



806 SW Broadway, Suite 900  
Portland, OR 97205

T 503.242.1745  
F 503.242.1072

HOBBSSTRAUS.COM

## MEMORANDUM

October 11, 2013

TO: Contract Support Cost Clients

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

RE: ***BIA CSC Workgroup Sends Recommendations to Assistant Secretary; Senators, U.S. Chamber of Commerce Join Opposition to CSC "Caps"; Government Shutdown Stalls CSC Settlement Discussions; Continuing Resolution Update***

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The current federal government closure has slowed, but not entirely curtailed, developments related to contract support costs (CSC).

### ***BIA CSC Workgroup Sends Recommendations to Assistant Secretary***

On October 8, 2013, the Bureau of Indian Affairs (BIA) CSC Workgroup sent Assistant Secretary – Indian Affairs Kevin Washburn a letter detailing recommendations arising from the Workgroup's recent meeting.<sup>1</sup> In the letter, a copy of which is attached, Tribal Co-Chair Jim Mackay of the Susanville Indian Rancheria sets forth the Workgroup's recommendations on several policy issues, including sequestration and funding levels, the CSC "cap" proposals, the proposed direct CSC pilot program, and projected CSC shortfalls. If you have comments on the recommendations, we would be glad to relay those to the Workgroup. Any recommendations that BIA decides to consider implementing would go out to all tribes for consultation before the agency acts.

### ***Senators, U.S. Chamber of Commerce Join Opposition to CSC "Caps"***

The chorus of voices denouncing the Administration's proposal to "cap" CSC in FY 2014 on a contract-by-contract basis has swelled to include several U.S. Senators and the world's largest business federation. In a letter to the Office of Management and Budget (OMB), a copy of which is attached, 11 Senators from both sides of the aisle blasted the proposal as "short-sighted and ill-timed." The Senators chide the Administration for failing to consult with Tribes, and they urge withdrawal of the proposal.

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<sup>1</sup> For a detailed account of the BIA CSC Workgroup meeting, please see our memorandum of August 28, 2013 and attachments.

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The U.S. Chamber of Commerce has also weighed in on the Administration's proposal. In a letter to Secretary Sebelius dated October 9, 2013 (a copy of which is attached), the Chamber calls the proposed caps "a significant roadblock" to the economic success of Tribes. The Chamber, which filed an amicus brief supporting the tribal position in the *Ramah* case, notes that the Supreme Court affirmed Tribes' right to full CSC funding and that IHS has vowed to follow the Court's holding. The Chamber and its Native American Enterprise Initiative conclude by urging the Administration to withdraw its CSC cap proposal and work with Tribes and Congress on a fair solution.

### ***Government Shutdown Stalls CSC Settlement Discussions***

Progress towards settlement of past-year CSC claims against the Indian Health Service (IHS), already slow, has been further delayed by the government shutdown. With most agency staff and attorneys furloughed, a number of settlement meetings scheduled for early October were cancelled, including a mediation session in Washington, D.C. involving nine tribes and tribal organizations (eight of them Hobbs Straus clients). Another of our clients settled several CSC claims before the closure but now faces delays in payment due to IHS's current inability to draft the necessary paperwork. We expect that CSC settlement discussions and implementation will resume promptly once the Government is back to work.

### ***Continuing Resolution Update***

The federal government continues to be in a partial shutdown as Congress has been unable to pass a continuing resolution (CR) to provide FY 2014 funding to federal agencies until or in lieu of enacting FY 2014 appropriations bills. The House passed H. J. Res. 59, which sought to defund the Affordable Care Act (ACA) in addition to extending funding of federal agencies through December 15, 2013. The Senate amended H. J. Res. 59 to, among other things, extend funding through November 15 and remove the language to defund the ACA. As we previously reported, neither version of H. J. Res. 59 contained the CSC cap language included in the President's Budget and recommended by the OMB to be included in the CR. Since then the House has passed a number of targeted or "mini" CRs that would open specific federal agencies or programs, such as Head Start, Veterans Affairs, National Parks, etc., but the Senate has refused to act on all but the ones to reinstitute military pay and military survivor benefits.

In the past few days differences in the focus of the House and Senate Republicans have become more evident, and with the debate becoming more focused on raising the national debt limit and less on derailing the ACA. The House GOP's latest plan, not yet introduced as a legislative measure, would raise the debt limit for six weeks without any policy riders (a "clean" debt limit proposal); it would not, however, include any CR language that would re-open the federal government. The proposal would be contingent on the President and Democrats agreement to negotiate on the CR and a long-term debt limit increase during the six-week period. The Senate Republicans are working on a plan

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that would not only provide a six-month CR but also provide a two-month debt ceiling increase. It is uncertain when a CR will be enacted.

### *Conclusion*

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



# SUSANVILLE INDIAN RANCHERIA

October 08, 2013

The Honorable Kevin Washburn  
Assistant Secretary for Indian Affairs  
MS-4141-MIB  
1849 C Street, NW  
Washington, DC 20240

Re: Contract Support Cost Workgroup Recommendations

Dear Secretary Washburn,

As you are aware from your discussions with tribal leaders at every venue this year, Contract Support Costs ("CSC") are a top priority for all Tribes. Since the National Policy Memorandum on Contract Support Costs ("CSC Policy") was signed in 2006, leading to the submission of CSC shortfall reports to Congress, Tribes have experienced a substantial increase in CSC funding along with expedited payments. While progress has been significant, there is still work to be done in order to achieve full CSC Policy implementation. To that end, the BIA Contract Support Cost Workgroup, comprised of Federal and tribal individuals as well as legal technical advisors, meets on an annual basis to provide advice and guidance on the CSC Policy.

The BIA Contract Support Cost Workgroup ("CSC Workgroup") met in Albuquerque, NM on August 20-21, 2013. The CSC Workgroup appreciated your support of our efforts to improve the BIA Contract Support Cost Policy and related reporting requirements by providing travel funds and Headquarter staff for this meeting. The importance of this matter was evident when you took time from your busy schedule to participate via teleconference. It had been over a year since the CSC Workgroup formally met and the meeting would not have happened without your efforts.

Because a number of individuals that attended had not participated in or observed a BIA CSC Workgroup meeting before, the first item of discussion was "What is the purpose of this Workgroup". Other equally important items of discussion included the following:

- Electing a new Tribal Co-Chair. Rhonda Butcher wished to step down as the Tribal Co-Chair to provide someone else with this opportunity. Ms. Butcher reviewed her duties as the Tribal Co-Chair. James Mackay from the Susanville Indian Rancheria was elected as the new Tribal Co-Chair.

- Tribal representatives communicating with the Tribes in their Region on CSC Workgroup discussions (issues and outcomes). It was agreed that CSC Workgroup members communicating with their Regional Tribes is extremely important and is intended for informational purposes and not a replacement for Tribal Consultation. Avenues of providing information to their Regional Tribes by the respective CSC Workgroup member includes meetings at the Self-Governance Conference, Regional budget meetings, and any other meetings asked for by tribal leaders.
- Can the Shortfall Report be standardized across the Regions? Each Region prepares the shortfall report in a slightly different manner. In order to be fair to everyone and provide a more accurate picture to Congress, each Region must be consistent and provide accurate data. It was agreed that any format changes to the shortfall report should be reviewed by the CSC Workgroup prior to being implemented.
- Shortfall Projections. Of significant interest to the CSC Workgroup was that the shortfall projections for future years, as calculated by BIA consultant Ron Demaray, showed a CSC Shortfall amount that was less than the Shortfall amount shown in a different calculation prepared by the House Appropriations Committee staff. The CSC Workgroup was advised that BIA might incorporate the House Appropriations Committee staff calculation in future SF reports.
- Speed of CSC Distribution. Variables on the distribution of FY 2013's Contract Support Costs included delays in the allocations from Congress due to the Continuing Resolutions, implementation by the BIA of the FBMS and ASAP payment systems, and Sequestration. Negotiations of Tribal Indirect Cost Rate Proposals with the Interior Business Center have also taken an excessively long time this year.
- Alaska Indirect Contract Support Cost (IDC) Rate of 30%. Many smaller Alaska tribes do not have current negotiated indirect cost rates and lack the capacity to develop rate proposals. BIA's current practice is to provide these tribes a lump sum for indirect costs equivalent to 30% of their direct cost base, while the lower-48 Tribes without current negotiated rates receive a default payment equivalent to 15% of their direct cost base. After some discussion on the fairness of this difference, it was agreed upon by the CSC Workgroup that because of the small size and isolation of the Alaska Tribes and Villages, the default rate of 30% is justifiable. It was also noted that the Shortfall Report for the Alaska Region needs to better reflect those Tribes that are taking the 30% rate as well as those

that have negotiated a different lump sum amount. The CSC Workgroup continues to review CSC funding for Alaska Tribes and Villages.

- 2014 CSC Budget. A discussion was held on the President's proposal of CSC being paid or capped on a contract-by-contract basis. All CSC Workgroup members and other tribal representatives strongly disagreed with that approach.
- Direct CSC Pilot Program. The CSC Workgroup continued the discussion previously held on a Direct CSC Pilot Program. The BIA CSC policy provides that Direct CSC needs are to be negotiated lump sum amounts. Due to a lack of capacity, however, the BIA for several years has estimated Direct CSC need at 15% of salaries. When the National Business Center attempted a pilot project to negotiate tribal Direct CSC lump sum amounts several years ago, they did not understand P.L. 93-638 programs and, as a result, that project was abandoned. The CSC Workgroup suggested reviving the pilot project and allow two self-governance Tribes and two contract Tribes to participate in a new pilot program. The Tribes will negotiate with the appropriate BIA representatives utilizing actual direct contract support costs to establish an individual Tribal DCSC lump sum amount. These Tribes will need to be held harmless on the negotiation of their Direct CSC rate; e.g., if the negotiated amount is below 15%, they will be allowed to keep the 15% of salaries; if the negotiated amount is higher than the 15%, they will be allowed to keep the negotiated lump sum amount.
- Changes to the BIA CSC Policy. It was noted that any substantive changes in the BIA CSC policy memorandum must be preceded by consultation as required by Article IV, § B of PSA-III entered in *Ramah Navajo Chapter, et al. v. Kempthorne*, CIV 90-0957, U.S. District Court, District of New Mexico (Doc. 1138-2, filed 5/19/2008). Some proposed format or other non-substantive changes in the BIA CSC policy memorandum, as prepared by BIA, were considered by the CSC Workgroup. The consensus was that these were not the types of changes that required consultation under the referenced PSA-III provisions.

#### **Recommendations from the CSC Workgroup:**

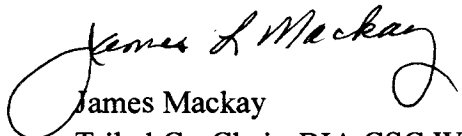
1. Co-Chair to report to the Tribal/Interior Budget Council (TIBC) on CSC Workgroup activities and be part of the TIBC budget subcommittee.
2. Clarify the Shortfall Report's definitions in Column C (total award) and Column H (exclusions). This is to be clarified by the Solicitor's Office in conjunction with Tribal Technical Advisory Attorneys.

3. Speed up funding delivery to Tribes. Funds have taken much longer to reach Tribes this year. Funding should not be subject to unauthorized processes or approvals. Using FBMS and ASAP requires a Tribe to register with SAMS and have a DUNS number. Enrollment in SAMS and having a DUNS number are not requirements of the P.L. 93-638 contracting process. The process needs to be reviewed to see if the funds can be disbursed in a more expeditious manner.
4. Sequestration. Let Tribes know in advance what may happen. Communication between the BIA and Tribes is important. Tribes are required to prepare their annual budgets and prepare their indirect cost rate proposals, but no potential funding amount is being given. It is better to err on the side of caution than to not have any potential figures and have to guess.
5. Spending plan. The BIA spending plan should be shared with all the Tribes. Again, communication from the BIA to Tribes will help in understanding the cuts/budget process. Do not put Tribes in a position to guess and speculate wrongly.
6. Pilot Program – negotiating lump sum Direct Contract Support. This was an unsuccessful program under the National Business Center, but can be successful utilizing Bureau personnel (Tribal Awarding Officials) and Tribal staff. The CSC Workgroup recommends that the Assistant Secretary send out an All Tribes letter asking four Tribes to volunteer for this pilot project (two compact Tribes and two contract Tribes). The participating Tribes should be held harmless if the negotiated amount is less than 15% of salaries.
7. Fully fund CSC. The Assistant Secretary of Indian Affairs Office should be a strong advocate on behalf of the Tribes to fully support CSC. We are not far away from achieving that goal. Please do not let the progress that has been achieved since the implementation of the BIA CSC Policy wither away.
8. Advocate the removal of CSC caps for FY 2014. There is no tribal support and no tribal CSC Workgroup support for Tribe-by-Tribe CSC caps in annual appropriations.
9. Excess CSC funds within a Region should be reallocated to Tribes within that Region, rather than being sent to the Central Office and then reallocated

to Regional Offices for disbursement. Any excess CSC funds from each Region should then be sent back to the Central Office and given to the appropriate Region/OSG to fund the Tribes with the lowest CSC funding percentage.

10. OSG Form for CSC Shortfall. This form lacks an OMB number and will be discussed with the OSG Tribes to determine if it needs to be submitted to OMB for a form number or not.
11. Review AFA CSC contract/compact language to see if the IHS language is appropriate for BIA programs. If it is, incorporate the language into each Tribe's AFA with tribal consent.
12. Regional CSC Workgroup Representatives attend Regional meetings and conferences to provide CSC updates to Tribes. Tribes are requesting that they be made aware of what is happening with the CSC Workgroup. Regional representatives and alternates can provide an update to their Regional Tribes at:
  - a. Regional Directors Meeting
  - b. OSG Meeting
  - c. TIBC Meeting
13. Alaska Tribes and the 30% Flat IDC Rate (Small and Needy). Many Alaska Tribes/Villages meet the definition of Small and Needy and do not require an annual audit. The BIA Greenbook defines Small and Needy tribes as follows: *The small tribes designation was given to tribes with a population of 1,700 or less and less than \$160,000 in recurring TPA funds in the lower 48 states and \$200,000 in recurring TPA funds in Alaska. Having funds below this threshold inhibits a tribe's ability to carry out basic tribal services and programs.* A permanent solution that is aimed at creating a floor for small and needy Tribes nationwide needs to be developed.

Respectfully,



James Mackay  
Tribal Co-Chair, BIA CSC Workgroup  
Susanville Indian Rancheria

Cc: BIA CSC Workgroup members



# United States Senate

WASHINGTON, DC 20510

September 30, 2013

The Honorable Sylvia Mathews Burwell  
Director  
Office of Management and Budget  
725 17th Street, NW  
Washington, DC 20503

Dear Ms. Mathews Burwell:

We support ongoing efforts to reduce the annual budget deficit, and understand the difficulty of the broader policy decisions required to make necessary funding reductions. Unfortunately we do not understand, nor do we support, the Administration's proposal to cap Contract Support Costs (CSC) owed to federally recognized tribes. These payments are necessary for tribal governments and tribal consortiums contracting with the Indian Health Service (IHS) and the Bureau of Indian Affairs (BIA) to provide critical services nationwide. The U.S. Supreme Court has ruled several times most recently last summer that the U.S. government must fulfill all contracts with tribal governments providing necessary medical and other social services to their members. The *Ramah* and *Arctic Slope* rulings, in particular were monumental for Indian Country. However, the Administration's response to those cases has been most troublesome.

At issue is the Office of Management and Budget's (OMB) direct action following in these recent case rulings. The President's fiscal year 2014 Budget Request unjustly demands that Congress, through the annual appropriations process, set caps on individual CSC accounts. As members of the Senate Committee on Indian Affairs, and other concerned members, we write to highlight that the authorizing committee responsible for the *Indian Self Determination and Education Assistance Act*, which provides tribes the authority to enter into contracts with the federal government has serious concerns with the Administration's approach to this issue. We view this maneuver to circumvent the Supreme Court rulings as short-sighted and ill-timed. Even more troubling is the fact that the proposed caps will hinder the ability of tribes and tribal consortiums to file claims for contract underpayments. The ability to file court claims is a necessary tool to ensure the federal government meets its obligations to our Nation's First People.

We understand that OMB has broad authority to manage the Administration's budget. Nevertheless, OMB, IHS, and BIA did not conduct tribal consultation on this proposal as recognized in Executive Order 13175, reaffirmed through a Presidential memo signed by President Obama on November 5, 2009. Furthermore, the agencies did not give the


congressional authorizing committees of jurisdiction the time necessary to hold oversight hearings and to work with tribes on a long term solution that works for all parties

involved. We strongly oppose the proposed CSC caps and urge you to withdraw the proposal. Instead, we encourage the Administration to work with tribal governments and consortiums, as well as the Congressional Committees of jurisdiction to develop a long-term solution that fulfills the federal governments' commitment to this Nation's First Peoples. In addition, tribes have requested our assistance in securing a meeting with the President to discuss this important issue directly.


We look forward to your prompt response to this matter.

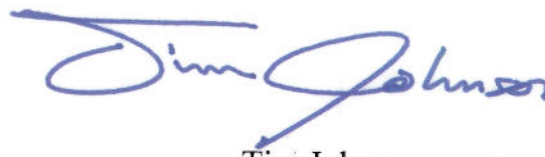
Sincerely,

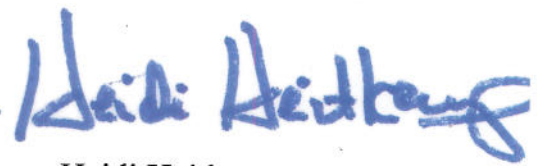
  
Mark Begich  
United States Senator

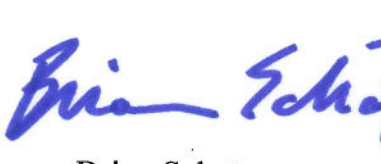
  
Lisa Murkowski  
United States Senator


  
Maria Cantwell  
United States Senator

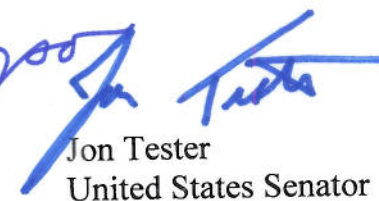
  
Tom Udall  
United States Senator

  
Tim Johnson  
United States Senator

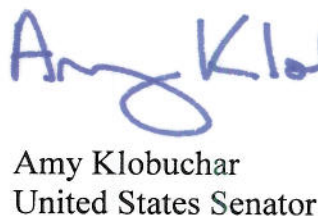
  
Heidi Heitkamp  
United States Senator

  
Brian Schatz  
United States Senator

  
Mike Crapo  
United States Senator

  
Jon Tester  
United States Senator

  
Dianne Feinstein  
United States Senator

  
Amy Klobuchar  
United States Senator

CC:

Jodi Gillette, The White House  
Kathleen Sebelius, HHS  
Yvette Roubideaux, IHS  
Kevin Washburn, BIA  
House Appropriations Committee  
Senate Appropriations Committee