

# PASCUA YAQUI TRIBE

## OFFICE OF THE CHAIRMAN



January 5, 2018

***Sent via Certified Mail and Email***

RADM Michael D. Weahkee, MBA, MHSA  
Acting Director, Indian Health Service  
Mail Stop 08E37A  
5600 Fishers Lane  
Rockville, MD 20857  
[Michael.weahkee@ihs.gov](mailto:Michael.weahkee@ihs.gov)

***RE: Recommended Decision Upholding IHS Denial of Final Offer***

Dear Acting Director Weahkee:

I am writing on behalf of the Pascua Yaqui Tribe to request that you reverse the recommended decision of Christopher Mandregan announced by letter to me dated December 22, 2017. I am attaching a copy of the recommended decision for reference. Mr. Mandregan presided at an informal conference requested by the Tribe at Rockville, Maryland on December 12, 2017. The purpose of the informal conference was to bring IHS and Tribal representatives together informally to attempt to resolve the IHS's rejection of the Tribe's final offer proposing that the following language be added to Tribe's self-governance funding agreement (FA):

Until such time as full appropriations are available, the Tribe shall be paid its pro-rata share of any funds it is entitled to through Continuing Resolutions within (10) days of such funds being apportioned by OMB.

The proposed language acknowledges that Congress for a number of years has not provided full-year annual appropriations to the IHS. Instead, Congress has provided appropriations through Continuing Resolutions (CRs) for shorter periods of time. The 10 day pay rule is required in Section 508 (25 U.S.C. § 5388) of the Indian Self-Determination and Education Assistance Act (ISDEAA) to assure that self-governance tribes receive timely funding from IHS after OMB apports appropriated funds to the IHS. The proposed language will require the IHS to transfer the Tribe's pro-rata share of funds within 10 days of OMB apportionment, whether Congress appropriates funds through full-year annual appropriations or through CRs. A continuing funding stream within 10 days of OMB apportionment is very important to the Tribe in order for the Tribe to carry out its compacted tribal health program under the ISDEAA. For this reason, IHS has agreed to the same language the Tribe is proposing here in other FAs with other self-governance tribes.

Instead of agreeing to the same language in the Tribe's FA, IHS representatives said they were wrong to agree to this language in other FAs, because apportionment did not apply to CR

appropriations, only to full-year annual appropriations. This is the basis for the recommended decision. However, this is contrary to apportionment law.

What OMB apportionment does is switch-on a federal agency's ability to obligate and spend appropriated funds. OMB must first apportion appropriated funds to an agency in order for the agency to have the authority to expend or obligate appropriated funds. The apportionment process is governed by 31 U.S.C. §§1511 – 1519 and OMB Circular A-11. Subsection 1512(a) requires that "Except as provided in this subchapter, an appropriation available for obligation for a definite period shall be apportioned to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period." CRs appropriate funds for a definite period of time. Thus, § 1512(a) applies to CRs and CR appropriations are subject to apportionment. There are specific exemptions from apportionment listed in § 1516, such as appropriations for (1) trust, working capital, or revolving funds, (2) interest on the public debt, (3) items the President decides are of a confidential nature, etc. However, CRs are not included in the list of exemptions.

OMB Circular A-11 at § 120.60 provides for automatic apportionment of CR appropriations from the date of enactment. This authorizes IHS to spend and obligate CR appropriations from the date of enactment. Without apportionment, IHS would not be able to spend or obligate CR funds. Subsection 1517(a) prohibits agency officers or employees from making an expenditure or obligation exceeding an apportionment. Agency officers and employees who make expenditures or obligations exceeding apportionments would likely be subject to penalties under the Anti-Deficiency Act at 31 U.S.C. § 1341.

Mr. Mandregan's recommended decision is based on the view, announced for the first time at the informal conference, that:

[Ann Church, Acting Director, Office of Finance and Accounting, IHS] stated that when the Congress passes a CR, such action results in automatic authority to spend; i.e., IHS does not actually receive an apportionment from the Office of Management and Budget (OMB) under a CR. She said that IHS does not receive an apportionment from OMB until a final budget is passed into law.

This statement is not legally correct. Under 31 U.S.C. § 1512(a), apportionment for appropriations is available for any definite period, including CRs. I have copied the OMB Director on this letter so that OMB may weigh in on this issue.

At our informal conference, we stated that we were concerned that the process was not a level playing field; not only for the Pascua Yaqui Tribe but for Tribes in general. By this, I mean an informal conference conducted by the IHS is essentially quasi-judicial process with an IHS official presiding. It is a process where IHS is both the judge and the jury and is thus inherently biased against Indian Tribes. We feel it is disingenuous to announce a new theory for rejecting our final offer at the informal conference and then tell us in the recommended decision that we may appeal through a costly process of administrative or court litigation. The whole point of an informal conference is to avoid such appeals if possible.

I request that you immediately reverse this decision as it is based on an incorrect view of apportionment law. It is a new position that will have an enormous impact on all self-governance tribes around the country.

Respectfully,



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Robert Valencia, Chairman

Enclosure

cc: Senator John McCain  
Senator Jeff Flake  
Representative Martha McSally (R-Tucson)  
Mick Mulvaney, Director, Office of Management and Budget  
Chris Mandregan, Alaska Area Director, IHS  
RADM Charles Ty Reidhead, Director, Phoenix Area Office, IHS  
Mark Bigbey, Area Lead Negotiator, Phoenix and Tucson Area Offices, IHS  
Jennifer Cooper, Acting Director, Office of Tribal Self-Governance  
Reuben Howard, Health Director  
Geoff Strommer, Esq.



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Alaska Area Native Health Services  
4141 Ambassador Drive, Suite 300  
Anchorage, Alaska 99508-5928

Mr. Robert Valencia  
Tribal Chairman  
Pascua Yaqui Tribe  
7474 S. Camino De Oeste  
Tucson, AZ 85757

Re: Report and Recommended Decision on Informal Conference Regarding Rejection Letter, dated November 3, 2017, of the Pascua Yaqui Tribe's Final Offer, dated September 15, 2017, Regarding its Title V Compact and Fiscal Year 2018 Funding Agreement

Dear Chairman Valencia:

Thank you for the opportunity to conduct an Informal Conference as requested by the Pascua Yaqui Tribe (Tribe). The Tribe requested an Informal Conference related to the Indian Health Service's (IHS) rejection of the Tribe's September 15, 2017, "final offer" (which the IHS received on September 22, 2017) under Section 507(b) of the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 5387(b). I was appointed by IHS as the designated representative of the Secretary to conduct the Informal Conference. This letter conveys my report and recommended decision with respect to IHS' rejection of the final offer, pursuant to 42 C.F.R. § 137.423.

**Report:**

The Informal Conference, which is authorized under 42 C.F.R. §§ 137.420 through 137.423, was conducted on December 12, 2017, at the IHS Headquarters office in Rockville, Maryland. Representing the Tribe were Robert Valencia, Chairman; Reuben Howard, Health Director; Doreen McPaul, In-House Counsel; and Geoff Strommer, Outside Counsel. Representing the IHS were Mark Bigby, Agency Lead Negotiator and Tucson Area Executive Officer; Ann Church, Acting Director, Office of Finance and Accounting, IHS; and Patrick Stewart, Assistant Regional Counsel, Office of the General Counsel (OGC), Department of Health and Human Services (DHHS). Also in attendance (but not participating) were Dixie Gaikowski, Director, Tucson Area IHS; Jennifer Cooper, Acting Director, Office of Tribal Self-Governance (OTSG), IHS; Aaron Lane, Program Analyst, OTSG, IHS; Steven Plumber, Financial Analyst, OTSG, IHS; Julianna Kittelson, Senior Attorney, OGC, DHHS; and Andrea Quinn-Matute, Attorney, OGC, DHHS.

On November 3, 2017, the IHS Acting Director rejected the Tribe's September 15, 2017, "final offer." Criteria supporting the rejection are stated in the rejection letter. At the Informal Conference, I first summarized my role as the designated representative of the Secretary, including that I was approaching the dispute with neutrality, that I had not had discussions with

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the IHS representatives beyond discussing scheduling and process matters, and that I was not privy to any information beyond the documentation that the Tribe also had in its possession. After that introduction, the Tribe's representatives spoke first, followed by the IHS. As the Secretary's designated representative, I asked clarifying questions to better understand issues as necessary. Two-way dialogue sometimes ensued until it was clear that each party understood the position of the other, notwithstanding differences of opinion that may have remained after presentation and discussion.

**Tribe's Presentation:**

Mr. Howard began, saying that the Tribe wanted to focus on the (negotiation) process. Given that the Tribe's proposed language exists in other ISDEAA compacts and contracts, the Tribe felt IHS has been discriminatory in its refusal to agree to include the same language in its compact and funding agreement.

Chairman Valencia provided a history of the Tribe, saying it was first federally recognized in 1978. The Tribe realized that the recognition was limited in scope, denying it the full sovereignty enjoyed by other federally-recognized Tribes. The Tribe was re-recognized in 1984, with the full scope of Tribal sovereignty. During the recognition and re-recognition process, the Tribe's observation was that the Bureau of Indian Affairs overextended its authority. Now, the Tribe feels that is what IHS has done in its refusal to accept language present in the ISDEAA compacts and contracts of other Tribes.

Mr. Strommer stated that the issue about which the Tribe and IHS are at impasse is not complex, adding that the history of IHS' position goes back ten years. He said that there is a pattern of discrimination on IHS' part and expressed concern that the Tribe is being picked on. He said that the Tribe's compact and funding agreement has funds from both the Tucson and Phoenix Area IHS Offices, and that there is already identical language to that which is being proposed by the Tribe in the compacts and funding agreements of some Phoenix and California Area Tribes.

The "final offer" had two issues, said Mr. Strommer. First, is the proposed language requiring payment within ten (10) days after apportionment under a Continuing Resolution (CR). Second, was a complaint regarding the process during negotiations. He said that during negotiations, IHS dragged out the sharing of information regarding Tucson Area Tribal shares. Mr. Strommer said the Tribe felt the silence in the IHS Acting Director's letter, rejecting the Tribe's "final offer" on the second issue was unacceptable and that IHS' failure to share information regarding Tucson Area Tribal shares on a timely basis was not good.

Mr. Strommer said the primary legal issue stems from the fact that Attachment A (to its Request for Informal Conference dated November 21, 2017) lists four to five funding agreements in the California and Phoenix Areas that have language the IHS rejected. He mentioned the practice observed in Alaska Tribal Health Compact (ATHC) negotiations, i.e., if during an individual Co-signer negotiation, a Tribe/Tribal Organization (T/TO) reaches agreement on language, all other Co-signer T/TOs under the ATHC reserve the right to adopt the same language in their compact and funding agreements. (IHS notes that all Co-signers to the ATHC negotiate Co-signer-specific funding agreements in the presence of all other Co-signers, and all share one "umbrella"

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Compact, to which all Co-signer T/TOs are signatories.) Mr. Strommer said there is disparate treatment of Pascua Yaqui Tribe compared to other Tribes in the Phoenix and California IHS Areas.

Mr. Strommer also addressed the "Secretarial amount." 25 U.S.C. § 5325(a)(1). He stated that the compact/funding agreement amount is what the Secretary would otherwise spend to support the services, plus contract support costs. He stated that the Tribe did not ask for more than the Secretarial amount but rather, the Tribe asked for a date certain by which it would be paid by IHS. He stated further, that IHS' rejection on the basis that the Tribe's proposal would entitle the Tribe to more funds than required by the ISDEAA is "completely ginned up." He said that penalty interest paid in accordance with the Prompt Payment Act is not part of the Secretarial amount, i.e., it is not tied to Title V of the ISDEAA but rather, to the Prompt Payment Act. With respect to 25 U.S.C. § 5388(a), he argued that IHS is misreading it and that the second sentence, which makes reference to the 10-day payment period, qualifies everything before it (in that paragraph), i.e., that the 10-day requirement applies to CRs.

Mr. Strommer also refuted the IHS' rejection on the basis that the subject of the final offer is an inherent federal function that cannot be delegated to Tribes. He stated that the Report of the Joint IHS/Tribal Residual Workgroup, February 1995, which was cited in the IHS Acting Director's rejection letter, is not binding on the Tribe. He added that "resource allocation" is not the subject of the final offer and therefore, the rejection criteria does not apply.

Mr. Howard closed by saying that the Tribe is being subjected to discrimination by IHS. He said the Tohono O'odham Nation entered into a self-governance compact over a year ago and the Pascua Yaqui Tribe received a letter from the Tucson Area IHS that included IHS' Tribal shares decision. The Tribe never agreed to the Tribal shares methodology, and considered it an affront, that it was not consulted and that the Tucson Area IHS decided on its own what the (Tribal shares) method should be.

#### **IHS' Presentation:**

Mr. Bigby said that the ISDEAA does not impose a time frame for payments under a CR. He added that the IHS tried to reach compromise agreements such as language that would require payment 30 days after apportionment or 20 days after allotment of funds to the Area. The Tribe rejected all such counter-offers. IHS then proposed language that would cite directly to 25 U.S.C. § 5388. Again, all IHS counter-offers were rejected by the Tribe. He added that a small minority of funding agreements have the language requiring payment within 10 days under a CR being sought by the Tribe and that generally, IHS maintains the position that the 10-day requirement does not apply to CRs but rather, only to the lump sum payment after an annual appropriation.

Mr. Stewart added simply that the IHS' rejection of the Tribe's final offer goes into more detail.

Ms. Church described the payment process, saying that under CRs, IHS tries to distribute funds as quickly as possible. She stated that when the Congress passes a CR, such action results in automatic authority to spend, i.e., IHS does not actually receive an apportionment from the

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Office of Management and Budget (OMB) under a CR. She said that IHS does not receive an apportionment from OMB until a final budget is passed into law.

**Clarifying Questions/Discussions:**

During his presentation, Mr. Strommer made reference to the Alaska Tribal Health Compact (ATHC) and language therein that required 10-day payments. I asked him if he meant to say that the ATHC requires payment within 10 days under a CR. He responded that the ATHC does not require payment within 10 days under a CR.

I asked Ms. Church to confirm my understanding of her statement, that under a CR, there is no apportionment by OMB. She confirmed that OMB does not conduct apportionment under a CR but rather, a CR results in automatic spending authority. She added that once a final budget is passed into law, then OMB conducts apportionment. Under a final budget, IHS gets 30 days spending authority while an apportionment request is submitted to OMB through DHHS. The Agency does not have authority to spend beyond that 30 days without an apportionment or an extension to the 30 days.

**Recommended Decision:**

The issue that is the subject of the final offer regards whether the IHS must agree to language that mandates it to pay the Tribe within 10 days of apportionment by OMB when under a CR.<sup>1</sup> I have seriously considered the Tribe's position as stated in its final offer, its letter requesting an Informal Conference, and its oral presentation during the Informal Conference. I sincerely understand the Tribe's frustration regarding the IHS' rejection of its final offer, in light of the fact similar language has been agreed to with other Tribes.

Notwithstanding, my recommendation is that the rejection of the Tribe's final offer be sustained on the bases stated in the IHS Acting Director's November 3, 2017, rejection letter. In forming this recommendation, I have also considered that the 10-day pay requirement in both the language proposed by the Tribe and the provisions at 25 U.S.C. § 5388(a) is triggered by apportionment of such funds by OMB. Under a CR, apportionment simply does not occur; hence, the 10-day pay requirement is not triggered. This is entirely consistent with the practice and language in the overwhelming majority of compacts and funding agreements entered into by IHS, where the 10-day pay requirement only applies to lump sum payments, at the beginning of the fiscal year, made after a final budget is passed into law by the Congress and apportionment is completed by OMB. In fact, the language at 25 U.S.C. § 5388(a) states, "In any instance where a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year, ..., *the first such transfer* shall be made not later than 10 days after the apportionment of such funds by the Office of Management and Budget to the Department, unless the funding agreement provides otherwise." (emphasis added). Coupling "the first such transfer" with "after apportionment" leads me to conclude that it only applies to the lump sum payment following

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<sup>1</sup> Although the Area shares and negotiations process issues were mentioned in the Tribe's final offer, and I appreciate the Tribe's comments on those matters, I find that the Tribe did not actually make a final offer on these issues pursuant to 25 U.S.C. § 5387(b) and 42 C.F.R. §§ 137.132-137.133. Therefore, no response from IHS was required.

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passage of a final budget that is contemplated by the statute. Furthermore, "the first such transfer" limits the IHS' statutory obligation to pay within 10 days to one instance in a given budget period. Under a CR, it is within the IHS' discretion to determine whether or not to agree to a 10-day payment requirement when performing its inherent federal function of resource allocation and payment.

Within 30 days of the receipt of the recommended decision from the Informal Conference, you may file an appeal of the initial decision of the DHHS agency with the Interior Board of Indian Appeals (IBIA) under 42 CFR 137.425. You may request a hearing on the record. An appeal to the IBIA under 42 CFR 137.425 shall be filed with the IBIA by certified mail or hand delivery at the following address:

Board of Indian Appeals  
U.S. Department of the Interior  
4015 Wilson Boulevard,  
Arlington, VA 22203.

You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. Alternatively you may file an action in Federal court pursuant to section 110 of the Act. [25 U.S.C. 5331].

This concludes my report and recommended decision. I thank you for the opportunity to be of service to the Pascua Yaqui Tribe and the Tucson Area Indian Health Service, and for your service to IHS beneficiaries.

Sincerely,



Christopher Mandregan, Jr., MPH  
Director

Alaska Area Native Health Service, IHS, DHHS

Cc: RADM Michael Weahkee, Acting Director, IHS  
Mark Bigby, Agency Lead Negotiator, Tucson Area IHS  
Dixie Gaikowski, Director, Tucson Area IHS  
Jennifer Cooper, Acting Director, Office of Tribal Self-Governance, IHS  
Patrick Stewart, Assistant Regional Counsel, OGC, DHHS Region IX  
Reuben Howard, Health Director, Pascua Yaqui Tribe  
Doreen McPaul, Assistant Attorney General, Pascua Yaqui Tribe  
Geoff Strommer, Outside Counsel