave., Suite 400
Rockville, MD 20852

RE: Comments on Administration's Position on CSC Payments on MSPI and DVPI programs.

Dear Acting Director McSwain:

We write on behalf of the Alaska Tribal Health Compact (ATHC) tribal co-signers about the IHS' position on the right of tribal contractors to be paid additional contract support cost (CSC) funding associated with the funds provided by IHS for the Methamphetamine and Suicide Prevention Initiative (MSPI) and Domestic Violence Prevention Initiative (DVPI) programs. The Caucus believes the IHS' current position that these programs are not eligible for CSC funding is incorrect and fundamentally undermines the rights of caucus members under the ATHC.


By way of background, Congress first appropriated funds for the MSPI in 2008, and first appropriated DVPI funds in 2009. Congress directed that these funds "shall be allocated at the discretion of the Director of the Indian Health Service." This language was intended to ensure these funds would go to the areas that needed them the most. Dr. Roubideaux echoes this sentiment in her recent "Dear Tribal Leader Letter," stating "[t]he goal of MSPI and DVPI was to ensure that the limited funding available goes to those with the greatest need." IHS distributed these funds to tribes with contracts and compacts through amendments to annual funding agreements. Historically, these amendments always occurred late in the fiscal year after the agency had already spent its entire CSC appropriation. As a result, the IHS routinely recognized a tribal contractor's CSC need associated with these programs, although it could not provide additional CSC funding at the time the amendments were issued.

As time passed and without explanation or consultation the IHS changed its position and argued that because these programs were special initiatives they were not covered by the ISDA and therefore were not eligible for any additional CSC funding. Eventually, the Southcentral Foundation, one of the caucus members, had to litigate the issue to establish that these funds were definitely covered by the ISDA, and to force the agency to accept that our CSC need associated with these programs went beyond the amounts specified in our program budgets.

Dr. Roubideaux recently issued a "Dear Tribal Leader Letter," requesting input on all aspects of the MSPI and DVPI programs. One portion of the letter requests comments on the funding mechanisms used to distribute these funds. The letter again proclaims that "[b]ecause these are special initiatives, they are not funded through the 'Secretarial amount' which comprises funding for recurring [PSFAs]." Based upon this flawed premise, Dr. Roubideaux now concludes that these funds are not entitled to CSC funding.

Co-signers strongly disagree with this position and urge you to return to the IHS' past practice, reflected in a 2010 letter to former TSGAC Chairman Jefferson Keel, to calculate contract support costs on all MSPI and DVPI funds. Thank you for the opportunity to address this critical issue. If you have any questions about these comments, please do not hesitate to contact the Alaska Native Health Board (ANHB) at 907-562-6006 or anhb@anhb.org. ANHB is the statewide advocacy organization and voice for the Alaska Tribal Health System, assisting state and federal agencies with achieving effective communication and consultations with tribes and their tribal health programs.

Sincerely,



ATHC Co-Lead Negotiator,
Natasha Singe



ATHC Co-Lead Negotiator,
Rosalie Tepp

cc: Alaska Congressional Delegation