

**TSGAC Meeting
February 9, 2022
Agenda with Talking Points from Tribal Caucus**

Welcome

Opening Prayer

Committee Business

Opening Remarks

Office of Tribal Self-Governance

Open Discussion on Health IT Modernization

- Follow up from December 14, 2021 IT Summit
- Development of Tribal Recommendations
- Process for Moving Forward

IHS Budget- Mandatory Funding, Consultations, and Budgets

- Summary of input from recent infrastructure Investment and Jobs Act Tribal Consultation Sessions
- Update on FY 2022 and FY 2023 Budget
- ***Update on discussions with OMB related to the exclusion of relief or supplemental funds from future rate calculations***
 - OMB issued guidance to advise the Interior Business Center on IDC rates related to an exception that only applies to CARES Act Coronavirus Relief Funds (CRF) funds which were not eligible for indirect cost recover.
 - During our last TSGAC in November 2021, we asked if OMB will be issuing additional guidance for other stimulus funds. TSGAC believes this exemption should also apply to other stimulus funds as these are one-time resources and could drive down Tribes' IDC rate in future years.
 - OMB said they will take this question back to their team and follow up with a response through the IHS.
 - OMB was supposed to attend last week's IHS CSC workgroup but were unable to attend. The Interior Business Center was there and explained their rationale for the exemption to the CARES Act. OMB determined that CARES Act funds where Tribes could not charge on top of that, could ask for an exemption. This exemption did not apply to other funds from the IHS or HHS.

Request: Did IHS have any further discussions with OMB?

Open Discussion with TSGAC & IHS Acting Director

- Update on COVID-19 (treatment)

- ***IHS Consultation Policy***

- The IHS is updating their Consultation Policy and developed a workgroup comprising of both IHS and Tribal representatives to update and revise the current policy.
- Sub workgroups were formed to tackle specific sections of the policy, things were working at first, but the Tribes are becoming frustrated with how the policy development is being handled.
- Tribes have been putting thoughts and suggestions on the table and the IHS is coming back rejecting those suggestions. When Tribes offer alternative suggestions, again those suggestions are being rejected. Suggestions about dual consent and having Tribes be a part of the decision-making process are consistently being rejected. It appears that the IHS is having staff weigh in on decisions when they are not participating in meetings. This impedes the Tribes' ability to negotiate or understand IHS's position when the people making decisions are not in the meeting.
- The goal of the IHS Consultation Policy is to make consultations meaningful. The process in developing the Consultation Policy is not meaningful and instead is inefficient and unproductive.

Request: TSGAC requests that everyone that has a role in the IHS Consultation Policy, including decision makers, be in the room for meetings. It is hard for Tribal Workgroup members to negotiate or discuss thoughts and decisions when the decision makers are not in the room.

- ***Contract Support Costs***

- Last August (2021), the D.C. Circuit court issued a decision for *Cook Inlet Tribal Council v. Dotomain* in which it held that Tribes cannot recover any costs as CSC if the government would have incurred a similar cost, even if the government never transferred those dollars to Tribes.
- In that case, IHS underfunded Cook Inlet's facilities costs. The D.C. Circuit said Cook Inlet should seek relief by asking for increased program (secretarial amount) dollars rather than CSC. The IHS does not have any funds available for secretarial amount increases, and the right to recover CSC was specifically added to the ISDEAA for this purpose. Congress has now fully funded CSC, so there is no reason for the IHS to try to limit it.
- Tribes are concerned that the decision can be used by IHS to significantly reduce Tribal CSC reimbursements.
- TSGAC is concerned that this decision could harm Self-Governance Tribes as this could potentially impact all Tribes and Tribal organizations that have ISDEAA agreements with IHS.

Requests:

(1) IHS should provide assurance to Tribes that it will continue to pay Tribes

100% of the CSC they have been paid to date and that no CSC payments will be reduced while Tribal consultation and congressional review are underway.

(2) IHS should support Tribal efforts to amend the ISDEAA to overrule the Cook Inlet decision and restore the status quo that CSC be made available when overhead or administrative costs that IHS paid are insufficient to meet reasonable and necessary Tribal requirements.

(3) IHS to issue a Dear Tribal Leader Letter that makes clear that the agency has no intention of applying this new legal ruling to change the way it has administered CSC for decades, retroactively or prospectively, while Tribal consultation and congressional review are underway.

- **Section 105(l) leasing**

- TSGAC has concerns about the anomaly being built into the joint venture construction project program. If a Tribe builds a facility with its own funds and negotiates a 20-year no cost lease with IHS, it prohibits that Tribe from entering into a Section 105 lease agreement on that facility until the 20-year no cost lease is satisfied.

Requests:

(1) TSGAC believes Tribes who have 20-year no cost leases should be able to seek Section 105 (l) funding to maintain these facilities and not wait 20 years. The IHS should correct this issue.

(2) TSGAC requests more transparency for Tribes as it relates to Section 105 (l) leasing. Tribes need better understanding of Section 105(l) funding calculations and formulas and should be at the table when funding decisions are being made and formulas are developed or revised. The same holds true for Section 105 principal and interest calculations in regard to the lease agreements.

- **Coronavirus Response & Relief Supplemental Appropriations Act Testing Funds**

- The Coronavirus Response & Relief Supplemental Appropriations Act of 2021 supplied \$1.125 billion to the IHS and Tribal health providers.
- Of that, \$790 million was allocated to the IHS from the HHS Public Health and Social Services Emergency Fund for testing and related costs, available through FY 2022.
- In a letter provided to the Tribes, the IHS required that Tribes 1) sign a bilateral amendment and submit to the Area Office prior to receiving the funds; 2) submit a COVID-19 Testing Plan within 60 days of the execution of the bilateral amendment. The IHS stated that a template and guidance on the COVID-19 testing plan and format is forthcoming; and 3) as soon as a reporting mechanism is available through IHS and every quarter thereafter until funds are expended,

Tribes shall report to IHS on uses of funding, detailing current commitments and obligations broken out by the coronavirus supplemental appropriations act that provided the source of the funds.

- The funds are available through September 30, 2022 and must be expended by that date.
- To date, the IHS has not sent out a spending plan template as identified in both the letter received by Tribes and the bilateral amendment that Tribes signed. In addition, the IHS has not provided Tribes with a reporting mechanism.

Requests:

- (1) TSGAC requests an update on the spending plan template and reporting mechanism as it relates to the Coronavirus Response & Relief Supplemental Appropriations Act testing funds.
- (2) During the January 4, 2021 IHS Tribal Consultation, the IHS did indicate that CRRSAA requires the Secretary to make these plans publicly available and that the IHS is to provide a spend plan on the uses of funds to Congress within 60 days of enactment, and report to Congress on uses of funding, commitments, and obligations, quarterly thereafter. TSGAC would like more information on what the IHS will do with the spending plans. TSGAC supports publishing aggregated data but has concerns with publishing individual spending plans.
- (3) TSGAC recommends the IHS remove the September 30, 2022 deadline on the testing funds and instead treat these funds similar to how the CARES Act funds were treated, that once these funds were distributed through the Self-Governance mechanism, that these funds are available until expended. An allowable use of these funds includes, but is not limited to, construction. Some Tribes, especially those in colder climates, plan to use these funds to construct drive through testing sites. Construction season is limited in some areas of the country and a September 30th deadline may not be plausible for some Tribes, especially when they have not received the spending plan or reporting mechanism.