

IHS TRIBAL SELF-GOVERNANCE ADVISORY COMMITTEE

c/o Self-Governance Communication and Education

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Sent Electronically to sgreport@ihs.gov

September 27, 2016

Mary Smith, Principal Deputy Director
Indian Health Service
Mail Stop: 08E86
5600 Fishers Lane
Rockville, MD 20857

Re: Comments on FY 2015 Report to Congress on Administration of the Tribal Self-Governance Program

Dear Principal Deputy Director Smith:

On behalf of the Indian Health Service (IHS) Tribal Self-Governance Advisory Committee (TSGAC), I write to provide comments on the Fiscal Year 2015 Report to Congress on the Administration of the Tribal Self-Governance Program. TSGAC appreciates the opportunity to submit these comments in response to your recent letter to Tribal leaders dated August 21, 2016.

As you know, this Report is required by law annually under § 514 of the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 458aaa-13. Subsection 514(b)(4) requires that each annual report to Congress, before being submitted to Congress, be distributed to Tribes for comment. Subsection 514(b)(5) requires that each annual report to Congress include the separate views and comments of the Tribes and Tribal organizations.

TSGAC previously submitted comments and recommendations, as recently as last year, to improve the annual report so that it meets the statutory requirements outlined in ISDEAA. Unfortunately, the FY 2015 Report does not reflect recommendations made in 2015 on the FY 2014 and do not meet the statutory requirements. As such, we find it necessary to spell out the statutory requirements for this report.

- Subsection 514(a)(2) requires that each annual report to Congress include a detailed analysis of the level of need being presently funded or unfunded for each Tribe, either directly by the Secretary, under Self-Determination Contracts, or under Self-Governance Compacts and Funding Agreements.
- Subsection 514(b)(2) of the ISDEAA requires, in addition, that each annual report to Congress identify:
 - (A) The relative costs and benefits of self-governance;
 - (B) With particularity, all funds that are specifically or functionally related to the provision by the Secretary of services and benefits to self-governance Indian Tribes and their members;

- (C) The funds transferred to each self-governance Indian tribe and the corresponding reduction in the Federal bureaucracy;
 - (D) The funding formula for individual Tribal shares of all headquarters funds, together with the comments of affected Indian Tribes and Tribal organizations, developed under § 514(c); and
 - (E) Amounts expended in the preceding fiscal year to carry out inherent Federal functions, including an identification of those functions by type and location.
- Subsection 514(b)(3) further requires that each annual report to Congress also contain a description of the method or methods (of any revisions thereof) used to determine the individual Tribal share of funds controlled by all components of IHS (including funds assessed by any other Federal agency) for inclusion in Self-Governance Compacts or Funding Agreements.

Given the statutory requirements, TSGAC provides the following comments to revise the FY 2015 Report and to improve future Congressional reports that are more responsive to the statutory reports.

1. **Include an analysis of level of need funded and unfunded.** The report does not contain any analysis of the level of need, being presently funded or unfunded for each Tribe. However, IHS does have data to evaluate the level of need funded and unfunded for Tribes and Service Units. IHS should work with Tribes to develop a data analysis and the best method to present the outcomes within the future Tribal Self-Governance Program reports.
2. **Expand on examples of benefits of Self-Governance.** There is no analysis of the relative costs and benefits of Self-Governance as required by § 514(b)(2)(A). This statutory requirement is reasonably read to require the IHS to conduct a cost/benefit analysis with examples of how Tribes have successfully redesigned their compacted programs in a cost effective way to improve program performance for the benefit of their communities. Instead, the report simply provides a listing of possible actions that Tribes might undertake and refers to the next section that lists the total amounts that Headquarters and the Area Offices have expended for Self-Governance. This is not responsive to the statutory requirement and does not accurately illustrate the tremendous success the Tribal Self-Governance Program brings to the Indian Health System.

Self-Governance Tribes have reduced Federal administration of health care in Tribal communities while providing culturally competent care, expanding local services, and strengthening Tribal economies. This report is an opportunity to let Congress know about how Tribes participating in Self-Governance have redesigned programs, leveraged other Federal resources, and created partnerships with the private sector to expand services and improve care for their communities. It is an opportunity to inform Congress of specific examples of program successes and the language on page 5 leaves much to be desired.

3. **Specify other department funding available to enhance Tribal Self-Governance Program.** The listing of total amounts expended by IHS Headquarters and IHS Area Offices in Section E does not comply with ISDEAA requirement to provide “with

particularity, all funds that are specifically or functionally related to the provision by the Secretary (HHS) of services and benefits to Self-Governance Indian Tribes and their members.” HHS agencies provide funding to Tribes to enhance and complement their Self-Governance programs. These activities should be included in the report.

4. **Provide a corresponding analysis of reduction in Federal bureaucracy.** While Section F of the Report does show funds transferred to each Tribe in Exhibit A, there is no analysis or illustration of any corresponding reduction in the Federal bureaucracy as required by ISDEAA. The simplistic statement provided does not provide valuable or informative data to Congress that Title V is achieving one of its stated goals, “to provide for a measurable parallel reduction in the Federal bureaucracy as programs, services, functions, and activities (or portions thereof) are assumed by Indian Tribes.” As previously recommended, TSGAC suggests a more detailed description and year-to-year comparison to measure reductions in Federal bureaucracy and further illustrate the Tribal Self-Governance Program success. The requirement in ISDEAA necessitates measurable outcomes, not just a vague statement about Federal actions prior to the formal establishment of Title V.
5. **Clarify inherent Federal functions by type and location.** ISDEAA requires that IHS include the “amounts expended in the preceding fiscal year to carry out inherent Federal functions by type and location.” Despite sharing the residuals total, it is not clear what functions the IHS continues to provide to Self-Governance Tribes using the IHS Headquarters residual amount, nor is the report specific about how this amount is determined annually. This number also does not accurately reflect the amount of funding IHS Area Offices retain to carry out inherent Federal functions.

There are criteria for identifying inherent Federal functions, which the Report could reference. The term “inherent Federal functions” is defined in § 501(a)(4) as meaning “those Federal functions which cannot lawfully be delegated to Indian Tribes.” The Federal Activities Inventory Reform Act of 1998 (FAIR), P. L. 105-270 (112 Stat. 2382-2385), codified as a note to 31 U.S.C. § 501, defines an “inherently governmental function” as meaning “a function that is so intimately related to the public interest as to require performance by Federal Government employees.”

The FAIR lists certain types of activities, involving the interpretation and execution of Federal laws, which determine whether a function is inherently governmental. OMB Circular A-76 also is a source for defining inherently governmental functions by type, as well as a recent Policy Letter 11-01 dated September 12, 2014 (76 Federal Register 56227). These sources could be used to respond more adequately to the statutory requirement in § 514(b)(2)(E).

6. **Provide additional opportunity for Tribal input.** This annual report is a unique opportunity for IHS to share the success of Self-Governance. However, the Agency has not made recommended improvements. Prior to development and release of the Report, TSGAC respectfully requests to work together to implement the changes requested above.

In closing, TSGAC appreciates the opportunity to submit comments on this Report and looks forward to working with you on future Reports. Should you have any questions or if I can provide any additional information, please contact me at lmalerba@moheganmail.com.

Sincerely,



Chief Lynn Malerba, Mohegan Tribe of Connecticut
Chairwoman, IHS TSGAC

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