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Roselyn Tso
Director
Indian Health Service
5600 Fishers Lane, Mail Stop: 08E86
Rockville, MD 20857

Dear Director Tso,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Indian Health Service's (IHS) request for input regarding its implementation of the Supreme Court decision in *Becerra v. San Carlos Apache Tribe*. This decision affirmed that the Indian Self-Determination and Education Assistance Act (ISDEAA) requires IHS to reimburse Contract Support Costs (CSC) associated with the expenditure of both IHS appropriations provided under ISDEAA contracts – also known as the Secretarial amount – and program income that is under and spent in support of those contracts, which is often referred to as "third party reimbursements" or "program income." The Supreme Court's decision in this case stands to bring millions of dollars in unpaid CSC to Tribal health programs and is another reaffirmation of the federal government's trust and treaty obligations to Tribal Nations.

USET SPF is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.[1] USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Regrettably, the questions IHS provided for this consultation period and the discussions held between the IHS and Tribal representatives on the CSC Advisory Group (CSCAG) suggest a desire by IHS to re-litigate the *San Carlos* case by making the process overly burdensome and complicated, and by inappropriately reducing the new CSC obligation through added requirements and limitations that do not exist under current law. USET SPF urges IHS to reconsider its current approach to implementing this case and instead fully embrace the decision and its intent. We offer the following comments, both as a response to the specific questions IHS posed in the Dear Tribal Leader Letter and as broader recommendations on how the agency can better fulfill its trust and treaty obligations to Tribal Nations through implementation of this decision.

IHS Must Honor Tribal Sovereignty and Fulfill Trust and Treaty Obligations by Fully Embracing the Decision

While USET SPF has specific recommendations regarding the IHS's proposed methodology and consultation questions, we are equally concerned with the need for IHS to acknowledge and accept its responsibility to fulfill the federal trust and treaty obligations to Tribal Nations by fully and faithfully implementing the decision in *Becerra v. San Carlos Apache*. Several portions of the IHS's consultation questions seem to indicate a desire to relitigate the case or otherwise reduce the obligation it created. The Supreme Court was exceedingly clear in its decision, its intent, and its reasoning: CSC are due on the expenditure of all program income when the spending furthers the "general purposes" of the ISDEAA contract, and failure to pay CSC on third-party reimbursements to Tribal Nations and organizations is a "penalty for pursuing self-determination." Despite this explicit direction, the IHS appears to be making attempts to reduce its cost obligations by raising concerns regarding payment of CSC on program income generated through serving non-beneficiaries and an insistence that there may not be a CSC "need" generated by certain third-party reimbursements. USET SPF believes that by raising these supposed complications, IHS is engaging in the very activity the Supreme Court's decision sought to remedy – inflicting a penalty on Tribal Nations for pursuing greater sovereignty and self-determination.

In the case of CSC due on program income generated by serving non-beneficiaries, there are several issues with the IHS's assertions and requests, but the overarching problem is that failure to pay those costs could create a funding gap between ISDEAA programs and the IHS. When IHS earns program income in connection with services to non-beneficiaries, both IHS's internal overhead and other government agencies' resources are available to support the subsequent spending of that income on additional health care services. Contract support costs are necessary for Tribal Nations and organizations because, per the opinion of the Supreme Court, "[b]y definition, these are costs that IHS does not incur when it provides healthcare services funded by congressional appropriations and third-party income." This creates the funding gap between IHS and ISDEAA contracting Tribal Nations that the Supreme Court characterized as a penalty for Tribal Nations attempting to pursue greater self-governance. Beyond the simple fact that this case requires IHS to pay CSC on third-party reimbursements, IHS should be viewing this requirement as honoring Tribal sovereignty and self-determination.

Further, on the issue of serving non-beneficiaries, the idea that the CSC obligation should be reduced simply because a program is serving non-beneficiaries is antithetical to the principle of self-determination. Tribal Nations operating health programs have the sovereign right to determine their service population, and that decision most often stems from the need to acquire more revenue and resources to serve their citizens and communities. Many Tribal programs require non-beneficiary patient volume to justify retention

of qualified medical staff and the provision of specialty services, which bring services and access to care for eligible Indians that might not have existed otherwise. The ISDEAA empowers Tribal Nations and organizations to make these decisions in order to best serve their citizens and communities, and those programs should not be punished through reduced CSC payments for exercising those authorities.

USET SPF urges IHS to reconsider where it is focusing its efforts regarding CSC and recommit to fully implementing the Supreme Court's decision without further complication. Failure to do so will likely result in further litigation that will be costly for not only the IHS but for the Tribal Nations who are simply seeking payment that they are owed.

Minimize Administrative and Procedural Burden

At all steps of the CSC calculation process, USET SPF urges IHS to minimize administrative and procedural burden as much as possible. This is particularly relevant for the documentation that IHS is considering requiring for CSC calculations and negotiations.

Regarding consultation Question 1, USET SPF believes that initial calculations of CSC due on program income spending in the upcoming year should reflect the Tribal Nation or organization's best estimate of program income spending in that year. Acceptable documentation supporting this should include a simple certified statement showing program income spending in the most recently completed year (including a calculation of the amount of CSC need, showing pass-throughs and exclusions associated with that program income spending) and projected program income spending in the upcoming year, if the projected amount differs from spending in the previous year. The certification statement should be as simple as possible and should not require additional supporting documentation as Tribal audit reports should be sufficient for verification. In the event reconciliation occurs, verification of program income spending may be determined from examination of Tribal audit reports. While we understand the IHS's desire to ensure fiscal responsibility, it is inappropriate to impose more burdensome certification requirements on self-governance programs than already exist in this process. In the rare case that IHS identifies an inconsistency in program income spending from a single audit, then it may initiate further investigation, but for the vast majority of programs, single audits should be more than sufficient for IHS to certify program spending.

USET SPF's position is similar on the issue of the *IHS Contract Support Costs Certification of Estimated Program Income Expenditures* form. The form should be as simple as possible and require the minimum amount of information necessary to make CSC calculations, which does not include requiring details on services to non-beneficiaries. While the form may look simple on a superficial level, the question inquiring about the percentage of non-beneficiary encounters or users has the potential to create an untenable burden for ISDEAA programs. Typically, Tribal Nations serving non-beneficiaries do not maintain systems for distinguishing between non-Indian patients, therefore, identifying the information IHS is considering requesting would require the development of new data reporting systems across numerous electronic health record systems and would involve excessive costs and time. Many Tribal Nations, particularly in the USET SPF region, are operating with staffing shortages and limited capacity, meaning that increased data reporting requirements would likely discourage those programs from seeking CSC from IHS that they are rightfully owed. To solve this issue, the form should simply ask, in a Tribal Nation's best estimate, "do health care expenditures on services to non-beneficiary patients constitute more than 50% of all health care spending?" If the answer is no, then that Tribal program should not have to provide any additional information or documentation, and the CSC calculation process should go on uninterrupted. If the answer is

yes, the IHS should initiate further negotiations with that program, but should not institute any automatic adjustments or reductions in the CSC obligation. By using this threshold method, the vast majority of programs will be able to complete the CSC negotiation process without hinderance, reducing the administrative burden on both Tribal programs and the IHS itself.

Beyond these reasons, IHS should not be attempting to implement burdensome administrative requirements on Tribal Nations in the era of Executive Order 14112, *Reforming Federal Funding and Support for Tribal Nations To Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination,* which explicitly directs federal agencies to reduce administrative burden, consider the barriers faced by Tribal Nations in program implementation, and increase the flexibility and efficacy of federal funds by "maximizing the portion of Federal funding that can be used for training, administrative costs, and additional personnel." Given these directives, it seems clear to USET SPF that any attempts to create additional barriers to accessing CSC funds or reduce CSC payments either purposefully or inadvertently through overly-burdensome processes would be a violation of Executive Order 14112. As the principal agency tasked with providing services and resources to Tribal Nations, the IHS should lead by example and make the CSC process as simple and efficient as possible to fulfill the goal of getting more federal resources into Indian Country.

Third-Party Reimbursements Are Not CSC

In the final consultation question, IHS states that "that compensation received from third-party payors may currently reimburse some costs that might also be proposed for CSC reimbursement" and asks what documentation could be provided to "ensure the program expenditure has not already been fully reimbursed, and there is, in fact, a CSC need." USET SPF reminds IHS that this case deals with the expenditure of third-party reimbursements, not the reimbursements themselves. As the Supreme Court noted in its opinion, the ISDEAA is clear that contract support costs are due on the expenditure of all program income so long as the spending furthers the "general purposes" of the contract. Beyond the fact that it is impossible to determine what portion, if any, of a payment from a third-party may be reimbursement of administrative costs, the reimbursement has nothing to do with the CSC that is incurred in connection with later spending that income on future services. The CSC that a Tribal program incurs when it spends program income is the key element of this decision. USET SPF is disappointed that IHS seems to be making another attempt to shortchange Tribal programs on CSC that they are owed by misrepresenting the key facts of the case. We urge the agency to redirect the energy and time it is expending in trying to reduce or circumvent its CSC obligation to advocating with Congress for more resources for the IHS. It is true that IHS is chronically underfunded, and that this new obligation creates a financial strain on the agency, but it is inappropriate to punish Tribal Nations exercising their self-determination rights by refusing to calculate CSC on certain portions of program income.

Conclusion

IHS has repeatedly acknowledged its legal obligation, as declared in *Becerra v. San Carlos Apache Tribe*, to reimburse contract support costs incurred in operating the entire federal program covered by the contract, including the expenditure of program income to carry out the general purposes of the contract. However, the discussions at the CSCAG and the questions provided in this comment period seem to indicate a desire by IHS to reduce or deny CSC on expenditures of program income through overly

burdensome processes and misguided interpretations of the Supreme Court's decision. In this "next era of Tribal self-determination," USET SPF urges IHS to reconsider its current approach by simplifying the CSC calculation and negotiation process and abandoning its attempts to impose restrictions on Tribal Nations exercising our self-determination rights. IHS must fully and faithfully implement the decision in *Becerra v. San Carlos Apache Tribe*. USET SPF hopes that our comments illuminate the issues with IHS's current approach to implementation. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906.

Sincerely,

Kirk Francis
President

Kitcki A. Carroll
Executive Director