DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Indian Health Service
Rockville, MD 20857

JUL 13 2019

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

Dear Chairwoman Malerba:

I am responding to Tribal Self-Governance Advisory Committee (TSGAC) information requests and recommendations to the Indian Health Service (IHS) from the April 24-25, 2019, TSGAC meeting in Washington, D.C.

1. **Provide an accounting of the 105(*l*) leasing funds for fiscal year (FY) 2018 and request separate funding increases for FY 2019 lease needs:** The TSGAC maintains that the Agency needs to prevent future diversion of inflationary increases and refrain from reducing program funds. The TSGAC also continues to advocate that the Agency request additional 105(*l*) funds separate from the Services budget to properly pay for the 105(*l*) lease agreements.

   The TSGAC sent a letter dated October 17, 2018, requesting that the IHS provide an accounting of the IHS service line items that were impacted in the reallocation, the impact of reprogramming changes by IHS Areas, the number of leases requested, and the IHS Areas that submitted leases for IHS approval during FY 2018. The IHS provided a summary of the service lines reallocated in a letter dated March 12, 2019, but did not provide the other information requested by the TSGAC. The TSGAC requests that the IHS to provide the other information previously requested as soon as possible.

   IHS Response: The IHS is continually evaluating short- and long-term options for meeting requirements of the ISDEAA for section 105(*l*) lease cost agreements. As part of this endeavor, the IHS conducted several Tribal Consultations and Urban Confers, with the first Consultation beginning on July 10, 2018, and ending on July 27, 2018. This Tribal Consultation was followed by my September 14, 2018, letter to Tribal Leaders and Urban Indian Organization Leaders notifying them of the Agency decision to reprogram a portion of the FY 2018 funding increase appropriated for inflation to fund 105(*l*) lease cost agreements with Tribes and Tribal Organizations. The second Tribal Consultation, which began on March 12, 2019, and ended on April 26, 2019, also focused on short- and long-term options for meeting requirements of section 105(*l*) leases. In response to comments received during Tribal Consultation and Urban Confer, including feedback from the TSGAC, the IHS is forming a joint Tribal-federal technical team to assist with gathering information necessary for projecting potential future costs.

The IHS continues to have discussions regarding Section 105(*l*) lease cost agreements with members of Congress and other stakeholders. During these discussions, the Tribal recommendation to consider a separate appropriation for the increasing costs related to section 105(*l*) has been shared. Cost information related to 105(*l*) leases has also been discussed. The IHS is working to identify appropriate levels of detail and reporting mechanisms to share this information with all partners.

2. **The IHS should provide technical assistance to the Department of Justice regarding protection of the Federal Trust Responsibility in the *Texas v. U.S. Case*:** The permanent reauthorization of the Indian Health Care Improvement Act (IHCIA) was included in the passage of the Patient Protection and Affordable Care Act (Affordable Care Act). The TSGAC is concerned that the IHS, Tribes, and Urban Indian Organizations will lose significant ground if judicial action overturns the Affordable Care Act in the *Texas v. United States* case. The TSGAC requests that IHS leadership actively seek opportunities to provide technical assistance and support to the U.S. Department of Justice (DOJ) regarding the IHCIA provisions and the Federal trust responsibility to provide health care to American Indians and Alaska Natives.

   IHS Response: The IHS is committed to communicating with the Department of Health and Human Services (HHS) Secretary and our Federal partners about the importance of this cornerstone legislation to the Indian health care system.

3. **Advance Appropriations:** The TSGAC is supportive of the Advance Appropriations for the IHS and of the IHS Principal Deputy Director's initiative to request the Department's support for Advance Appropriations for the Agency. The TSGAC requests any updates regarding this internal Agency initiative.

   IHS Response: I have shared comments and recommendations from Tribal Leaders with the Secretary regarding Advance Appropriations. I have also shared with the Administration the varied perspectives of Tribal Leaders on the issues and concerns Tribes have provided to us related to Advance Appropriations (which will be raised in future HHS Consultations), your strong support of Advance Appropriations, and draft bills related to Advance Appropriations.

   For example, I have consistently shared that with Advance Appropriations, Tribes and the IHS can better administer programs and not be subject to any lapse in funding, as recently experienced during the partial government shutdown. Additionally, Ms. Ann Church, Acting Director for the IHS Office of Finance and Accounting, frequently provides technical assistance to the appropriators. Also, we have planned discussions with the Department of Veterans Affairs (VA) to learn the specific steps they took to obtain Advance Appropriations.

4. **Provide Support to HHS for Title VI Expansion:** The TSGAC remains committed to the Title VI expansion effort. The TSGAC requests that the IHS utilize their seat at the Secretary's Intradepartmental Council on Native American Affairs (ICNAA) to encourage

HHS and the Office of the Commissioner for the Administration for Native Americans to pick up this initiative and pursue a demonstration project within the Agency.

IHS Response: The ICNAA held a meeting on May 22, 2019, to identify priorities for action and partnership. At this meeting, the ICNAA included the expansion of self-governance and 477 Workforce Development programs.

5. **Utilize the *Broken Promises* Report to Develop Budget Priorities:** Tribes are supportive of the findings and conclusions of the U.S. Commission on Civil Rights (USCCR) report entitled, "*Broken Promises,*" and ask that the IHS consider the report in developing the Presidential Budget Request for FY 2021. The TSGAC requests information about any Agency plans to address the budget shortfalls identified in the report beyond the work of the IHS National Budget Formulation Workgroup.

   IHS Response: The IHS is continuing to review the findings and recommendations provided in the USCCR report, "*Broken Promises*." Information from this report will be considered during budget priority and formulation discussions, including the annual budget Tribal Consultation and Urban Confer with Tribes and Urban Indian Organizations. In addition, the IHS participated in a congressional panel discussion on policy solutions to the report. I served as a panelist in this discussion, which was held on June 5, 2019, to ensure there was strong representation of Indian health care priorities and concerns.

6. **Pharmacy Benefit Management (PBM) Claims Update:** In September 2018, IHS announced that the Agency would begin testing the CVS Caremark (CVS) Pharmacy Benefit Management (PBM) rejected claims for payment at two test sites. Tribes have not received another update regarding this process or other PBMs that have rejected pharmacy claims. TSGAC continues to advocate that the IHS expeditiously resolve the process with CVS and identify processes for other PBMs.

   IHS Response: For the past year, the IHS has been communicating with CVS Caremark regarding the denial or rejection of pharmaceutical and medical claims by the IHS, Tribes, and Urban Indian Organization (I/T/U) pharmacies for a variety of reasons, including: pharmacies being out-of-network, the pharmacy not being a recognized specialty pharmacy, and the pharmacy must use a mail-order process. Progress has been slow, but initially, CVS seemed agreeable that under the IHCIA, I/T/Us have a right of recovery that would enable many types of claims to be paid that were previously denied. IHS held a conference call with key members of TSGAC on Friday, July 12, 2019, to provide a brief update and IHS will update all of TSGAC next week.

7. **Behavioral Health Grants Tribal Consultation:** The FY 2018 Appropriations Explanatory Statement required the IHS to consider and evaluate whether current IHS grants that fund behavioral and substance abuse health initiatives such as the Methamphetamine and Suicide Prevention Initiatives and the Behavioral Health Innovation Initiatives can and/or should be

distributed through alternative funding mechanisms. The IHS received Tribal comments in the fall of 2018 and asked the National Tribal Advisory Committee on Behavioral Health (NTAC-BH) to provide recommendations to the IHS. The TSGAC has learned that there has been communication between the NTAC and the IHS, with possible Tribal Consultation to follow. The TSGAC asked what will be requested from Tribes and when can Tribes expect to see a Tribal Leader Letter?

IHS Response: On May 18, 2018, the IHS initiated Tribal Consultation and Urban Confer on the mechanism to distribute certain behavioral health initiative funding. At the request of Tribal Leaders and Urban Indian Organization Leaders, the IHS sent another letter on August 1, 2018, extending the comment deadline to August 17, 2018. Since that time, the IHS NTAC-BH has met several times to review the comments received by the Agency and submitted two recommendation letters to the Agency dated December 21, 2018, and March 14, 2019. The last IHS NTAC-BH meeting was on March 12-13, 2019, in Alpine, California. These recommendations are currently under Agency review. The NTAC-BH met face-to-face with IHS senior leadership on June 17, 2019, in Rockville, Maryland, to discuss recommendations. A follow-up letter will be sent to Tribal Leaders and Urban Indian Organization Leaders sharing updates on this issue in the near future.

8. **HHS/IHS Tribal Consultation Policy:** The TSGAC made recommendations following the October 2018 TSGAC meeting regarding the IHS Tribal Consultation Policy and also requested a small workgroup be established to review possible changes to the policy. The TSGAC recognized that HHS has initiated a review of the Department-wide Tribal Consultation Policy. The TSGAC requests information on the timeline for review of the IHS Tribal Consultation Policy and asks whether the Agency will consider the TSGAC's request to establish a small workgroup.

   IHS Response: The IHS will be moving forward with reviewing the IHS Tribal Consultation Policy and we look forward to discussing this topic more with TSGAC during next week's meeting.

9. **Contract Support Cost Policy:** The TSGAC continues to state concerns with the IHS suspending the use of the 97/3 methodology to negotiate Indirect Costs. The TSGAC is concerned that the IHS has not provided an update on the decision to implement the previous recommendations made by the IHS Contract Support Costs (CSC) Workgroup to the IHS Director or reinstate the 97/3 methodology. The TSGAC requests action on the CSC Workgroup recommendations regarding implementation of the 97/3 methodology and recommends finalization of the Annual CSC Cost Calculation form.

   IHS Response: In December 2017, the IHS temporarily rescinded section 6-3.2E(3) – Alternative Methods for Calculating Indirect Costs Associated with Recurring Service Unit Shares ("97/3 Split" or "97/3 Method") of the CSC policy in the Indian Health Manual

(IHM), Part 6 – Services to Tribal Government and Organizations, Chapter 3 – Contract Support Costs. We are close to finalizing a policy decision related to the IHS CSC Policy Section 6-3.2(E) – Alternative Methods for Calculating Indirect Costs Associated with Recurring Service Unit Shares. Once this step is complete, we plan to hold a conference call with members of the IHS CSC Workgroup to share the IHS policy decision. As for the next workgroup meeting, we are looking at dates and locations in August and September.

10. **Purchased/Referred Care Chapter Changes:** The TSGAC learned that the Purchased/Referred Care (PRC) Chapter changes have been published. However, notification to Tribes has not yet occurred, nor has a crosswalk of Tribal comments and final decisions been published. The TSGAC believes it is important for Tribes to see when Tribal comments are considered and result in a change to the proposed policies. The TSGAC recommends that IHS consider sending notification to Tribes and provide information regarding the outcome of the policy.

IHS Response: A letter to Tribal Leaders was issued on May 15, 2019, with an enclosure outlining the Summary of Changes to the PRC Chapter of the IHM, Part 2, Chapter 3. The updates were presented to the Director's Workgroup on Improving PRC at the in-person meeting on May 16, 2019, in Phoenix, Arizona. One session was held at the IHS 2019 Partnership Meeting on June 11, 2019, in Spokane, Washington. The session was online, as well as in-person for staff attending the IHS 2019 Partnership Meeting.

11. **IHS – Veteran Affairs National Agreement:** The IHS and U.S. Department of Veterans Affairs (VA) announced in June 2018 that all IHS-VA agreements were renewed with small changes to pharmacy services reimbursement. The TSGAC continues to advocate that the IHS-VA agreement should include direct and contract care. However, Tribes were not included in the renewal process or advised that the IHS-VA were in negotiations about the agreement. The TSGAC recommends that IHS should support the Tribal position and advocate to broaden the National Agreement to include PRC during the next renewal cycle.

IHS Response: The VA's Veterans Health Administration (VHA) and the IHS will initiate a joint Tribal Consultation and Urban Confer to seek input and recommendations on a draft memorandum of understanding (MOU) between the VA and the IHS.

A Tribal Leader letter is forthcoming to invite Tribes to this first in-person Tribal Consultation session, which will occur on Tuesday, September 17, 2019, at the National Indian Health Board (NIHB) Tribal Health Conference in Temecula, California.

Updating the VA IHS MOU demonstrates our commitment to successful collaboration and identifying mutual goals to advance coordination and resource-sharing between the VA and the IHS to improve the health status of American Indian and Alaska Native Veterans. We have set a goal to have an updated MOU by the fall of 2020. We remain committed to engaging in meaningful Tribal Consultation and Urban Confer to accomplish this goal.

12. **Sanitation Facilities Construction and Sanitation Deficiency System Draft Guidance:** The TSGAC expressed concerns that changes to the Sanitation Deficiency System Draft Guidance have not been implemented, nor has the IHS updated the underlying criteria since Title V became a permanent authority. The TSGAC requested an update regarding the implementation of changes and assessment of those changes on the distribution of funds.

    IHS Response: On July 2, 2018, the IHS initiated Tribal Consultation on proposed updates to the *IHS Sanitation Deficiency System – A Guide for Reporting Sanitation Deficiencies for American Indian and Alaska Native Homes and Communities (SDS Guide)*. At the request of Tribes and Tribal Organizations, the IHS sent another letter on August 1, 2018, extending the comment deadline to September 14, 2018. Since that time, the IHS Facilities Appropriations Advisory Board (FAAB) met several times to review the comments received by the Agency. Updates on the outcomes of the FAAB meeting were shared during a conference call with Tribal Leaders and Urban Indian Organization Leaders on May 2, 2019. Additionally, the IHS issued a May 24, 2019, Tribal Leader letter to provide an update on the Tribal Consultation for the SDS Guide. A link to the letter is available on the IHS Web site at https://www.ihs.gov/newsroom/triballeaderletters/.

13. **Agency Lead Negotiator (ALN) Designation and Training:** The TSGAC remains concerned about the ALN designation, onboarding, and ongoing training process for new ALNs. The TSGAC provided comments and suggestions for ALN development, designation, and training in February 2017. These recommendations included creating a formalized peer network, improving the designation process, establishing an ALN evaluation process, developing a job description, and creating a centralized point of accountability. The IHS has implemented an informal peer network and is working to formalize this process. However, the other recommendations remain unimplemented. The TSGAC requests an update from the Agency on how it plans to improve and continue to support ALN development.

    IHS Response: The IHS Office of Tribal Self-Governance continues to discuss this issue with all stakeholders, and most recently, with the IHS Area Directors. Identifying IHS employees to carry out the delegation of an ALN is the next area of focus. The Agency will also host an internal all Federal training on the ISDEAA and negotiation topics at the end of 2019.

14. **Presidential Task Force to Protect Native Children in IHS:** On March 29, 2019, the White House announced the establishment of the "*Presidential Task Force on Protecting Native American Children in the Indian Health Service System.*" The Task Force is charged with investigating the institutional and systemic breakdown that failed to prevent a predatory pediatrician from sexually abusing children while acting in his capacity as a doctor in the IHS. The TSGAC requests information on how the IHS is engaged in this Task Force.

IHS Response: The IHS is committed to ensuring a culture of quality, leadership, and accountability. Providing a safe and caring environment for our patients is a top priority as we work to improve and sustain the culture of care throughout the Agency. Earlier this year, we released new professional standards and stronger requirements for IHS employees to report suspected sexual abuse and exploitation of children. As part of this new policy, we created employee training on protecting children from sexual abuse in health care settings. The training is mandatory for all IHS employees to complete no later than September 30, 2019. It includes information on indicators of abuse and warning signs, organizational safeguards to ensure patient safety, and the process for reporting suspected sexual abuse. We have hired an outside group to review and examine whether laws, policies, and procedures have been followed with regard to protecting patients from sexual abuse. The contractor will also identify any further improvements that the IHS can implement to protect patients more effectively. This review will complement work being done by the Presidential Task Force on Protecting Native American Children in the IHS System and a separate review by the HHS Office of Inspector General, each with a different focus.

If you have any questions, please contact Ms. Jennifer Cooper, Director, OTSG, IHS, by telephone at (301) 443-7821 or by e-mail at jennifer.cooper@ihs.gov. Thank you for your support and partnership as we work towards a shared vision for healthy communities and quality health care systems.

Sincerely,

RADM Michael D. Weahkee, MBA, MHSA
Assistant Surgeon General, U.S. Public Health Service
Principal Deputy Director