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MEMORANDUM

January 15, 2014

TO: Contract Support Cost Clients

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP /s/

RE: ***No Caps on Contract Support in Consolidated Appropriations Bill; IHS CSC Workgroup Addresses Pre-Award Negotiations***

The long-awaited FY 2014 Consolidated Appropriations Act bill, released on January 13, does not limit or "cap" contract support cost (CSC) spending at either the aggregate or individual level. In an explanatory statement, appropriators rejected the Administration's proposal to cap CSC on a contract-by-contract basis and called on the Administration to work with Congress and Tribes on a long-term solution. We discuss the implications of the bill language and explanatory statement below. We also report on an important meeting of the Indian Health Service (IHS) CSC Workgroup devoted to the calculation of CSC requirements in the pre-award context.

No Caps on Contract Support in Consolidated Appropriations Bill

If enacted as currently written, the FY 2014 appropriations bill would mark a significant change in CSC appropriations. Since FY 1998 for IHS, and FY 1994 for the Bureau of Indian Affairs (BIA), Congress has capped total CSC spending each year. The amounts appropriated have never been enough to pay full CSC on a national basis, giving rise to CSC funding "shortfalls" suffered by most Tribes carrying out contracts and compacts under the Indian Self-Determination and Education Assistance Act (ISDEAA). In the 2012 *Ramah* decision, the U.S. Supreme Court held that the caps limit BIA's aggregate CSC spending, but any contractor not paid in full can recover damages from the Judgment Fund in a contract claim against the Government.¹ The Court said that Congress had placed the agencies in a "dilemma" by commanding full payment of CSC in the ISDEAA, yet capping CSC appropriations at levels insufficient to carry out that command. The Court identified several legislative options for resolving this dilemma, such as appropriating enough for full payment, amending the ISDEAA to allow less than full payment, or making line-item CSC appropriations.

In the FY 2014 President's Budget, the Administration proposed the latter option. The budget included proposed appropriations act language that would have incorporated tables from BIA and IHS listing the maximum amount of CSC available for each ISDEAA agreement. This effectively created line item appropriations that, in combination with the ISDEAA provision that all funding is "subject to the availability of

¹ *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012). The *Ramah* decision applies equally to IHS. *Arctic Slope Native Ass'n v. Sebelius*, 501 F. App'x 957 (Fed. Cir. 2012).

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appropriations," aimed to remove Tribes' right to full CSC and protect the U.S. from liability for shortfalls. As we have reported, this proposal evoked widespread outrage, not only from Tribes but from some members of Congress and organizations representing government contractors such as the U.S. Chamber of Commerce.²

The omnibus bill released on Monday does not mention CSC at all in the context of FY 2014 appropriations.³ No specific amount of CSC is appropriated for either IHS or BIA, and no caps limit the amounts the agencies can spend on CSC. Instead, CSC would be payable from each agency's lump-sum appropriation (\$3,982,842,000 for IHS and \$2,378,763,000 for BIA) for expenses to carry out the ISDEAA and its other statutory obligations. Under this appropriation structure, the Supreme Court ruled in the *Cherokee* case that the agency's entire lump-sum appropriation was legally available to pay Tribes' CSC requirements in full.⁴ Thus Tribes would retain their right to full CSC in FY 2014. Disagreements would still arise about what that full amount is for a particular Tribe, but removing the caps would appear to affirm Congress's intent that CSC be fully funded on a national basis, even if IHS must reprogram funds away from other priorities to do so.

The Joint Explanatory Statement accompanying the bill explains the conscious decision to reject both individual and aggregate caps. The agencies must determine how much CSC to pay from their discretionary funds—but underpayments would subject the Government to contract liability under *Cherokee*. Meanwhile, "the underlying contradictions in current law," as the Joint Statement puts it, remain to be addressed by Congress. The appropriations committees direct the agencies to consult with Tribes and work with Congress "to formulate long-term accounting, budget, and legislative strategies to address the situation." Within 120 days of enactment, the agencies would have to develop work plans and announce consultation with Tribes. Even before that, the Joint Statement directs both BIA and IHS, within 30 days of enactment, to submit operating plans to the appropriations committees displaying funding allocations to the activity level. Presumably these plans will indicate how the agencies plan to fund CSC obligations.⁵

² See, e.g., our memoranda of November 18, 2013 (reporting on Senate oversight hearing on CSC issues) and September 17, 2013.

³ The entire bill, almost 1600 pages, can be found at <http://docs.house.gov/billsthisweek/20140113/CPRT-113-HPRT-RU00-h3547-hamdt2samdt.xml.pdf>. The bill retains the familiar provision that the total amounts of CSC appropriated for, or designated in committee reports for, BIA and IHS "are the total amounts available for fiscal years 1994 through 2013." See Section 406 on pages 828-29. This provision has been included in the appropriations act for many years and has not precluded recovery on past-year CSC claims.

⁴ *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005).

⁵ Relevant excerpts from the Joint Explanatory Statement are attached to this report.

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The bill's rejection of the CSC caps in favor of full funding has received coverage in the mainstream press, with the Washington Post⁶ portraying the bill as a Congressional rebuke to the Administration's attempt to eliminate Tribes' legal remedies when their contracts are not paid in full.

If the bill is enacted with the CSC provisions unchanged, Tribes' right to full CSC funding will continue at least through FY 2014, making the negotiation of that full amount—the subject of the IHS Workgroup meeting described next—a critical and timely topic.

IHS CSC Workgroup Addresses Pre-Award Negotiations

On January 7 and 8, 2014, in response to recommendations from Tribes as well as the IHS Tribal Self-Governance Advisory Committee (TSGAC) and Direct Service Tribes Advisory Committee (DSTAC), the Director of the IHS, Dr. Yvette Roubideaux, convened a meeting of the IHS CSC Workgroup in Rockville, Maryland. The recommendations to reconvene the Workgroup grew in part out of tribal discontent with the Administration's FY 2014 appropriations cap proposal described above, as well as IHS's cumbersome approach to settling past-year claims for unpaid CSC.

Director Roubideaux opened the meeting with an overview of what IHS hoped would be the Workgroup's charge and its scope of work for the meeting. Remarking that the Supreme Court's decision in the *Ramah* case in 2012 raised a number of new issues in the CSC context, she noted that attempts to resolve several of those issues are ongoing, including settlement of past claims and appropriations of future funding. However, she said that the Workgroup's efforts in the meeting would focus on estimates of CSC need in the pre-award negotiations phase.

As Director Roubideaux explained, after the *Ramah* decision IHS and tribal attorneys agreed on language for use in funding agreements to govern the CSC award. (Tribes may elect to use this new language, to use the previous CSC language, or to negotiate different language with the IHS.) The new CSC language consists of three paragraphs that: (1) set forth an estimate of the tribal contractor's full CSC need for the year; (2) set forth the lesser amount that IHS has available to pay based on appropriations; and (3) reserve the legal rights of all parties, including Tribes' rights to bring contract claims for any shortfalls. Dr. Roubideaux said that discussions between

⁶ The article can be found at http://www.washingtonpost.com/politics/spending-bill-directs-government-to-pay-indian-contracts/2014/01/14/ebb8f692-7d4c-11e3-93c1-0e888170b723_story.html?tid=auto_complete.

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IHS and tribal contractors so far to try to agree on the "paragraph 1" estimate of CSC need have been "interesting" and that there appears to be some difference of opinion as to how to calculate CSC need for purposes of the estimate.⁷

Dr. Roubideaux asked the Workgroup to begin by identifying areas of *agreement* between Tribes and the IHS in arriving at the CSC estimate in the pre-award negotiations context. She said that the Office of Management and Budget (OMB) will be reviewing the Workgroup's efforts and outcomes and that even a short list of areas where Tribes and IHS agree would be helpful to share for budgeting purposes. She suggested that the Workgroup could go further to identify areas of disagreement, and perhaps even begin to discuss ways to resolve those disagreements (or agree to disagree), but that the Workgroup need not go that far.

Dr. Roubideaux also addressed some limitations on the scope of the Workgroup's efforts. First, she said that consistent with recommendations from the TSGAC and DSGAC, the Workgroup would not discuss settlement of past claims, since those past claims are currently the subject of litigation. She also said that the Workgroup's prior recommendations with regard to the CSC policy should be revisited and discussed again in light of the *Ramah* decision, but that the Workgroup should not turn to that task in this meeting.⁸ She also said that the Workgroup would not be discussing appropriations, though she acknowledged that Tribes have not supported the individual contract caps proposed by the Obama Administration for FY 2014 and said that she believes "progress has been made" in separate discussions on the appropriations issue. Finally, Dr. Roubideaux affirmed that the Workgroup's recommendations would be presented to Tribes for consultation.

Dr. Roubideaux cited recommendations from the TSGAC to assign federal staff knowledgeable about CSC to work with Tribes on the Workgroup, and noted that the IHS Area Directors as well as representatives from the Office of Tribal Self-Governance, the Office of Direct Service and Contracting Tribes, the Office of Finance and Accounting, and the Office of General Counsel had been appointed to the Workgroup. (Tribal representatives objected to participation by the Office of General Counsel on the Workgroup, and those representatives were removed.) Both self-governance and direct service Tribes are represented on the Workgroup as well.⁹

⁷ It has proven difficult for the parties to agree on a paragraph 1 numbers, as IHS has scrutinized every line item for possible exclusions, duplications, etc. to minimize the requirement. See our report of November 2, 2012 and attached draft letter to IHS at 4-5.

⁸ See our memorandum of September 20, 2012 and attachment (tribal redline showing proposed changes to existing IHS CSC Policy).

⁹ A list of the tribal and federal representatives on the Workgroup is attached.

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Dr. Roubideaux did not stay to participate in the Workgroup's substantive discussion. After her departure, the Workgroup reconvened for a presentation by Max Tahsuda, Agency Lead Negotiator for the IHS Oklahoma Area Office, reviewing several factors affecting the calculation of CSC need for purposes of the "paragraph 1" estimate. The listed factors were based largely on the statutory language defining CSC as reasonable, necessary, allowable, and non-duplicative amounts for activities that must be carried out to ensure prudent management and compliance with the contract.¹⁰ The presentation, a copy of which is attached, isolated individual requirements of the statute and the IHS Policy in order to allow the Workgroup to discuss whether there is agreement over these statutory principles defining CSC. The presentation also addressed factors specific to indirect CSC, including the use of indirect cost rates and pass-throughs and exclusions. The discussion and recommendations resulting from the Workgroup's consideration of these factors are summarized below.

1. Pass-throughs and Exclusions Generally

Tribal representatives emphasized that their indirect cost rates are negotiated with their cognizant agency for purposes of all federal funding received by the tribal contractor from many different federal agencies, of which the IHS is only one. For that reason, tribal representatives expressed that IHS needs to respect both the indirect cost rate that the federal government has agreed to with the tribal contractor and the pass-throughs and exclusions that were agreed to as a part of that rate agreement. IHS representatives pointed out, though, that they need to determine a tribal contractor's pass-throughs and exclusions in order to figure out the IHS base, and that during pre-award negotiations they do not always have access to detailed information about the pass-throughs and exclusions that have been agreed to with the tribal contractor's cognizant agency, which most often is the Department of the Interior's Interior Business Center (IBC). To address that issue while still seeking consistency between IHS practices and those of the tribal contractor's cognizant agency, a tribal representative suggested that IHS look to a tribal contractor's total pass-throughs and exclusions in past years (as shown in the carryforward schedules based on actual audited expenditures) and use a rolling three-to-five-year average to estimate the tribal contractor's pass-throughs and exclusions for the year being negotiated, unless there is an obvious reason to deviate from that average.

2. Duplication of Costs

The ISDEAA provides that CSC funding "shall not duplicate any funding provided" as part of the Secretarial amount. The federal and tribal Workgroup members agreed that duplication of costs is an area that will likely require a great deal of

¹⁰ See 25 U.S.C. § 450j-1(2) & (3).

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discussion, and that the topic should be reserved for a future Workgroup meeting, most likely the next one in February.

3. CSC on PFSAs

The IHS pays CSC only on programs, functions, services, and activities (PFSAs) carried out pursuant to the contract or compact. The Workgroup agreed to reserve for further discussion the issue of whether CSC would be paid on funding that a tribal contractor chose to use to carry out a program for which there exists congressional authorization, but which the Secretary is not carrying out because there has been no appropriation. However, the Workgroup noted that the last PFSA Manual published by the Central Office was published in 2002, and suggested that each Area Office should have a PFSA Manual that is updated on an annual basis.

4. "Reasonable," "Necessary," and "Allowable" Costs

Under the ISDEAA and IHS Policy, CSC must be reasonable, necessary and allowable "to ensure compliance with the terms of the contract and prudent management." The Workgroup did not discuss specifically how those terms should be defined, but tribal representatives stated that OMB A-87 and the ISDEAA allowable cost exceptions define the parameters and that allowable costs are determined in negotiations with the tribal contractor's cognizant agency. Tribal representatives said that IHS should respect the results of those negotiations and pointed out that fixed-with-carryforward rates are designed to correct for over or under-recoveries, based on audited expenditures in a given year, by adjusting the rate in future years to make up the difference. Therefore, tribal representatives said it is unnecessary and inappropriate for the IHS to seek to make such determinations independently of the rate negotiation process.

IHS representatives, however, expressed at least two concerns: first, whether fixed-with-carryforward rates truly do account for and correct tribal over-recoveries, and (2) whether the over-recovery carryforward correction fully compensates IHS or whether its effect is diluted among all the agencies benefiting from the indirect cost pool. Some of the IHS representatives suggested it might help for IHS to be consulted or involved in the rate negotiation process along with the tribal contractor and the cognizant agency; however, tribal representatives objected to that idea. They again pointed out that IHS is only one of several agencies to which the negotiated rate applies, and that it would be cumbersome and inappropriate for every agency to have a seat at the table.

5. Pass-throughs and Exclusions

IHS provided a list of possible pass-throughs and exclusions that, in the agency's view, are particular areas of concern or are raising questions in the negotiation of the "paragraph 1" CSC estimate. The Workgroup then discussed the items on the list to

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assess the extent of agreement on the proper approach to each item. Importantly, IHS agreed with tribal representatives that a categorical approach is not appropriate—that is, funds properly excluded from one tribe's direct cost base might not be appropriately excluded from another tribe's base. The touchstones are (1) the extent of administrative effort required, and (2) how the funds were treated in the indirect cost rate proposal and agreement. For example, while Contract Health Services (CHS) funding might generally be treated as pass-through, to the extent CHS funding was included in the base for purposes of the rate agreement (thus lowering the rate), it should also be included in the base for the purpose of applying that rate to calculate the indirect cost requirement in paragraph 1. IHS representatives appeared to acknowledge that such differences in the indirect cost rate-making process and other differences in tribes' treatment of funds require a nuanced rather than categorical approach to exclusions. Therefore, a tribal contractor should be able to provide clarifying information (such as a simple written statement) to correct the IHS default position if it is not accurate. Tribal representatives also suggested that IHS employees take advantage of training opportunities offered by the Interior Business Center and the HHS Division of Cost Allocation in order to understand the standards and expectations applied by those cognizant agencies.

6. Use of Medical Inflation Rate for Direct CSC Estimate

Tribal representatives noted that in the Workgroup has recommended, in a redline IHS CSC Policy presented to the agency in 2012, the use of the medical inflation rate, rather than the non-medical rate, to adjust direct CSC annually. That recommendation was not adopted, according to IHS representatives, because OMB insisted on the non-medical rate. After some waffling by the IHS representatives, the Workgroup agreed to reiterate the recommendation notwithstanding OMB's objection.

Some general themes emerged throughout the Workgroup's discussion. One was the need to address inconsistencies in approaches to various CSC issues taken by the Area Offices. Tribal representatives felt that the existing CSC Policy would generally be adequate to address IHS's concerns were they consistently followed and uniformly implemented by the agency itself. A second theme emerging from tribal leaders was that IHS should trust and respect the rate negotiations and agreements (including the determinations of issues such as allowable costs, pass-throughs and exclusions) reached between tribal contractors and their cognizant agency, and that IHS must not assert the right to second-guess those negotiations at a later date.

After concluding discussion, the Workgroup presented its recommendations to Dr. Roubideaux, noting that they were still in draft form and that the Workgroup plans to meet again to continue discussions. Dr. Roubideaux indicated that she will be speaking with OMB to update them on the Workgroup's progress, but she agreed to emphasize that the Workgroup's efforts are ongoing and that its recommendations will be subject to tribal consultation once finalized. February 24 and 25, 2014 has been proposed for the next

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Workgroup meeting, to be held in Washington, D.C. in conjunction with the IHS budget formulation meetings. The primary focus of the CSC Workgroup meeting will likely be duplication. This could turn out to be a contentious issue, as IHS seems intent on expanding the universe of potential duplication between the Secretarial amount and CSC in order to minimize tribes' CSC requirements.

Conclusion

If you have any questions about this memorandum, please do not hesitate to contact Joe Webster (jwebster@hobbsstrauss.com or 202-822-8282), Geoff Strommer, (gstrommer@hobbsstrauss.com or 503-242-1745), Steve Osborne (sosborne@hobbsstrauss.com or 503-242-1745), or Caroline Mayhew (cmayhew@hobbsstrauss.com or 202-822-8282).



Contract Support Costs:

Contract Language and Factors Affecting Calculation of Contract Support Costs Amounts

January 7-8, 2013

Developed for Deliberation of the Indian Health
Service Contract Support Costs Workgroup

Overview

- I. Contract Language Addressing Contract Support Costs (CSC)

- II. Factors Affecting the Calculation of CSC

I. Contract Language - Overview

- Two Standard Options
 - “2011 common language”
 - Post-*Ramah* language
- In addition, the Indian Health Service (IHS) will negotiate with each tribe, in recognition of the government-to-government relationship underlying each contract/compact.

Contract Language – Option I

- 2011 Common Language (example of Title I language)

Contract Support Costs:

The parties agree that the CSC funding under this Annual Funding Agreement (AFA) will be calculated and paid in accordance with Section 106 of the Act; IHS CSC Policy (Indian Health Manual - Part 6, Chapter 3); and any Congressional restrictions in appropriations or other statutes. In accordance with these authorities and subject to available appropriations for CSC, the parties agree that under this AFA the _____ Tribe will receive direct CSC in the amount of \$ _____ [amount from funding table], and indirect CSC in the amount of \$ _____ [amount from funding table]. These amounts may be adjusted as set forth in the IHS CSC Policy (IHM 6-3) as a result of changes in program bases and/or Tribal CSC need, and available CSC appropriations. Any adjustments to these amounts will be reflected in future modifications to this AFA.

Contract Language – Option 2

- **Post-Ramah Language (example of Title I language)**
 1. In accordance with 25 U.S.C. § 450j-1 contract support costs (CSC) are the reasonable costs for activities which the Tribe must carry out to ensure compliance with the terms of the contract and prudent management and which do not duplicate funding provided under 25 U.S.C. § 450j-1(a)(1). As of the date of execution of this agreement, and based upon the best available data, the Tribe's CSC requirement under the foregoing statutory provisions for the fiscal year covered by this agreement has been estimated to be \$XX, including \$XX for direct CSC and \$XX for indirect or indirect-like CSC. This estimate shall be recalculated as necessary to reflect the full CSC required under 25 U.S.C. § 450j-1, and, to the extent not inconsistent with the Indian Self-Determination Act, as specified in IHS Manual Part 6, Chapter 3 (approved Apr. 6, 2007).
 2. From the amount Congress appropriates for CSC for FY 2013, and, to the extent not inconsistent with applicable law, employing the allocation procedures specified in IHS Manual Part 6, Chapter 3 (approved Apr. 6, 2007), and treating the Tribe on the same basis as all other tribes, IHS will pay \$YY to the Tribe for the fiscal year covered by this agreement, including \$YY for direct CSC and \$YY for indirect or indirect-like CSC, provided that such payment shall be subject to adjustment based on 25 U.S.C. § 450j-1(b) and the actual amount Congress appropriates for CSC, and that adjustments to the payment will be reflected in future amendments to this agreement. In no event shall the preceding payment exceed 100 percent of the Tribe's recalculated CSC requirement.
 3. Pursuant to 25 U.S.C. § 450m-1(a), (d), the Tribe retains the right to file a damages claim under the ISDEAA, this agreement and the Contract Disputes Act, 41 U.S.C. § 7101 *et seq.*, to the extent there is a difference between the CSC requirement recalculated under subparagraph 1, and the amount actually paid under subparagraph 2, and to take such other action as may be authorized under 25 U.S.C. § 450m-1(a). Nothing in this agreement shall be construed as a waiver of the Tribe's rights under 25 U.S.C. § 450j-1.

Note: The amounts in paragraphs 1 and 2 can be revised to identify startup and pre-award costs, if appropriate.

Contract Language - Comparison

- *Post-Ramah* Option
 - Available to tribes that request it
 - Recognizes estimate of full CSC in paragraph 1; requires negotiation of those estimates
 - Recognizes amounts IHS is able to pay in paragraph 2; typically based on prior year funding
 - Reserves the tribe/tribal organization's right to file a claim in paragraph 3
- 2011 Common Language
 - Recognizes amounts IHS is able to pay; typically based on prior year funding
 - Silent as to additional amounts for CSC

II. Factors Affecting Calculation of CSC – Overview

- A. Factors that apply to all categories of CSC
 1. For programs, functions, services, and activities (PFSAs) managed through contract/compact
 2. For compliance with terms, prudent management
 3. Necessary and allowable
 4. Reasonable amounts
 5. Non-duplicative (not funded through the Secretarial amount)
- B. Factors specific to indirect CSC
 1. Indirect cost rates (provisional/final, fixed carryforward)
 2. Pass through and exclusion amounts
- C. Factors specific to direct CSC

A. Factors That Apply to All CSC

1. For PFSAs managed through contract/compact
 - 25 U.S.C. § 450j-1(a)(2)
 - IHS CSC Policy Exhibit 6-3-H
2. For compliance with contract terms, prudent management
 - 25 U.S.C. § 450j-1(a)(2)
 - IHS CSC Policy Exhibit 6-3-H
3. Necessary and allowable
 - 25 U.S.C. § 450j-1(a)(2)
 - IHS CSC Policy 6-3.2E, Exhibit 6-3-H

A. Factors That Apply to All CSC

(cont.)

4. Reasonable amounts

- 25 U.S.C. § 450j-1(a)(2)
- IHS CSC Policy Exhibit 6-3-H

A. Factors That Apply to All CSC

(cont.)

5. Non-duplicative (not funded through the Secretarial amount)

- Statute authorizes CSC for costs not funded through the Secretarial amount and prohibits duplication. 25 U.S.C. § 450j-1(a)(2), (3).
- Risk of duplication because the Secretarial amount is not limited to funding for direct costs.
- The Secretary also carries out administrative functions and transfers related funding through the Secretarial amount, including Tribal shares.

A. Factors That Apply to All CSC (cont.)

5. Non-duplicative (cont.)

- IHS CSC Policy
 - 6-3.2(B) – identify duplication during negotiations, including by analyzing indirect cost pool
 - 6-3.2(F) – option of 80/20 split on tribal shares at Headquarters and Area level
 - Exhibit 6-3-H – examples for identifying duplication in new/expanded and direct CSC
- Examples
 - Exhibit 6-3-H – examples for new/expanded and direct CSC
 - Table I

Table 1. Potential Duplication between the Secretarial Amount and Contract Support Costs

| Secretarial Amount – Program/Service Unit Level Funding | Secretarial Amount – Tribal Shares Funding | Contract Support Costs Funding |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Definition: the amount the Secretary would have otherwise provided for the operation of the PFSA.</p> | <p>Definition: a share of the supportive administrative functions at IHS Headquarters and the relevant Area Office that are otherwise contractible.</p> | <p>Definition: an amount for the reasonable costs that are incurred for additional activities the Tribe must carry on to ensure contract compliance and prudent management.</p> |
| <p>Examples of Costs Incurred by IHS <i>(Areas of Potential Duplication are Underlined)</i></p> <p>Direct Costs</p> <ul style="list-style-type: none"> • Payroll for medical staff • Medical equipment and supplies • <u>Staff training</u> <p>Indirect Costs</p> <ul style="list-style-type: none"> • <u>Budget and financial management</u> • <u>Building rent/lease costs</u> • <u>Utility costs</u> | <p>Examples of Costs Incurred by IHS <i>(Areas of Potential Duplication are Underlined)</i></p> <p>Direct Costs</p> <ul style="list-style-type: none"> • PFSA coordinator (staff position) <p>Indirect Costs</p> <ul style="list-style-type: none"> • <u>Information Technology (IT) support</u> • <u>Building rent/lease costs</u> • <u>Utility costs</u> | <p>Examples of CSC Proposed by Tribes <i>(Areas of Potential Duplication are Underlined)</i></p> <p>Direct Costs</p> <ul style="list-style-type: none"> • State workers' compensation insurance • <u>Staff training</u> <p>Indirect Costs</p> <ul style="list-style-type: none"> • ISDEAA audit requirements • <u>Budget and financial management</u> • <u>Building rent/lease costs</u> • <u>Utility costs</u> • <u>IT support</u> |

B. Factors Specific to Indirect CSC

1. Indirect cost rates

- Provisional/final
- Fixed carryforward
- Indirect type costs negotiations

2. Pass through and exclusion amounts

IHS CSC Policy 6-3.2E

C. Factors Specific to Direct CSC

- IHS CSC Policy 6-3.2D
- IHS CSC Policy Exhibit 6-3-H

**IHS Contract Support Costs Workgroup
Members - 2014**

Updated: 1/6/2014

| Tribal Workgroup Members | Name | | |
|-----------------------------|-------------|--------------------|--------------------|
| | IHS-HQ/AREA | Official Members | Designee |
| | Aberdeen | Cheryl Donovan | |
| | Aberdeen | Leander McDonald | |
| | Alaska | | Lee Olson |
| | Alaska | | Dr. David Mather |
| | Albuquerque | | Linda Austin |
| | Albuquerque | vacant | |
| | Bemidji | Aaron Payment | |
| | Bemidji | | Dave Waupoose |
| | Billings | Jace Killsback | |
| | Billings | vacant | |
| | California | Silver Galleto | |
| | California | Michelle Hayward | |
| | Nashville | Joseph Socobasin | Clayton Sockabasin |
| | Nashville | | Doug Weaver |
| | Navajo | Rex Lee Jim | |
| | Navajo | Jonathan Hale | |
| | Oklahoma | John A. Barrett | Rhonda Butcher |
| | Oklahoma | Gregory Pyle | Mickey Peercy |
| | Phoenix | Arlan Melendez | |
| | Phoenix | Sylvia Homer | |
| | Portland | Fawn Sharp | |
| | Portland | Andrew Joseph, Jr. | |
| | Tucson | Sandra Ortega | |
| | Tucson | | Reuben Howard |

| | | |
|------------------------------|---------------|---------------------|
| Federal Workgroup Members | IHS HQ | Randy Grinnell |
| | IHS HQ | RADM Sandra Pattea |
| | IHS HQ | Roselyn Tso |
| | IHS HQ | CAPT Chris Buchanan |
| | IHS HQ | Ben Smith |
| | IHS HQ | Elizabeth Fowler |
| | IHS HQ | Melissa Jamison |
| | IHS HQ | Julianna Frisch |
| | Alaska IHS | Chris Mandregan |
| | Bemidji IHS | Jenny Jenkins |
| | Nashville IHS | Martha Ketcher |
| | Oklahoma IHS | RADM Kevin Meeks |
| | Oklahoma IHS | CAPT Max Tahsuda |
| | Portland IHS | Dean Seyler |

OIL SPILL RESEARCH

The bill provides \$14,899,000 for Oil Spill Research. The Bureau is directed to continue studying the full suite of possible strategies and their effectiveness in responding to oil spills, including dispersants, mechanical recovery, in-situ burn, use of autonomous underwater vehicles that detect and track the location of liquid hydrocarbons, and remote sensing technologies that could be used to assess the effectiveness of applied dispersants.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT REGULATION AND TECHNOLOGY

The bill provides \$122,713,000 for regulation and technology. Within this amount, the bill funds regulatory grants at \$68,590,000, equal to the fiscal year 2012 enacted level. The Committees find the budget proposal to reduce regulatory grants would undermine the State-based regulatory system. It is imperative that States continue to operate protective regulatory programs as delegation of authority to the States is the cornerstone of the surface mining regulatory program. Further, the agreement does not provide funds to expand and enhance Federal oversight activities of State programs.

ABANDONED MINE RECLAMATION FUND

The bill provides \$27,399,000 for the Abandoned Mine Reclamation Fund.

BUREAU OF INDIAN AFFAIRS AND BUREAU OF INDIAN EDUCATION OPERATION OF INDIAN PROGRAMS (INCLUDING TRANSFER OF FUNDS)

The bill provides \$2,378,763,000 for Operation of Indian Programs. The agreement includes the following instructions:

Contract Support Costs.—The agreement includes funding to implement the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.) as in prior years which, among other things, authorizes discretionary appropriations for contract support costs. The agreement does not include statutory language carried in prior year appropriations bills, which limited the amount available in any given fiscal year for the payment of contract support costs, nor does it include the proposal put forth in the Administration's fiscal year 2014 budget request that would place a cap on the contract support cost amounts available for each tribal contract or compact. That proposal was developed

without tribal consultation and the Committees heard from numerous Tribes voicing their strong opposition.

Instead, the question of contract support cost amounts to be paid from within the fiscal year 2014 appropriation is remanded back to the agencies to resolve, while the underlying contradictions in current law remain to be addressed by the House and Senate committees of jurisdiction. Until such matters are resolved, the House and Senate Committees on Appropriations are in the untenable position of appropriating discretionary funds for the payment of any legally obligated contract support costs. Typically obligations of this nature are addressed through mandatory spending, but in this case since they fall under discretionary spending, they have the potential to impact all other programs funded under the Interior and Environment Appropriations bill, including other equally important tribal programs. The Committees therefore direct the Department of the Interior and the Department of Health and Human Services to consult with the Tribes and work with the House and Senate committees of jurisdiction, the Office of Management and Budget, and the Committees on Appropriations to formulate long-term accounting, budget, and legislative strategies to address the situation. In the Committees' view, each Department's solution should consider a standardized approach that streamlines the contract negotiation process, provides consistent and clear cost categories, and ensures efficient and timely cost documentation for the Departments and the Tribes. Within 120 days of enactment of this Act, the Departments shall develop work plans and announce consultation with Tribes on this issue.

The Department of the Interior is directed to submit an operating plan to the Committees within 30 days of enactment of this Act displaying funding allocations to the activity level. The plan should consider the ability of the offices and bureaus overseen by the Assistant Secretary—Indian Affairs to accommodate the streamlining reduction proposed in the fiscal year 2014 budget considering the progress made thus far, while ensuring adequate administrative support at the national and regional level for administrative functions.

Indian Self-Determination Fund.—The agreement includes funding for this program in the two-year appropriation, as opposed to the no-year appropriation as was done in prior years.

Housing Improvement Program.—The agreement includes \$8,000,000 to partially restore the proposed cut to the program.

Trust – Real Estate Services.—The Committees expect the Bureau of Indian Affairs to support the Klamath Basin Restoration Agreement.

Education.—The bill provides \$591,234,000 for forward-funded education but does not include funding for the proposed turnaround schools pilot project.

The Committees are concerned that management challenges within the Department, the Bureau of Indian Affairs, and the Bureau of Indian Education (collectively, "Indian Affairs"), as identified in a

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The bill provides \$3,982,842,000 for Indian Health Services. The agreement includes the following instructions:

Contract Support Costs.—The Committees' disposition of contract support costs is discussed under "Bureau of Indian Affairs and Bureau of Indian Education, Operation of Indian Programs" earlier in this explanatory statement. The Service is further directed to follow the instructions therein. The Service is directed to submit an operating plan to the Committees within 30 days of enactment of this Act displaying funding allocations to the activity level.

Staffing costs for new and expanded health care facilities.—The agreement includes funding for staffing costs for new and expanded health care facilities. Funds are limited to facilities funded through the Health Care Facilities Construction Priority System or the Joint Venture Construction Program that are newly opened in fiscal year 2013 or that open in fiscal year 2014. None of the funds may be allocated to a facility until such facility has achieved beneficial occupancy status.

Dental Health.—The agreement includes funding for the early childhood caries initiative. The Service is encouraged to work with the Bureau of Indian Education (BIE) and to consult with Tribes about increasing preventive dental care for children by bringing dentists and hygienists into BIE schools. The Service should continue to make significant strides towards completion of electronic dental records. The Service is encouraged to explore establishing a centralized credentialing system to address workforce needs similar to those of the Departments of Defense and Veterans Affairs, to consider a pilot program for the credentialing of dentists, and to propose funding for fiscal year 2015.

Urban Indian Health.—The Committees continue to support grants for urban Indian health in light of the disparity in health funding for urban Indians.

Coordinated health care for American Indian and Alaska Native veterans.—The Department of Veterans Affairs (VA) and the Indian Health Service have developed mechanisms to implement and monitor their memorandum of understanding (MOU) regarding the provision of health care to Native American veterans. However, the Government Accountability Office (GAO) reported that the performance metrics developed to assess the MOU's implementation could limit the ability of VA and Service managers to gauge progress and make decisions relating to the expansion or modification of their programs and activities. Both agencies are encouraged to implement the recommendations contained in the GAO report to the extent possible and provide the Committees with an update by March 1, 2014.