

# IHS TRIBAL SELF-GOVERNANCE ADVISORY COMMITTEE

c/o Self-Governance Communication and Education

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February 5, 2018

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Indian Health Service  
5600 Fishers Lane  
Rockville, MD 20857

Jennifer Cooper, Acting Director  
Office of Tribal Self-Governance  
5600 Fishers Lane  
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P. Benjamin Smith, Deputy Director  
Intergovernmental Affairs  
5600 Fishers Lane  
Rockville, MD 20857

Elizabeth Fowler, Deputy Director  
Management Operations  
5600 Fishers Lane  
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## **RE: Concerns about Inconsistencies in the IHS Funding Agreement Negotiation Process**

Dear Acting Director Weahkee, Acting Director Cooper, Deputy Director Smith, and Deputy Director Fowler:

I write to you on behalf of the Tribal Self-Governance Advisory Committee (TSGAC) to reiterate our concerns related to the Agency's recent departure from established precedent in negotiating and recently denying standard language that has been in numerous existing funding agreements for over a decade.

We are greatly concerned about the current disagreement between IHS and a new Self-Governance Tribe regarding the timing and responsibility of the IHS to distribute Title V payments. The Tribe submitted a final offer that included a provision requiring the IHS to make Title V payment either within 10 days of apportionment or on an incremental basis in the case of an applicable continuing resolution. The IHS rejected the offer, finding that it did not need to meet the requirements set forth at 25 U.S.C. § 5388(a) governing the transfer of self-governance funds.

Section 5388(a) of the Indian Self-Determination and Education Assistance Act (ISDEAA) states, in relevant part, that:

Pursuant to the terms of any compact or funding agreement entered into under this subchapter, the Secretary shall transfer to the Indian tribe all funds provided for in the funding agreement ... **and provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations ...** In any instance where a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year, or requires semiannual or other periodic transfers of funding to be made commencing 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.**

25 U.S.C. § 5388(a) (formerly codified at 25 U.S.C. § 458aaa-7(a)) (emphasis added). We think that the statutory language is clear: Payments must be distributed within 10 days, unless a superseding budget resolution or funding agreement provision dictates otherwise.

The IHS has negotiated and approved numerous funding agreements with other Tribes that include substantially similar language regarding the timing of payment. The IHS, however, chose to break with years of established precedent and reject the final offer, rendering the ISDEAA's 10-day payment requirement essentially meaningless. The decision severely undermines the IHS's credibility in the negotiation process and will have repercussions for all Self-Governance Tribes with IHS funding agreements. The TSGAC, thus, requests that, consistent with federal law, that the IHS reaffirm its commitment to abide by its negotiated agreements, which has, regrettably, been cast into doubt.

As you know, over 360 Tribes currently participate in Tribal Self-Governance. That number will only continue to grow as additional Tribes choose to exercise their inherent right to govern and protect the interests of their citizens. To better ensure the successful operation of these programs, we need an IHS that is consistent and reliable in the administration of its negotiating responsibilities. Over the years, Tribal leaders have repeatedly expressed frustration about what they perceive as a systemic lack of proper negotiation training of Agency Lead Negotiators (ALNs). During our face-to-face meeting on January 24, 2018, all of you acknowledged that internal business policies need to be improved to ensure greater consistency in practice.

Tribal members of the TSGAC, therefore, urge the IHS to adopt a nationwide policy that directs ALNs to accept compact and funding agreement provisions proposed by tribes during a negotiation that have already been negotiated and approved by the IHS in agreements with other Tribes. The IHS has followed this policy in Alaska for almost two decades with positive results. Expanding the policy nationwide would help minimize negotiation-related issues and, importantly, also help to minimize the perception of discrimination against new Self-Governance Tribes.

I thank you for the opportunity to share our serious concerns on these important issues. If you have any questions or would like to discuss these comments in further detail, please contact me at [lmalerba@moheganmail.com](mailto:lmalerba@moheganmail.com).

Sincerely,



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

cc: TSGAC Members and Technical Workgroup