

# IHS TRIBAL SELF-GOVERNANCE ADVISORY COMMITTEE

c/o Self-Governance Communication and Education

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Mr. Robert McSwain, Principal Deputy Director  
Ms. Mary Smith, Deputy Director  
Indian Health Service  
The Reyes Building  
801 Thompson Avenue, Suite 400  
Rockville, MD 20852

**RE: Interpretation of Duplication Provision in 25 U.S.C. § 450j-1(a)(3)**

Dear Principal Deputy Director McSwain and Deputy Director Smith,

On behalf of Tribal Self-Governance Advisory Committee (TSGAC) and Self-Governance Tribes, we write to express our serious concern over the Indian Health Service's recent reinterpretation of the duplication provision found in the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. § 450 *et seq.* The agency's new position that duplication is based on categories of funding, rather than the actual dollars provided in the Secretarial amount, drastically lowers the amounts owed to Tribes and Tribal organizations and is not supported by the statute or IHS's own Manual.

We respectfully urge IHS to restore its prior position that funding for contract support costs will only be considered duplicative to the extent amounts for those items have been transferred in the Secretarial amount.

***I. The ISDA's Duplication Provision Forecloses the Agency's New Position on Duplicated Costs***

The ISDA provides that a Tribe's contract support cost requirement may not duplicate funds already being paid as part of the Secretarial amount. The Act could not be clearer that contract support costs include:

any additional administrative or other expense related to the overhead incurred by the Tribal contractor in connection with the operation of the [IHS program under] contract, except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.<sup>1</sup>

The focus on "funding," not functions, is beyond reasonable debate. It is funding amounts that are potentially duplicated, not functions.

This straightforward reading of the statute is confirmed by this provision's legislative history. Section 450j-1(a)(3)(A)(ii) was added to the ISDA in 1994 to "assure against any inadvertent double payment of contract support costs which duplicate the Secretarial amount already included in the

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<sup>1</sup> 25 U.S.C. § 450j-1(a)(3)(A)(ii) (emphasis added).

contract.”<sup>2</sup> Since the 1994 ISDA amendments expanded the definition of CSC, the duplication provision assured that, notwithstanding that expansion, Congress was not authorizing the agency to pay the same costs twice and thus make a “double payment.” That is all the duplication provision means; it is not a categorical bar against the payment of additional costs necessary to carry out a contract.

Section 450j-1(a)(3)(A)(ii)’s plain meaning is also supported by Congress’s overall motivation for expanding the definition of CSC in 1994. Congress amended the Act to make clear that “[i]n the event the Secretarial amount under section 106(a)(1) for a particular function proves to be insufficient in light of a contractor’s needs for prudent management of the contract, contract support costs are to be available to supplement such sums.”<sup>3</sup> Congress was concerned that if CSC could not “supplement such sums,” program funds would have to be used to cover the required costs:

[T]he Committee’s objective [was] to assure that there is no diminution in program resources when programs, services, functions or activities are transferred to Tribal operation. In the absence of the [amended section], a tribe would be compelled to divert program funds to prudently manage the contract, a result Congress has consistently sought to avoid.<sup>4</sup>

The Act and its legislative history are therefore abundantly clear that any duplication reduction of a Tribe’s CSC requirement must be based upon a showing of duplicate amounts already being funded within the Secretarial amount.

The agency’s new focus on duplicate functions produces the very result Congress in 1994 sought to avoid—the diversion of program dollars to pay overhead costs. This will occur because if, as a result of the agency’s new approach, a Tribe is denied a portion of the full funding it requires to carry out an overhead function, the Tribe will be forced to divert program funds to cover its higher costs. That outcome defeats the core purpose of the statute’s contract support cost provisions—which was to eliminate “the onerous choice [contracting Tribes confronted] of either reducing the level of services to pay for administrative costs, or else reducing their level of effort to maintain their administrative systems.”<sup>5</sup>

The agency’s new focus on duplicate functions is also illogical. The agency’s new approach makes no sense because it means that if the agency includes any sum for a particular overhead function in the original Secretarial amount—even just one dollar—that fact categorically bars the Tribe from being paid the remainder of the contract support costs necessary to perform that function. That nonsensical outcome is avoided when Congress is taken at its word, so that the duplication provision merely recognizes that some overhead and other CSC functions are partly funded by the Secretarial amount (albeit at levels below what a Tribe finds necessary to carry out those functions), with the

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<sup>2</sup> 140 CONG. REC. 28,326 (1994) (comments of Sen. McCain regarding proposed amendment of S. 2036); 140 CONG. REC. 28,629 (1994) (notes to Committee amendment of H.R. 4842) (emphasis added).

<sup>3</sup> 140 CONG. REC. 28,631 (1994) (section-by-section analysis of proposed amendments to the CSC provisions of the Act) (emphasis added).

<sup>4</sup> *Id.*

<sup>5</sup> S. REP. NO. 100-274, at 13 (1987); *see also* S. REP. NO. 103-374, at 9 (1994).

remainder of the required amount covered with CSC funds. After all, Congress emphasized that CSC funding “shall not duplicate any funding provided under subsection (a)(1),”<sup>6</sup> not that it shall not “duplicate any function funded under subsection (a)(1).”

The agency’s new focus on duplicate functions would also render the ISDA’s duplication provision superfluous. If no function funded through the Secretarial amount could ever also be funded through the contract support cost amount, there would be no need for the duplication provision in the first place. The duplication provision only makes sense, and can only be given meaningful effect, if it means that functions can be partially funded from both sources, so that it becomes necessary to assure against any “double payment.”

Finally, the agency’s new focus on duplicate functions is also contrary to other provisions of the Act. The ISDA states that contract support cost funding is intended to provide for a Tribe’s overhead and administrative costs in whatever amount is “reasonable” for activities that “must be carried on” in order to “ensure compliance with the terms of the contract and prudent management.”<sup>7</sup> There is nothing in the statute that limits the activities that CSC funding can cover, nor that caps the payment of any of these activities to the amount the Secretary once spent (or budgeted) for a particular overhead activity. If the agency’s new focus on duplicate functions were correct, a Tribe would have no contract support cost requirement other than for the very few unique costs that IHS never incurs (such as audit costs and workers compensation premiums)—a result that would eliminate most of the very costs that Congress declared shall be “eligible” contract support cost funding under 25 U.S.C. § 450j-1(a)(3).

In short, the agency’s new position is contrary to the Act. The correct rule is this: so long as the additional costs the Tribe claims are reasonable and necessary for the Tribe to prudently carry out the contract, then those additional costs are eligible for CSC funding.

***II. The IHS Manual, like Prior Agency Guidelines, Correctly Adopts a Duplicated Cost—and Not a Duplicated Function—Approach to Contract Support Cost Calculations***

Contrary to the agency’s new approach, the IHS CSC Manual<sup>8</sup> expresses the agency’s longstanding position that most CSC functions are funded by both the Secretarial amount and the CSC amount, and that this is the general rule rather than the exception. One of the best examples is found in the Manual’s treatment of direct contract support costs associated with personnel fringe benefits (an approach IHS just reaffirmed this year<sup>9</sup>). For instance, when IHS is administering a program, it routinely pays for various fringe benefits for agency employees, including retirement and insurance. A Tribe incurs the very same types of costs when carrying out an ISDA contract. When a given IHS program is contracted to a Tribe, typically fringe benefit dollars will be transferred to the Tribe as part of the Secretarial amount. Since a Tribe’s fringe benefit costs are usually higher than

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<sup>6</sup> 25 U.S.C. § 450j-1(a)(3).

<sup>7</sup> 25 U.S.C. § 450j-1(a)(2).

<sup>8</sup> See Indian Health Manual (IHM) Part 6, Chapter 3, Exh. 6-3-H.

<sup>9</sup> Tribal Leader Letter from Acting Director Robert G. McSwain (May 22, 2015) (implementing the Manual’s approach of offsetting federal fringe benefit amounts paid in the Secretarial amount against a Tribe’s fringe benefit amounts to compute a non-duplicated net Tribal CSC requirement for additional fringe benefit costs).

the agency's, the Manual provides that the Tribe's CSC requirement will be computed as the additional costs, over and above the federal fringe already paid to the Tribe, that the Tribe requires to cover its full fringe costs.<sup>10</sup>

The Manual's approach to computing direct contract support cost requirements for fringe benefits is utterly inconsistent with the agency's new approach to duplicated functions. This is the case because if duplicated "functions" were a disqualifier under the Act's duplicated cost provision, a Tribe would never be entitled to any CSC payments associated with most fringe benefits (contrary to the Manual's approach to this issue). The Manual's provisions are not a mere holdover from a now-discarded agency view of the law; only a few months ago IHS reaffirmed this approach to duplicated costs, agreeing that Tribes are eligible for additional CSC payments when the Secretarial amount paid for a particular DCSC fringe activity is insufficient to meet the Tribe's full requirement for that very same fringe activity.<sup>11</sup> Indeed, this has long been agency practice.<sup>12</sup>

Another example of duplicated functions is reflected in the Manual's provision for negotiating Tribal CSC requirements when a Tribe does not have an indirect cost rate, in order to determine a CSC amount for personnel, procurement, financial management and other administrative functions.<sup>13</sup> Even though IHS has the very same types of overhead costs, the Manual does not invoke a "duplicated function" rule and disqualify a Tribe from negotiating a CSC amount for these costs. Instead, the Manual contemplates just the opposite, a negotiation leading to a CSC payment to cover those Tribal costs.<sup>14</sup>

A last example is reflected in the Manual's treatment of Tribal share funding, where the Manual acknowledges that when Area and Headquarters "Tribal Shares" are paid to a Tribe as part of the Secretarial amount, they include a significant portion of administrative overhead costs. Under the Manual, the fact that Headquarters and Area Tribal Shares include some overhead costs does not disqualify a Tribe from seeking additional CSC for the same types of overhead costs. To the contrary, the Manual assumes a Tribe's costs are higher and specifies a shorthand calculation to determine the duplicate portion of the Headquarters and Area Tribal Shares amounts. In this shorthand method, 20% of the Headquarters and Area Tribal Shares are deemed to cover these types of overhead costs and therefore "[are] considered available for CSC."<sup>15</sup> This 20% portion is then credited to the agency

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<sup>10</sup> See, e.g., IHM Exh. 6-3-H ("Fringe benefits have historically constituted the majority of all DCSC [direct contract support costs]. The Agency reviews the documented amounts requested by the awardee and deducts the amount provided as part of the Section 106(a)(1) amount to the awardee.").

<sup>11</sup> Tribal Leader Letter from Acting Director Robert G. McSwain (May 22, 2015), at 3.

<sup>12</sup> See, e.g., Indian Health Service Circular 2004-03, Exh. 2004-03-H.

<sup>13</sup> See, e.g., IHM § 6-3.2E(2) (showing indirect contract support costs often include financial management, personnel management, records management, office services, etc.).

<sup>14</sup> See also 25 U.S.C. § 450j-1(a)(3)(A)(ii) (costs eligible for CSC include "any additional administrative or other expense related to the overhead incurred by the Tribal contractor in connection with the operation of the Federal program . . ." (emphasis added)).

<sup>15</sup> IHM § 6-3.2F(2).

as a dollar-for-dollar offset against the Tribe's total contract support cost need.<sup>16</sup> Here, again, the IHS Manual makes perfectly clear that it is not only permissible, but routine, for there to be overlapping categories of costs covered by both the Secretarial amount and the contract support cost amount. When such overlap occurs, the Manual calls for a dollar-for-dollar credit to eliminate any duplication in funding. The agency's new position on duplicated functions, rather than amounts, is therefore not only contrary to the Act but contrary to the agency's approach to this very issue in the agency's own Manual.

### **III. Conclusion**

The most natural reading of the ISDA's duplication provision, the one supported by its legislative history, and the one reflected in IHS's own Manual, is that subsection (a)(3) calls for a dollar-for-dollar offset when a category of CSC funding is duplicated in the Secretarial amount. The newly-developing agency position that would categorically disqualify all of a Tribe's CSC requirement for a function if any funding for that function was originally included in the Secretarial amount, is contrary to law, arbitrary, and inconsistent with the agency's longstanding and continuing practice under the IHS Manual. Not only must IHS administer ISDA contracts in conformity with the law; it must interpret any ambiguities in the law in favor of contracting and compacting Tribes.<sup>17</sup> IHS's new interpretation of the statutory duplication provision does not comply with this requirement.

**In closing**, we therefore respectfully request that the agency abandon its new interpretation of the ISDA's duplication provision. We look forward to your continued engagement with us on this critical matter. If you have any questions, you can reach me at (860) 862-6192; or via email: [lmalerba@moheganmail.com](mailto:lmalerba@moheganmail.com). Thank you.

Sincerely,



Chief Lynn Malerba, Mohegan Tribe  
Chairwoman, TSGAC

cc: P. Benjamin Smith, Director, Office of Tribal Self-Governance (OTSG)  
TSGAC Members and Technical Workgroup

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<sup>16</sup> IHM Exh. 6-3-C. This offset is applied in a similar manner if a Tribe does not wish to use the 80-20 shorthand formula for calculating the credit amount. In that case, the Manual specifies an alternative procedure for determining duplication: "[Area Office and Headquarters] Tribal shares will be reviewed to identify types of costs that are duplicative of costs that are already included in the awardee's IDC [indirect cost] pool, or are proposed to be funded as DCSC. The costs already in the awardee's IDC pool or DCSC budget will be considered as duplicative of the Tribal shares for purposes of funding IDC for administrative or 'overhead' purposes (Section 106(a)(3)(A)(ii))." IHM § 6-3.2F(1). *See also* IHM Exh. 6-3-B (noting "assumption" in item 2 that an amount of "Tribal shares is similar in nature to costs included in Tribe B's indirect cost pool," and making a corresponding credit adjustment). This language again makes clear that overhead costs can appear both in the Secretarial amount for a Tribe's Tribal share of the regional Area Office, and also in the Tribe's contract support cost requirement, subject to a credit adjustment to eliminate any double payment.

<sup>17</sup> *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2191 (2012) ("Contracts made under the ISDA specify that '[e]ach provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor . . .'" (citing 25 U.S.C. § 450l(c) (Model Agreement, § 1(a)(2)))); *see also* 25 U.S.C. § 458aaa-11(f); 25 C.F.R. 900.3(a)(5), (b)(11); 42 U.S.C. § 137.2(d).