



## DEPARTMENT OF HEALTH &amp; HUMAN SERVICES

Public Health Service

MAR 27 2017

 PORTLAND AREA  
 INDIAN HEALTH SERVICE  
 1414 NW NORTHROP, Suite 800  
 PORTLAND, OREGON 97209

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MAR 29 2017

 Office of Tribal Attorney  
 Nooksack Indian Tribe

 Mr. Robert J. Kelly  
 Chairman, Tribal Council  
 Nooksack Indian Tribe  
 P.O. Box 157  
 Deming, WA 98244

Re: Notice of Non-Emergency Reassumption of ISDEAA Contract No. 248-96-0025

Dear Chairman Kelly:

Pursuant to 25 U.S.C. § 5330 and 25 C.F.R. §§ 900.249-900.250, the Portland Area Indian Health Service (IHS) hereby submits its second written notice to the Nooksack Indian Tribe (Nooksack or Tribe) that Contract No. 248-96-0025 and the most recent Annual Funding Agreement (AFA) entered into by and between the IHS and the Tribe pursuant to the authority of the Indian Self-Determination and Education Assistance Act (ISDEAA), Public Law 93-638, as amended, will be wholly rescinded and re-assumed, on a non-emergency basis.<sup>1</sup> This action is being taken as a result of the Nooksack Indian Tribal Council's failure to take the necessary corrective action outlined in the Agency's January 19 letter, which was sent pursuant to 25 C.F.R. § 900.248. *See* 25 C.F.R. § 900.249. As explained in more detail below, Nooksack's Tribal Council lacks a quorum to do business in accordance with Nooksack's Constitution and bylaws. *See* enclosed November 14, 2016, letter from Principal Deputy Assistant Secretary Roberts. (Exhibit 1). Additionally, despite lacking a quorum, the Tribal Council took action to discontinue services to eligible IHS beneficiaries. The actions taken by the Tribal Council and its refusal to engage IHS in finding a solution violated the rights of certain beneficiaries and endangered the health, safety, and welfare of those individuals by refusing to provide required health services. The Tribe was given several opportunities to explain its position and work with IHS to resolve this matter (including requesting technical assistance pursuant to 25 C.F.R. § 900.248(c)), but the Tribe never responded to any of the Agency's letters and requests for information and/or a meeting.

### **Findings**

In late-October 2016, the Portland Area Indian Health Service received a message stating that Nooksack was refusing to provide services to some eligible IHS beneficiaries. (Exhibit 2). On or about November 2, 2016, the former IHS Principal Deputy Director, Mary Smith received a letter stating Nooksack was declining to provide health services to a substantial number of

<sup>1</sup> The most recent signed AFA was in CY 2011. The parties have continually extended that AFA by issuing contract modifications and IHS has continually provided funding for the programs, services, functions, and activities identified in that AFA.

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eligible IHS beneficiaries, possibly as many as 331. (Exhibit 3). Additionally, the IHS received a copy of two letters from the United States Department of Interior's (DOI) Principal Deputy Assistant Secretary. Those letters notified Nooksack that the Tribal Council lacked a proper quorum to conduct business and that all of the Council's actions after March 16, 2016, would not be recognized because those actions were taken in violation of the Tribe's own Constitution and bylaws. (Exhibits 1 & 4). The DOI's November 14, 2016, letter reminded the Tribe of the Nooksack Court of Appeals' order ruling that the individuals the Tribe was attempting to disenroll remained eligible to vote in elections. Because the Tribal court ruled that those individuals remained Nooksack Tribal members, those individuals remained eligible for health services.

On November 18, 2016, the IHS Portland Area Director sent a letter to Nooksack notifying the Tribe about the complaints it had received and reminding the Tribe that the individuals in question should receive health services in accordance with the ISDEAA contract between the parties. (Exhibit 5). The letter advised the Tribe that based on the DOI's determination, the individuals who had complained to IHS were still considered members and therefore, eligible for health services. The IHS reminded the Tribe that the funding provided under the ISDEAA contract between the parties includes funding for those individuals. Nooksack never responded to IHS' November 18 letter.

On December 1, 2016, the former IHS Principal Deputy Director received another letter informing the Agency that Nooksack was continuing to deny health services to eligible beneficiaries. (Exhibit 6). Attached to the letter were declarations from Tribal members explaining that they had been denied access to health services. Also included were letters from Nooksack refusing to provide health services to the individuals in question.

On December 13, 2016, former IHS Principal Deputy Director, Mary Smith, sent Nooksack another letter continuing to express concern that the Tribe was not complying with its ISDEAA contract and the law by failing to provide services to all eligible IHS beneficiaries. (Exhibit 7). The former Principal Deputy Director reminded the Tribe about the DOI's letters that did not recognize the Tribal Council's actions after March 22, 2016. The IHS reasonably deferred to the DOI on this issue, which was partially based on a Northwest Intertribal Court System ruling that the individuals in question were still considered enrolled members, and that subsequent action to disenroll certain members was done without the sufficient quorum required by the Tribe's Constitution and bylaws. Once again, IHS outlined the basis for its position that the Tribe needed to provide services to all eligible beneficiaries, including the individuals the Tribal council was attempting to disenroll (without a quorum). IHS requested evidence supporting the Tribe's decision not to provide services to those selected individuals, and sought a meeting to discuss the Agency's concerns. The Tribe never responded to the Agency's letter.

In late December, IHS continued to receive copies of letters that Nooksack sent to eligible members, denying access to health services. (Exhibit 8). Due to the Tribe's refusal to respond to the Agency's previous attempts to address this issue or otherwise alleviate the Agency's concerns, IHS issued a notice of intent to rescind the contract and reassume the health care programs, services, functions, and activities (PSFAs) on January 19, 2017, pursuant to 25 C.F.R. § 900.248. (Exhibit 9). The letter explained that in addition to the Tribe's failure to provide

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services to all eligible beneficiaries, the Agency could not in any case enter into a subsequent annual funding agreement with the Tribe because the Tribal Council lacks a sufficient quorum to do business on behalf of the Tribe.<sup>2</sup> The letter clearly stated that the Tribe's actions violated the rights of certain eligible beneficiaries and endangered the health, safety, and welfare of those individuals. In accordance with 25 C.F.R. § 900.248, IHS gave the Tribe 45 days to take corrective action and offered technical assistance. The Tribe did not respond to the Agency's letter or otherwise take the corrective action requested.<sup>3</sup>

Since March 2016, Nooksack has not had a duly elected Tribal Council recognized by the DOI. Because the DOI is the federal agency responsible for election matters on reservations, IHS relies on, and concurs with, the DOI's determination. The IHS has repeatedly conveyed to the Tribe the importance of a quorum for the Nooksack Tribal Council resulting from duly elected council members in an election recognized by the DOI. The DOI stated that it would not recognize any "'referendum election' claiming to disenroll current tribal citizen or any other [disenrollment] action inconsistent with the plain language of the Tribe's law." Furthermore, the IHS has received numerous patient complaints about health services being denied to eligible beneficiaries who were not properly disenrolled and/or may still be eligible regardless of Tribal membership.

On January 19, 2017, the Tribe was notified of IHS's intent to exercise its reassumption authority under 25 U.S.C. § 5330, if these corrective actions were not taken.<sup>4</sup> The Tribe was given until March 6, 2017, for the Tribal Council to have a quorum resulting from a duly elected council member in an election recognized by the DOI. The IHS has offered to meet with the Tribe to resolve the Agency's concerns, but to date, the Tribe has not responded to any of IHS' attempts to discuss these issues directly with the Tribe. This leaves the IHS with no choice but to rescind the ISDEAA contract and reassume the applicable programs in order to protect federal funding, and ensure that the necessary health services are provided to all eligible beneficiaries whose rights have been violated and whose health, safety, and welfare has been endangered by the Tribe's actions.

Therefore, pursuant to 25 C.F.R. §§ 900.249-900.250, the IHS is hereby notifying you of its decision to reassume, in its entirety, Contract No. 248-96-0025, and of your rights to a formal hearing. Specifically:

- a) If you choose not to exercise your right to a formal hearing, the effective date of reassumption will be April 29, 2017.

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<sup>2</sup> While the parties did not enter into an AFA for CY 2017, the IHS continued to fund the Tribe to operate the PSFAs identified in its contract by issuing contract modifications under the most recent AFA.

<sup>3</sup> Instead, on or about February 21, 2017, Nooksack filed an appeal with the Interior Board of Indian Appeals, despite the fact that IHS continued to fund the Tribe's contract and a final decision had not been issued by the Agency.


<sup>4</sup> "Reassumption," as used in the ISDEAA, means rescission, in whole or in part, of a contract and assuming or resuming control of the operation of the contracted program by IHS without the Tribe's consent. See 25 CFR § 900.246.

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- b) See attached correspondence and reasons summarized above regarding the details and facts supporting the IHS' reassumption decision.
- c) Within 30 days of receipt of this decision, you may request an informal conference under 25 C.F.R. § 900.154, or request a formal hearing at the Interior Board of Indian Appeals (IBIA) under 25 C.F.R. §§ 900.158 and 900.250. Should you decide to appeal this decision, you may request a hearing on the record. An appeal to the IBIA under 25 CFR §§ 900.158 and 900.250 must be filed with the IBIA by certified mail or by hand delivery at the following address: Board of Indian Appeals, U.S. Department of Interior, 801 N. Quincy Street, Suite 300, Arlington, VA 22203. You must serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed, and you must certify to the IBIA that you have served these copies. In lieu of filing such an appeal, you may, at your option, initiate a civil action in Federal District Court and proceed directly to such court pursuant to the ISDEAA, 25 U.S.C. § 5331(a).

I regret that we were not able to come to some agreement whereby the reassumption could have been avoided.

Sincerely,



Dean M. Seyler  
Director

Enclosure

cc: Nooksack Tribal Council Members