DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Indian Health Service
Rockville, MD 20857

SEP 19 2018

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 writing to provide updates to the recommendations and questions raised during our Indian Health Service (IHS) Tribal Self-Governance Advisory Committee (TSGAC) meeting held on July 18-19 in Washington, DC. Please see the enclosure for these updates.

I appreciate the work and collaboration of the TSGAC in helping us meet our mission to raise the physical, mental, social and spiritual health of American Indians and Alaska Natives to the highest level. If you have any questions, please directly contact Ms. Jennifer Cooper, Director, Office of Tribal Self-Governance, IHS, by telephone at (301) 443-7821 or by e-mail at jennifer.cooper@ihs.gov.

We look forward to our next quarterly meeting on October 3-4, 2018, in Washington, D.C.

Sincerely,

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

Enclosure: IHS Responses on Follow-Up Items from the Tribal Self-Governance Advisory Committee Meeting on July 18-19, 2018

Indian Health Service
Tribal Self-Governance Advisory Committee Third Quarterly Meeting
July 28-29, 2018 – Washington, D.C.

1. **Information Systems Advisory Committee (ISAC) Charter**: The Tribal Self-Governance Advisory Committee (TSGAC) requested an update on the status of the ISAC Charter and noted they provided written comments and recommendations for the ISAC Charter to the Indian Health Service (IHS) on April 5, 2018.

   IHS Response: Following three rounds of comments and revision, the ISAC made final recommendations to IHS leadership for review and consideration on a draft ISAC Charter. In response, IHS leadership requested that the ISAC revisit the number of voting members identified in the charter to maintain broad input, strong communication, and transparency. The ISAC last met in Phoenix, Arizona, on March 14-15, 2018. Plans for the next ISAC meeting are underway for the first quarter of fiscal year (FY) 2019.

2. **Modernization of the Indian Health Service Health Information System:** The TSGAC asked if the IHS requested appropriations for the modernization of the IHS health information system. Highlighting the Department of Veterans Affairs (VA) momentum in gaining appropriations and entering into a $10 billion contract with Cerner, the TSGAC inquired as to whether the IHS had any discussions to leverage funding from the VA and/or to negotiate a small amount of these funds for modernizing the IHS health information system, specifically the Resource and Patient Management System (RPMS).

   IHS Response: Working through the budget formulation process, the IHS continues to evaluate the scope of additional resources necessary for modernization of health information technology systems. In addition to these efforts, the IHS actively seeks insight on any system selection and implementation collaboration opportunities with other Federal partners, including the Department of Defense, the VA, and the U.S. Coast Guard. The IHS continues collaborative technical discussions regarding modernization efforts of their respective legacy electronic health record (EHR) systems, VistA and RPMS. Ongoing discussions are also underway with the VA on its Cerner implementation and the Department of Health and Human Services' (HHS) Office of Chief Information Officer to carry out a Healthcare Information and Management Systems Society (HIMSS) Maturity Model Assessment, which measures how well an organization incorporates usability and other user-focused design processes.

3. **Renewal of the Department of Veterans Affairs (VA) and IHS Reimbursement Memorandum of Understanding (MOU):** The TSGAC expressed disappointment that the IHS and VA MOU was renewed, without notifying Tribes that negotiations were being held until after the MOU was signed by the parties. The TSGAC stated they had previously requested to be informed and involved in the IHS and VA negotiations for the

MOU, as this agreement substantially "sets the stage" for Tribal negotiations with the VA, for Tribal reimbursement agreements. The TSGAC was also concerned that reimbursement for Purchased/Referred Care (PRC) was not included in the VA and IHS Reimbursement Agreement. The TSGAC inquired as to whether the inclusion of PRC reimbursement was discussed during negotiations, and why PRC was not included in the Reimbursement Agreement, as required by section 402 of the Indian Health Care Improvement Act. The TSGAC requested information on the Agency's plan to require the VA to fully comply with section 402 by including reimbursement for PRC.

IHS Response: In 2003, the IHS and VA entered into a MOU to establish mutual goals and objectives for ongoing collaboration between the IHS and the VA in support of our respective missions and to establish a common mission of serving American Indian and Alaska Native (AI/AN) Veterans. This MOU was renewed and updated in 2010. The MOU does not create a legally binding agreement between the IHS and the VA, but rather sets a framework for collaboration and expresses intended common goals and objectives.

Separate from the MOU, in December 2012, the IHS and the VA executed an agreement for reimbursement for direct health care services. This document, which became known as the "National Reimbursement Agreement," carries specific terms and conditions, including a period of agreement with options to update or cancel. The IHS and the VA executed an amendment in January 2017 to extend the terms of the agreement.

Most recently, in June 2018, the IHS and the VA executed an amendment to extend the terms of the agreement and to add pharmacy language that will make the agreement in compliance with VA pharmacy policy related to medication. As a result of VA denials of non-formulary pharmacy requests for eligible AI/AN Veterans, the VA reached out to the IHS to communicate to the IHS the need for the VA to follow its non-formulary pharmacy request policy. After clarifying this portion of the agreement, the IHS and the VA extended the dates of the reimbursement agreement in accordance with the terms of the agreement itself. At this time, discussions have not been scheduled to discuss PRC.

Additionally, the TSGAC expressed concern that the VA is still not able to accept electronic billing for pharmacy, and asked if a plan exists to address this issue.

IHS Response: The IHS discussed the possibility of billing pharmacy claims electronically with the VA's Electronic Data Interchange staff. Unfortunately, this cannot occur at this time as the VA's system enhancements are still in development. The IHS does not have information from the VA on a timeline for completion.

4. **IHS Director Nomination:** The TSGAC expressed concern that the term for an "Acting" IHS Director is time-limited, and requested information pertaining to the IHS's plan to extend or renew RADM Michael Weahkee's term as the deadline approaches.

   IHS Response: The Indian Health Care Improvement Act (IHCIA) established the IHS Director as a position that must be appointed by the President, by and with the advice and consent of the Senate (25 U.S.C. § 1661(a)(2)), often referred to as a "PAS position." The Federal Vacancies Reform Act of 1998 places limits on the time a person can serve as acting in a PAS position. The President withdrew his first nomination in February 2018. If a nomination for the IHS Director position is not submitted on or before September 25, 2018, the current Acting Director's service must end on that date. If a second nomination for the IHS Director's position is submitted on or before September 25, 2018, however, the Acting Director may continue to serve in the position until the second nomination is confirmed or for 210 days after the second nomination is rejected, withdrawn, or returned. *See* 5 U.S.C. § 3346(b).

5. **The Great Plains Tribal Chairman's Health Board (GPTCHB) request to participate in the Tribal Self-Governance Program:** The TSGAC expressed concern that the IHS determined that the GPTCHB was ineligible to participate in the IHS Tribal Self-Governance program. The TSGAC strongly encouraged the IHS to "liberally construe" the Indian Self-Determination and Education Assistance Act (ISDEAA) to facilitate transfer of these programs, as the Oglala Sioux Tribe, Cheyenne River Sioux Tribe, and Rosebud Sioux Tribe have authorized through Tribal Resolutions pursuant to the ISDEAA. Further, the TSGAC commented that to do otherwise sets a precedent that arbitrarily limits Tribes in their Self-Governance efforts.

   IHS Response: The IHS welcomes, invites, and supports participation by all Tribes and Tribal Organizations in the IHS Tribal Self-Governance Program (TSGP). All participants must meet the eligibility requirements, as described under Title V of ISDEAA and the corresponding regulations. The IHS determined that the GPTCHB does not meet the eligibility criterion to participate in the IHS TSGP, because it has not demonstrated, for a 3-year period, financial stability and financial management capacity. Specifically, Title V of the ISDEAA defines conclusive evidence of meeting the financial stability and financial management capability criterion as having "…no uncorrected significant and material audit exceptions **in the required annual audit of the Indian tribe's self-determination contracts or self-governance funding agreements** with any Federal agency . . . " 25 U.S.C § 5383(c)(2) (emphasis added); 42 C.F.R. § 137.21. Further legal interpretation of this requirement is noted by the House Report, 106-477, H.R. Rep. No. 106-477, at 20 (1999).

To date, all participants in the IHS TSGP have demonstrated financial stability and financial management capability based on audits of the funds managed by the Tribe or Tribal Organization under Title I or Title IV of the ISDEAA. However, the audits submitted by the GPTCHB are not funds managed by the GPTCHB under a Self-Determination contract or Self-Governance funding agreement with any Federal Agency, authorized by the ISDEAA. We have shared possible alternatives with the GPTCHB, including that one of the three Tribes that has met the eligibility requirements under Title V may assume PFSAs on behalf of the other two Tribes. Another alternative is to have the GPTCHB submit an ISDEAA Title I contract proposal pursuant to 25 C.F.R. § 900.8. We have also informed the GPTCHB that the IHS Office of Direct Service and Contracting Tribes (ODSCT) is available to assist the GPTCHB through the ISDEAA contracting process.

6. **The Department of Health and Human Services (HHS) "Re-imagine" process:** The TSGAC requested information on the status of the HHS "Re-Imagine" process, and how it will affect Indian health and Tribes.

   IHS Response: The IHS has worked collaboratively with the HHS staff and Operating Divisions to identify Department-wide strategies and resources that can be used to address issues affecting the quality of health care provided to American Indian and Alaska Native people served by IHS facilities. The IHS is an eager participant in the Re-Imagine HHS, work which is focused on making HHS more effective at fulfilling its mission, more focused on serving the American people, and a better place to work. In concert with these activities, the IHS is seeking to implement innovative approaches to delivering and improving health care, identifying areas where regulatory reform can facilitate Agency processes, and evaluating opportunities to carry out our mission more effectively.

7. **Meaningful Tribal Consultation:** The TSGAC expressed concern with the short time frame for several Tribal Consultations, which were open for public comment for 30 days, or less (e.g., one Tribal Consultation was open for comment for only 2 weeks). The TSGAC requested that the IHS provide longer Tribal Consultation time frames to provide sufficient time for Tribes to develop meaningful and comprehensive input or recommendations. Additionally, the TSGAC recommended that a consistent process needs to be established to analyze and incorporate Tribal input received during Tribal Consultation. Further, the TSGAC suggested that if an IHS and Tribal workgroup exists that is associated with the topic of Tribal Consultation, then the workgroup should reconvene to jointly review the comments and incorporate or take action on the results of the Tribal Consultation.

   IHS Response: Thank you for your input and recommendations. In addition, the IHS received the August 10, 2018-dated letter, jointly signed by the Chairs of the IHS TSGAC and Direct Service Tribes Advisory Committee, which recommends the

establishment of a joint Federal-Tribal Workgroup to review and develop recommendations to improve the IHS Tribal Consultation Policy.

Both the IHS and HHS share your interest in improving the IHS Tribal Consultation Policy and process. This is an agenda topic on the upcoming HHS Secretary's Tribal Advisory Committee (STAC) meeting on September 24-25, 2018, in Fairbanks, Alaska. Let us plan to further discuss this topic at the next TSGAC meeting.

8. **July 10, 2018-dated Tribal Leader Letter Regarding Use of FY 2018 Inflationary Increases for Section 105(l) Leases:** The TSGAC expressed concern that the time frame of 2 weeks for Tribal Consultation on the issue of using FY 2018 inflationary increases to pay for Section 105(l) lease cost agreements was inadequate. The TSGAC also commented that using inflationary increases that are already due and owed to the Tribal programs to pay for IHS obligations is unacceptable, as the provisions of their ISDEAA agreements provide that any such increases would be paid to Tribes. Also, the TSGAC recommended that the Agency project reasonable estimates for the 105(l) leases, and request an indefinite appropriation from Congress, similar to that for Contract Support Costs.

   IHS Response: The IHS appreciates the TSGAC sharing their concerns and comments. The short comment period for the Tribal Consultation and Urban Indian Confer was necessary to allow the Agency to include more accurate estimates, develop a plan to fulfill the funding requirements for this fiscal year, and meet congressional notification timelines. We also sought to solicit input from Tribes and Urban Indian Organizations for consideration prior to any formal action. The IHS is currently required to use funds appropriated to the IHS Services account to meet the payment requirement of section 105(l) of the ISDEAA. A final decision for FY 2018 was shared in a letter to Tribal and Urban Indian Organization leaders on September 14. The IHS will continue to consult with Tribal Leaders and confer with Urban Indian Organization Leaders, as well as Congress, as we work together to identify and discuss long-term solutions.

9. **Indian Health Care Improvement Fund (IHCIF) Workgroup Recommendations and Tribal Consultation on the IHCIF:** The TSGAC requested information on the process to incorporate or address Tribal comments received during the IHCIF Tribal Consultation, which closed for comments on July 13, 2018. The TSGAC also recommended to the IHS that the IHCIF Workgroup reconvene at the earliest opportunity to address Phase II tasks and issues. Additionally, the TSGAC suggested that the IHCIF Workgroup be provided with more opportunities to meet face-to-face to work on the imminent, complex, and important issues.

   IHS Response: The IHS conducted three in-person Tribal Consultation sessions and one call to solicit feedback from Tribes and Tribal Organizations on the IHCIF Workgroup recommendations. The IHS received written comments from 25 Tribes

and Tribal Organizations. These comments were reviewed by IHS senior leadership and led IHS to make changes to the final recommendations. The IHS convened a call with the IHCIF Workgroup members on July 30 to announce decisions on the IHCIF formula and to answer Workgroup questions. An additional call with the Workgroup was held on August 10 to discuss the alternate resource calculation. The final decision for Phase I for FY 2018 was announced in an August 17-dated Tribal Leader Letter, notifying Tribal Leaders of the FY 2018 Indian Health Care Improvement Fund (IHCIF) allocations. A link to this letter is available online at https://www.ihs.gov/newsroom/triballeaderletters/.

A summary of all comments received during the consultation is posted on the IHCIF Consultation Web page at www.ihs.gov/ihcif/ihcif-consultation/. The IHCIF Workgroup began its work on Phase II issues at a meeting in Rockville, Maryland, on August 29-30, 2018.

10. **Sanitation Deficiency System (SDS) Tribal Consultation:** The TSGAC had a number of concerns and comments regarding the SDS Guidance, and related issues, as follows:

    a. The TSGAC recommended to the IHS that the SDS Tribal Consultation be meaningful and that the IHS consider Tribal input more seriously.

    IHS Response: As recommended by the TSGAC, and to allow more meaningful Tribal Consultation, the IHS has extended the comment period until September 14 for the Tribal Consultation on the proposed updates to the IHS *"Sanitation Deficiencies System (SDS) Guide - A Guide for American Indian and Alaska Native Homes and Communities"* (commonly known as the "SDS Guide"). The IHS will work with the IHS Facilities Appropriation Advisory Board who will review and make recommendations on comments submitted during the comment period. More information on the Tribal Consultation for the SDS Guide is available at https://www.ihs.gov/newsroom/triballeaderletters/.

    b. The TSGAC expressed concern that water and sanitation needs are still very prevalent in some Tribal communities, and that the full need is not represented accurately to Congress. The TSGAC requested information describing the short- and long- range plans for the IHS to ensure that every Native household has safe water and sanitation.

    IHS Response: A similar concern was raised by the Government Accountability Office's final report entitled, "*Drinking Water and Wastewater Infrastructure: Opportunities Exist to Enhance Federal Agency Needs Assessment and Coordination of Tribal Projects*" (GAO-18-309). Recommendation 1 of this report was, "*The Director of the Indian Health Service should implement a targeted, resource-efficient method to identify additional eligible Indian homes that may have existing*

deficiencies to include in Home Inventory Tracking System (HITS)." In response to this recommendation the Director of the IHS Division of Sanitation Facilities Construction (DSFC) directed Area DSFC Directors in an August 1, 2018-dated memorandum "*...to leverage their current interaction with their Tribal partners during the annual Sanitation Deficiency System updates to identify additional eligible Indian homes that have existing deficiencies and include these homes in HITS.*"

Over the long term, the IHS is actively taking steps to integrate the use of Geographic Information Systems (GIS) tools into their work identifying water and sanitation needs. These tools will improve the DSFC's ability to access, store, and update information about existing sanitation facility needs for Indian homes and communities and aid in the delivery of technical assistance to Tribes when operating and maintaining the facilities provided through the IHS and other Federal partners.

c. The TSGAC expressed concern over the definitions of "Indian home" and "Indian community," and associated requirements to match funding for certain projects that did not meet the definitions. Further, the TSGAC explained that it is not always possible to secure funds in unincorporated areas, where third-party matching is not available.

IHS Response: IHS authority to operate a sanitation facilities construction program originates from Public Law 86-121, codified at 42 U.S.C. § 2004a. Based on this authority to report and respond to the sanitation deficiencies of Indian Tribes and communities, the IHS implemented two policies: the Sanitation Facilities Construction (SFC) Criteria Document (Criteria Document) and the Sanitation Deficiency System Guide (SDS Guide).

Under the Criteria Document, which has been in effect since 1999, the cost of improvements in AI/AN communities is divided among IHS beneficiaries, commercial, and non-Indian users. Only the pro rata portion of the improvements benefitting IHS beneficiaries is eligible for IHS SFC funding. The pro rata cost of the improvements for non-Indian homes and commercial users must be paid with other available sources of funding. Over the past several years, the IHS has been working to ensure compliance with this policy across all IHS Areas. In addition, the IHS routinely works with Tribes to identify non-IHS contributions when necessary.

d. The TSGAC commented that Tribes also have significant concerns about IHS interpretation of Deficiency Levels, whether they meet the requirements of the authorizing law, and whether these are responsive to water and sanitation needs of our Tribal citizens.

IHS Response: The updated SDS Guide, which is currently out for Tribal Consultation, streamlines and clarifies deficiency level guidance and removes reference to future or anticipated deficiencies that were not intended to be reported to Congress as sanitation deficiencies under the requirements of the IHCIA. The updated SDS guide is intended to ensure SDS projects address existing sanitation facility needs and the project deficiency level guidance adheres to the statutory requirements at 25 U.S.C. § 1632(g)(4). Tribes are encouraged to provide their input on these updates through the Tribal Consultation process.

11. **Community Health Aide Program**: The TSGAC requested information about the status of the Community Health Aide (CHA) interim policy.

IHS Response: The Community Health Aide Program (CHAP) Tribal Advisory Group met on August 10, 2018, in Seattle, Washington. During the meeting, members discussed updates for ongoing efforts to expand programs, establish workgroups to research key program components, and develop an interim policy for Tribes that have already worked to build a sustainable health aide program within their communities.

The CHAP Tribal Advisory Group continues to work on an interim policy recommendation for IHS consideration. This includes whether or not to recommend that the IHS conduct Tribal Consultation on the interim policy or to immediately implement an interim policy while the CHAP Tribal Advisory Group completes its works on a policy and implementation plan to nationalize the CHAP outside of Alaska. Plans for the next CHAP Tribal Advisory Group meeting are underway for the first quarter of FY 2019.