

# IHS Self-Governance Advisory Committee (TSGAC) Meeting Summary

November 2021

1:00 – 5:00 PM Eastern Time

Virtual Meeting

## Attendance:

A quorum was established for the TSGAC meeting.

## Committee Business:

- July 2021 minutes were approved.
- Candice Skenandore (Oneida Nation of Wisconsin) volunteered, and a motion was approved for her to serve as the TSGAC Technical Advisor/Co-Chair.
- Lana Butler (Sac & Fox Nation of Oklahoma) was nominated to serve as the alternate representative for Oklahoma Area 1.
  - The nomination was approved by unanimous consent.

## HHS/IHS Updates

*Elizabeth Fowler, Acting Director, IHS*

After providing open remarks, Director Fowler emphasized booster recommendations for all three COVID-19 vaccines. The IHS encourages vaccine boosters; however, the primary goal remains to encourage individuals to receive an initial dose of vaccine. She announced that the P-Fizer COVID-19 vaccine had been approved for children 5 to 11 years old. IHS has a supply of pediatric vaccines. The IHS is working with the CDC, IHS area offices, and Federal, Tribal, and Urban sites on the ongoing distribution of the P-Fizer vaccine for children.

Additionally, the Director provided a funding update. She started with FY 2022 and reminded the group that we still operate under a continuing resolution ("CR"). The exception apportionment submitted by the IHS has been approved by the OMB, which will allow the IHS to issue payments to Tribes. Should the CR be extended beyond the December timeframe, the IHS will submit an exception apportionment for the calendar year Tribes.

The infrastructure bill that was recently passed includes \$3.5 billion for IHS Sanitation Facilities Construction. They are also tracking the Build Back Better Act, which contains \$2.3 billion for the IHS. Additionally, they are monitoring congressional activity regarding the final FY 22 appropriations. Currently, the Senate mark is lower than the House mark. The Senate mark includes a \$1.4 billion increase for the IHS.

## **Office of Tribal Self-Governance (OTSG) Update**

***Jennifer Cooper, Director, OTSG***

Currently, there are 105 self-governance compacts and 131 funding agreements (83 fiscal year, 48 calendar year). Recurring base funding is roughly \$2.6 billion, with 375 federally recognized participating in funding agreements. The OTSG continues to provide ongoing technical assistance to Tribes interested in securing a self-governance compact.

There has been roughly \$2.7 billion (recurring and non-recurring) transferred through ISDEAA Title V agreements. COVID-19 and ARPA funding are at a total of \$2.9 billion for Title V compact holders. A total of \$5.62 billion has been transferred to all self-governance Tribes in FY 2021. Director Cooper expressed her appreciation for the staff of the OTSG, area staff, colleagues in OFA, and all supporters throughout IHS for helping to distribute funds as fast as possible.

### **Ongoing OTSG priorities include:**

- Supporting consultation regarding the development of the IHS consultation policy
  - For more information, contact [Anna.Johnson2@ihs.gov](mailto:Anna.Johnson2@ihs.gov)
- Updating the OTSG website
- Updating Headquarters Program, Services, Functions, and Activities (PSFA) Manual
- Recruiting for two OTSG vacancies
  - One position has been filled.
- Processing FY 2022 funding
- Providing Training and Technical Assistance
  - Tribal Self-Governance Negotiation Handbook
  - Self-Governance Planning and Negotiation Cooperative Agreements FY2021-2022 Notice of Funding Opportunity
- Negotiations

### **Questions, Answers, & Comments**

**Q:** Did the OTSG officially release the updated negotiation guidance that the joint tribal-IHS workgroup developed?

**A:** Not officially yet. They are working on publishing the final printed form for distribution.

**Q:** Regarding the manual, are there changes from what was recommended by the workgroup?

**A:** Nothing is changing from the version that the joint workgroup submitted.

## **Overview of Mandatory Funding**

*Jillian Curtis, Director, Office of Finance and Accounting, IHS*

Director Curtis provided TSGAC meeting attendees with an overview of mandatory funding and its implications. The Biden administration has been exploring moving toward mandatory funding for the IHS. Mandatory funding could potentially increase funding and ensure that IHS officials can plan more effectively because mandatory funding would be more predictable. A mandatory funding consultation and confer was held from August through September 3. The IHS will take comments provided through consultation and use them to inform future presidential budget requests. Once the review of comments has been completed, they will work on the next steps.

Discretionary funding is appropriated in an annual appropriations act, limited by a cap. Mandatory funding is much more complex.

The Budget Enforcement Act created the "discretionary" and "mandatory" categories. Additionally, the bill created a framework around the two categories of spending to figure out how they would ensure that spending did not get out of control. On the discretionary side, spending is controlled by caps that trigger sequestration if exceeded. The Budget Enforcement Act created "PAY GO" (pay as you go) rules for taxes and certain entitlement programs on the mandatory side. Under PAY GO rules, if Congress wishes to increase spending for particular services on the mandatory side of the budget, they must offset it with savings in another portion of the mandatory budget.

Discretionary funding is provided through annual appropriations acts. Appropriations acts are under the jurisdiction of the House and Senate Appropriations Committees and typically provide funding for one fiscal year. IHS receives a bulk of its funding through an annual appropriations act under the Subcommittee for the Interior. However, mandatory funds can either be appropriated in an annual appropriations act or authorizing legislation. Authorizing legislation is under the jurisdiction of the House and Senate Standing Committees, who can appropriate funding for one or more fiscal years.

Discretionary funding is capped at the amount provided in the appropriations act. Mandatory funding can be capped or open-ended. Open-ended means that the funding sources do not have an upper-level limit on spending.

IHS Contract Support Costs (CSCs) and Section 105(I) Lease Agreements are categorized as indefinite appropriations – budgeted in the annual appropriations act and open-ended. Therefore, the President's budget proposes reclassifying CSCs and 105(I) lease costs as mandatory starting FY 2023.

## **Consultations Update**

There were three critical themes noticed in the consultation comments. The first key theme was strong support for a tribal workgroup on mandatory funding approaches. The IHS has reached out to the National Tribal Budget Formulation Workgroup to identify volunteers for a sub workgroup to identify questions or topics that require additional analysis. Another key theme is mandatory funding provided through authorization legislation. Finally, there appears to be a balancing act between support for acting fast while there is a potential policy or political opportunity in alignment with the Biden Administration and both houses of Congress, and taking the time to refine the analysis over time.

### **Open Discussion with OMB/IHS/TSGAC on Mandatory Funding Recommendations**

*Marilynn “Lynn” Malerba, Chief, Mohegan Tribe, and Chairwoman, IHS TSGAC*

*Elizabeth A. Fowler, Acting Director, IHS*

*Topher Spiro, Associate Director for Health, OMB*

Associate Director Spiro began the discussion by providing an update on the administration's budget for FY 22. The FY 22 budget provided a historic increase for the Indian Health Service. The budget also began to address the issue of guaranteeing that the IHS has stable, adequate, and predictable funding.

They did so in two ways. One way was by proposing an advance appropriation for FY 23. Additionally, they proposed reclassifying contract support costs and 105(l) lease agreement costs in the budget. They believe they are making progress regarding both of those issues in Congress. Associate Director Spiro mentioned that the OMB is committed to continuing work on health equity issues.

In the American Rescue Plan Act (ARPA), the Biden Administration made a historic investment in fighting COVID-19 in Indian Country by providing over \$6 billion in new resources. In the Build Back Better Act (reconciliation bill), \$2.3 billion was included for various IHS programs – including \$944 million for Maintenance and Facilities. Lastly, the Bipartisan Infrastructure Framework (BIF) includes \$700 million each year for the next five years (\$3.5 billion) for IHS Sanitation Facilities.

Associate Director Spiro closed his opening remarks by emphasizing the administration's commitment to consultation in a meaningful way.

### **Comments, Questions, Answers**

#### **Tribal Leader Comment:**

Advance appropriations provide some certainties, stability, and access to meaningful resources within the framework of discretionary funding. However, we have some unanswered questions when it comes to advance appropriations.

**Q:** How do we coordinate with your office [OMB], the HHS, and IHS concerning what number [funding level] will be used to carry forward? We are awaiting clarity as to how adjustments will be made for variables such as inflation, population growth, etc.

**Federal Official Response (OMB):**

One of your questions is who you talk to at OMB. The answer is me (Topher Spiro). My door is always open for that kind of engagement. In terms of process, we are currently developing the FY 23 budget at OMB. We work with HHS and IHS on that. We will be consulting with the Domestic Policy Council (DPC). Another person you can talk to in the White House is Libby Washburn. I would say that over the next month or two, we will be developing the budget proposals across the board.

I think your analytical framework is the right way to think about it. We need to think about which problems do advance appropriations solve which problems do not solve. You mentioned a couple of issues. One was discretionary caps. One was the fact that sometimes we have CRs. Another is that when you are considering funding for only one year, it is hard to plan or invest in infrastructure or long-term projects. You need to think about the issues in the context of advance appropriations and mandatory funding.

**Tribal Leader Comment:**

We understand that you are a small shop, so we want to assist in any way possible. We think Tribe's must be represented within the OMB. The OMB engages with all the agencies, so you, in a way, is the one who truly upholds the trust and treaty obligations to Tribes and makes sure that other agencies are doing the same thing. We are not there yet, but we are working toward that.

**Q:**

We understand that OMB will be issuing guidance soon about its decision to advise the Interior Business Center that tribal, state, and local government recipients of CARES Act funding may exempt certain funds when negotiating indirect cost (IDC) rates. It seems that the only exemption being discussed applies only to CARES Act funds under Treasury's COVID Relief Fund, which was not eligible for indirect cost recovery. Will OMB be issuing additional guidance on other COVID-related funds received under the American Rescue Plan Act (ARPA), corona relief supplemental, the FY 21 appropriation, the Paycheck Protection Program, the Families First Act, and other COVID related legislation that provided funds?

**A:**

I want to take that question back to my team and ensure we get you the correct answer. We can follow up with a response through IHS.

## **Update on Expansion of Self-Governance in HHS**

*Marilynn "Lynn" Malerba, Chief, Mohegan Tribe, and Chairwoman, IHS TSGAC*

*W. Ron Allen, Chairman/CEO, Jamestown S'Klallam Tribe, Vice Chairman, TSGAC*

*Stacey Ecoffey and Devin Delrow, Office of the Secretary, Intergovernmental and External Affairs, Department of Health and Human Services*

Chairman Allen began the update by emphasizing the success of Tribes in self-governance and his hopes of expanding those successes into other federal programs. He sees the Biden Administration's support for self-governance as a signal that now is the opportune time to expand self-governance.

The challenge to expansion is not at the senior level but the system's roots. Chairman Allen suggested choosing a few programs for a pilot project and showing how they can work. If we can move that agenda forward, agencies will recognize the benefits of implementing the self-governance approach.

Chief Malerba mentioned that they looked at HHS and ACF because those programs contribute to the social determinates and health of our tribal members. We conducted a study in 2013, and there were a lot of roadblocks along the way. We are now looking at legislation and working with the Hill on proceeding with self-governance expansion. It is essential to hear the Administration's perspective, and also, they think we can work together on this initiative.

Principal Advisor Ecoffey indicated that they received the letter Tribes sent and the Senate Committee's draft legislation. Under the Obama Administration, we took the time to review this initiative and see where there may be a few holes in how we do things. The result was that we do need legislation, and I believe the department still feels that way. However, there are conversations that we still need to have that will prove to be helpful. Some conversations occurred under former Secretary Azar about the Tribes sending in information about the expansion of self-governance. One of the issues is that ACF operates under eleven different pieces of authorizing legislation instead of the IHS, where we have just one. Another issue is how grants will be considered and managed.

Associate Director Delrow stated that this issue was raised at the STAC meeting in September before the Secretary and reemphasized the Secretary's support for tribal sovereignty and self-determination. As we continue to have these conversations, that commitment will continue to be at the forefront.

### **Comment:**

There is a link available on the SGCETC website to the legislative proposal, all the programs that we think should be considered for self-gov expansion, and eleven different resolutions of support from regional intertribal organizations. <sup>1</sup>

## **ACA/IHCIA Project Update (FY2022 Project Year)**

***Cyndi Ferguson, Self-Governance Specialist/Policy Analyst, SENSE Incorporated***

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<sup>1</sup> [Ongoing Initiative: Tribal Efforts to Expand Self-Governance Authority to Select HHS Programs - Tribal Self-Governance \(tribalselfgov.org\)](https://tribalselfgov.org)

Cyndi Ferguson provided an update regarding the ACA/IHCIA. She began by announcing that the IHS Office of Tribal Self-governance has refunded the project for the new project year – effective October 1.

Ms. Sara Sullivan has taken a position with the Swinomish Tribe as their healthcare policy director for their wellness center. Ferguson introduced Betsy Barron as the new project intern. Ms. Barron introduced herself and shared some of her educational and professional achievements. She is currently a doctoral student at the University of Colorado and interned for the National Indian Health Board (NIHB) in 2017.

Elliot Milhollin will continue to focus on the legal and regulatory issues and provide some guidance and mentorship to Ms. Barron. Ms. Barron will be focusing on MMPC TTAG and healthcare policy. Cyndi Ferguson will continue to work on outreach and education. They still use subject matter experts depending on the topic or webinar.

They recently held a webinar at the end of September, and it was well attended. Doneg McDonough provided a comprehensive overview of tribal sponsorship and some of the new opportunities under the American Rescue Plan Act (ARPA) during the webinar.

Ms. Sullivan worked with the team and completed a briefing paper regarding the Community Health Aide Program (CHAP) and how it would apply to the lower forty-eight. The briefing paper guides Tribes who are interested in participating in the CHAP.

They continue to maintain and update a list of project priorities coordinated with the TTAG priorities. TSGAC has two representatives (Chairman Allen and Melanie Fourkiller) on TTAG. They continue to ensure that they coordinate and not duplicate efforts while providing technical assistance.

They are releasing a survey to gather input and recommendations that will be used to determine critical topics and priorities for the upcoming fiscal year. This information will be utilized to determine what types of webinars, training, and technical assistance are offered.

### **Open Discussion with TSGAC and IHS Acting Director**

#### **IHS Consultation Policy**

The first topic of discussion was the IHS Consultation Policy. An overview of efforts underway to update the IHS's consultation policy was provided. They are actively exploring a way to improve the consultation process. The subgroup has expressed some interest in extending the timeline for completing the policy. This is an opportunity to provide recommendations that will not conflict with other recommendations in the document or that are cohesive. They have had a couple of subgroup meetings; however, more dialogue is needed. If the timeline is extended, they believe that the final product will be much better.

They will need to compare the IHS Consultation Policy with the HHS Consultation to determine if there are any conflicts.

A proposal was made to extend the timeline. IHS officials will meet with tribal leaders to determine an appropriate timeline extension.

### **Behavioral Health Funding**

The discussion then shifted to behavioral health funding. Melanie Fourkiller reminded the group that a request was made to the former IHS Director to reevaluate grant programs to allow for self-determination and self-governance opportunities.

Director Fowler acknowledged the request and expressed an ongoing commitment to considering the decision made, looking at the comments provided through consultation, and exploring the rationale for the decision that was made.

Director Fowler went on to explain the rationale for the decision. A couple of significant concerns were on the IHS's part. We support Indian self-determination and self-governance. The two major concerns have to do with the amount of available funding and the need for data to support the purpose of the funds.

One reason the decision was made to maintain the grants was that it would have taken additional time to work out some issues. One of them is the allocation of the amounts. Was it the intention that the funding goes to the current grantees? Would it be converted into their compacts or contracts? Then that becomes a fairness issue. If the funds are used for an ISDEAA agreement and converted into shares, then the amounts are too small to accomplish the purpose of the funds.

The other major issue is how do we ensure that we are receiving the needed data to demonstrate that we have accomplished the goals of the funds. For example, the data from the Special Diabetes Program for Indians has helped ensure that the program is reauthorized.

Director Fowler expressed her willingness to continue the discussion regarding how we address these significant concerns.

Melanie Fourkiller expressed her appreciation for Director Fowler's engagement and willingness to review the information. Ms. Fourkiller noted that many of the rationale, reasons, or basis that Director Fowler provided are arguments that tribal leaders have heard against self-governance and self-determination since the beginning. Regardless of the level of funding received by a Tribe, it is their right to receive that funding and assume operational control over the services provided with the funding.

The rationale that Congress appropriated a dollar for a particular reason and that you must use that dollar for a particular reason is also applied by Tribes when they appropriate funding.

The concern of access to data has been an argument Tribes have heard since the beginning of the self-governance demonstration project. The IHS can't require data from us, but that does not mean we do not provide data. That does not mean that we are not accountable. It is simply



then that the accountability is shifted to the tribal government, not to the federal government. It is no longer the federal government's responsibility to monitor the success of that program.

Director Fowler responded by emphasizing that she was willing to have an ongoing discussion regarding the matter. She stated that there might be a path forward.