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September 17, 2013

TO: Contract Support Cost Clients

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

RE: ***IHS Announces Plan to Re-Open Method for Calculating CSC; CSC Appropriations Update***

In this memorandum, we report on a new "Dear Tribal Leader" letter from Indian Health Service (IHS) Director Dr. Roubideaux. Among other things, the letter announces an initiative to revisit the way contract support cost (CSC) needs are calculated. We also provide a brief update on CSC appropriations and the status of the contract-by-contract caps proposed by the Administration.

***IHS Announces Plan to Re-Open Method for Calculating CSC***

In a "Dear Tribal Leader" letter released last week, a copy of which is attached, Dr. Roubideaux addressed several CSC issues. First she acknowledged that the claim settlement process must become more efficient. She states that "IHS has recently committed funding for additional staff and resources dedicated to settling claims under both the traditional and alternative processes." (The "traditional" approach involves extensive document exchange and detailed analysis by financial experts, while under the "alternative" approach IHS makes a one-time, non-negotiable offer based on the documents in the agency's possession.) While Dr. Roubideaux says the claims settlement process will become more efficient, her remarks on "available resources and the current budget climate," combined with the agency's track record so far, are not encouraging.

Dr. Roubideaux also acknowledged "some disagreement" between Tribes and the agency with respect to implementing the template CSC provision in current funding agreement negotiations. That provision contains a three-paragraph structure that (1) identifies the estimated full amount of direct and indirect CSC need, (2) identifies the lesser amount IHS will pay based on limited appropriations, and (3) reserves the rights of both parties under the Indian Self-Determination and Education Assistance Act (ISDEAA). As we have reported, it has proven very difficult to agree on the estimated full amount, as IHS has scoured the documents for every possible exclusion, duplication, or other means of lowering the figure. Tribes have resisted these efforts, naturally enough, and the negotiation and approval process has often slowed or stalled. IHS's solution, as announced in the letter, is to convene a small group charged with developing "more detailed guidance" on how to apply the ISDEAA's CSC principles such as reasonableness, necessity, and non-duplication. Dr. Roubideaux specifically mentions the need to develop a means of quantifying duplication between the indirect cost pool and

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the "Secretarial amount." While it is true that the Secretarial (or 106(a)(1)) amount contains some indirect costs, these amounts are difficult to identify with precision, and have long been estimated as 20% of Area and Headquarters tribal share funding. For many years Tribes and IHS have agreed to deem this 20% available for CSC for purposes of calculating CSC provided and CSC shortfalls. IHS now appears to contemplate a much more complex process that involves scrutinizing individual types of costs (rent and utilities are mentioned as examples) for duplication. It is not clear how this would speed negotiations; it seems more likely to slow them down even further, at least in the short term. The goal of attaining agreement on how to apply the statutory CSC principles is a worthy one in theory, but Tribes and IHS have been fighting over these issues for more than twenty years at negotiating tables and in courts. Rather than move beyond litigation, as Dr. Roubideaux has stated that the agency wishes to do, this proposal may merely shift the scene of the conflict to a "costs incurred" battleground.

Perhaps as troubling as the proposal itself is the process Dr. Roubideaux outlines in her letter. First, she will schedule a 2-3 hour session on the topic at the next Tribal Self-Governance Advisory Committee (TSGAC) meeting and the next IHS Direct Service Tribes Advisory Committee meeting. Then she will convene a small group comprised of 4-6 individuals from each of those Committees to meet—she anticipates just once or twice—and develop recommendations on "elaborating the statutory principles for calculating CSC estimates." IHS will then "review [its] options" for tribal consultation. Clearly IHS envisions a fast track for these "clarifications" of what CSC means and how it is to be calculated. Notably absent from this process, however, is the IHS CSC Workgroup, comprised specifically of tribal leaders and technical experts with the most in-depth knowledge of CSC as defined in the ISDEAA and as implemented by the IHS CSC Policy. That is the group IHS appointed to develop recommendations on the kinds of issues Dr. Roubideaux describes. Instead, she intends to rely on the results of one or two meetings of tribal officials who may or may not have much expertise in CSC matters.

Dr. Roubideaux requests that input on this process and the issues it is meant to resolve be submitted to your Area Tribal Representative on the TSGAC or Direct Service Tribes Advisory Committee.

### *CSC Appropriations Update*

As the new fiscal year looms on October 1, the House of Representatives struggles to reach agreement on a short-term Continuing Resolution (CR) to fund federal agencies while hopefully finding a longer-term agreement to provide appropriations through the entirety of fiscal year 2014. However, the gridlock in Congress is such that a shut-down of the federal government is increasingly being mentioned as a possibility.

CRs generally require that funding distributed during the period be spent on activities and under conditions that existed in the prior fiscal year. Exceptions to this rule are called "anomalies." The Office of Management and Budget (OMB) recently sent to

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Congress a list of proposed anomalies that included the Administration's proposal—strongly opposed by tribes—to impose caps not only on aggregate CSC spending for IHS and the Bureau of Indian Affairs but also on every individual ISDEAA agreement.<sup>1</sup>

On September 10, 2013, the House Appropriations Committee Chairman Rogers (R-KY) introduced H. Res. 59, a CR that does not include the CSC anomaly requested by OMB and would therefore provide CSC under the authority and conditions in the FY 2013 appropriations act. The cap on overall CSC spending would remain, but the new caps for individual ISDEAA agreements would not be added. H.J. Res. 59 would run through December 15, 2013, and provide funding at the FY2013 post-sequester funding level (a compromise between the spending caps set by the House and Senate budget resolutions). However, conservative House Republicans objected to the Resolution on the grounds that it would not de-fund the Affordable Care Act (ACA) and that the overall spending level is too high. Speaker Boehner, sensing that he might not have enough votes for passage, pulled it from the floor schedule.

Representative Graves (R-MO) countered on September 12 with another CR, H. J. Res. 62, which reflects the wishes of the conservative wing of House Republicans – increased funding for Military Construction, Veterans programs, Homeland Security, and Defense while making large reductions in domestic discretionary spending. It would also zero out funding for the Affordable Care Act (PL 111-148) beginning in FY 2014 and running through January 1, 2015. As you know, the Indian Health Care Improvement Act is incorporated into the ACA and so the IHS funding would be zeroed out. H. J. Res. 62 goes even further stating that the Affordable Care Act has no effect. There are likely many members of Congress who do not realize that de-funding PL 111-148 would also de-fund the IHS. There is little or no chance that H. J. Res. 62 will be enacted into law, but the single-minded determination of some in Congress (and elsewhere) to de-fund the ACA has basically stopped Congress from reaching agreement on appropriations matters.

We do not expect H. J. Res. 59 or H. J. Res. 62 to be the CR on which the House will vote, although House Republican leadership is hoping for a House floor vote on a yet to be seen CR late this week.

As of this writing, the Senate Appropriations Committee has not released its version of a CR, preferring to wait until the House has acted. Given that the Senate Appropriations Committee "reluctantly" (to use their word) included the Administration's CSC aggregate and individual cap proposal in its FY 2014 draft Interior appropriations bill, there is still concern over the final outcome of contract support costs in a FY 2014 appropriations bill.

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<sup>1</sup> As we have reported, the House Appropriations Committee in its FY 2014 Interior appropriations bill opposed this proposal, while the Senate Appropriations Committee draft report stated that they adopted it "reluctantly."

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## *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).



SEP 9 2013

Dear Tribal Leader:

I am writing to provide an update on Contract Support Costs (CSC). My letter to you on June 12, 2013 provided a detailed update on CSC appropriations and resolution of past CSC claims. The IHS continues to make progress on past CSC claims with bi-monthly updates to our case management plan regarding appeals to the Civilian Board of Contract Appeals, completion of settlements and submission of settlements to the Judgment Fund for payment to Tribes, and initiation of an alternative process for claims resolution. In terms of CSC appropriations, I have received input in multiple forums on the desire for an alternative solution to the fiscal year (FY) 2014 President's Budget's proposed appropriations language and anticipate that this topic will be discussed in depth during the IHS Tribal Budget Formulation Process this fall at both the Area and the National level.

I also wanted to provide an update on IHS' work to make the CSC claims process more efficient. I have heard that some Tribal representatives are concerned that there are many pending claims and want to see more progress on settlements. We have continued to develop our process for handling the claims, and IHS has recently committed funding for additional staff and resources dedicated to settling claims under both the traditional and alternative processes. We believe that the claims settlement process will become more efficient moving forward, in the context of available resources and the current budget climate.

I have also heard that Tribes would like to see more work on technical issues related to CSC. Given our experience since the *Salazar v. Ramah Navajo Chapter (Ramah)* decision, it is clear that there is some disagreement about how to generate estimates of CSC in the pre-award context during annual contract/compact negotiations. After the *Ramah* decision, IHS and Tribal lawyers agreed on CSC language that Tribes may use at their option, which includes an estimate of both direct and indirect CSC in the first paragraph of the language while continuing to identify the amount IHS will pay the Tribe from its annual appropriation. The IHS and Tribes have been successful in negotiating this language and the corresponding estimates in many funding agreements, but some have raised questions about how to define what types of costs qualify as CSC for inclusion in those estimates.

The Indian Self-Determination and Education Assistance Act (ISDEAA) defines the costs that qualify for CSC. 25 U.S.C. § 450j-1(a)(2). Although IHS's current policy provides practical negotiation guidance based on the statutory definition, more detailed guidance could be beneficial to negotiating the estimates in a consistent manner with all Tribes. For example, some agreed-upon principles would be helpful for applying the statutory principles of reasonableness, necessity of the activity/costs to ensure contract compliance and prudent management, and eliminating duplication of costs already paid to the Tribe in the Secretarial (106(a)(1)) amount.

Differences of opinion on the application of these principles have led to differing estimates and, in the end, prolonged discussions during negotiations.

There may also be a need to clarify the difference between indirect cost rates negotiated with a Tribe's cognizant agency, which covers all indirect costs and relies upon a methodology applied to non-ISDEAA contractors as well, versus the negotiation with IHS of indirect CSC for programs, services, functions and activities (PSFAs) included in ISDEAA contracts and compacts. The indirect cost rate that a Tribe negotiates for grants and contracts is related to but not the same as CSC, since some indirect costs are also funded through the Secretarial amount and those same costs must not also be funded as indirect CSC. For example, while Tribes' indirect cost pools often include rent and utilities, IHS incurs costs for rent and utilities as well and transfers the funding for those costs as part of the Secretarial amount; it would be duplicative to include the costs again in the CSC calculation. Discussions to clarify or improve everyone's understanding of the estimate of CSC in ISDEAA negotiations would help to resolve some of this confusion. Understanding these differences up front would help the entire contracting process, as well as development of the IHS Report to Congress on funding needs for CSC.

These principles may also be helpful to reducing litigation in the future. Our experience with the CSC litigation to date shows that we can eventually agree on the amount of CSC that is owed, even though the initial damages calculations by the Tribes and the IHS are often very far apart. We can reduce the litigation and the work required to reconcile these calculations if everyone can agree on a more accurate method for calculating CSC at the beginning of the process, i.e., at the time of negotiating the contract/compact, because we have reached agreement on how to calculate CSC from the very beginning. Moreover, such agreement will also lead to a more efficient and accurate process with respect to CSC funding and estimation of need. Reaching agreement on the relevant principles at the beginning of the process will help make every other part of the process go more smoothly.

Therefore, I would like to begin discussions on this topic using the following process: first, I will schedule a 2-3 hour session at the next IHS Tribal Self-Governance Advisory Committee meeting and the next IHS Direct Service Tribes Advisory Committee meeting to begin a policy discussion on this topic with Tribal leadership; and second, I will ask for 4-6 representatives to be selected from each Committee to meet together as one group to have more in-depth discussions on the topic and develop recommendations that will then be taken back to both Committees. I anticipate that it will only take one to two meetings of the group to develop recommendations to IHS on elaborating on the statutory principles for calculating CSC estimates. Once this process is complete, the IHS will review options for engaging all Tribes in consultation on this issue. While we may not reach complete agreement on the calculation, some agreement on these general principles is likely to save everyone on both the IHS and Tribal sides a lot of work in the end. Since having this clarification as soon as possible would be helpful, this process will help us be as inclusive and efficient as possible. Please give your input to your

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respective Area Tribal representative on each of these Committees prior to their next scheduled meetings in October.

Thank you for your assistance in this important matter.

Sincerely,

/Yvette Roubideaux/

Yvette Roubideaux, M.D., M.P.H.  
Acting Director