



MEMORANDUM

January 28, 2014

To: Contract Support Cost Clients

From: HOBBS, STRAUS, DEAN & WALKER, LLP

Re: *Tribal Advisory Committees Discuss CSC Appropriations with Assistant Secretary for Indian Affairs and IHS Director; Administration Receives Letters from Tribal Representation with CSC Consultation Recommendations*

On January 21- 23, 2014, the Department of the Interior (DOI) Self-Governance Advisory Committee (SGAC) and the Tribal Self-Governance Advisory Committee (TSGAC) to the Indian Health Service (IHS) convened in Washington, D.C. for quarterly meetings. This memorandum summarizes the discussion between the SGAC and Assistant Secretary for Indian Affairs, Kevin Washburn, and between the TSGAC and the Director of the IHS, Dr. Yvette Roubideaux, on the topic of contract support costs (CSC) at those meetings. In addition, we report on recent letters submitted to the IHS and the Bureau of Indian Affairs (BIA) relating to CSC.

IHS CSC Appropriations

At the quarterly meeting, Director Roubideaux presented the TSGAC with an update on appropriations. The Consolidated Appropriations Act of 2014, providing FY 2014 appropriations for IHS as reported in our memorandum dated January 15, 2014, was signed into law on January 17, 2014. Director Roubideaux said that the IHS is pleased with its FY 2014 appropriation, which she reported totals \$4.4 billion and represents an increase of \$303 million over the FY 2013 actual level (post-sequestration and rescission). She said the IHS is also excited about the President's FY 2015 budget proposal, which is currently in development, though she could not comment on the amount that might be requested for IHS or for CSC specifically.

Director Roubideaux said that the FY 2014 appropriation for IHS is complicated and is still under review by the Administration. She noted that the IHS appropriation, as usual, is divided between facilities and services. Congress provided line-item appropriations for the facilities portion, as has been practice in past years. However, for the services portion of the appropriation (which includes all clinical programs as well as CSC), the Director noted that Congress appropriated a lump sum amount - representing \$270 million above the FY 2013 actual level - and provided a specific program amount

only for the Contract Health Service program.¹ Additionally, Congress provided that the amount appropriated for services includes funding for staffing of new facilities and funding for CSC, though specific amounts were not provided for either of those items. Congress's directive to fund those three specific items, Director Roubideaux said, constrained the Agency's allocation choices for the overall increase in funding.

Director Roubideaux said that Congress would like the agency to try to provide full funding for CSC, and that the significant increase in the IHS's overall budget can help the agency reach that goal. However, she said that the specific program amounts are still under review and that the IHS still has to sort out the details of all of the other line items in its budget. Given Congress's directive that the IHS submit an operating plan for FY 2014 within 30 days of the passage of the Appropriations Act, Director Roubideaux said that the agency is on a tight timeline to get feedback from tribes. Tribal representatives on the TSGAC suggested that the IHS schedule webinars for that purpose, to which Director Roubideaux responded that she would take the suggestion back for consideration.

Beyond FY 2014, Director Roubideaux said there is time to come up with a long-term plan for CSC funding. Congress also directed the IHS to have a plan for tribal consultation to develop strategies to address CSC funding issues within 120 days of passage of the Appropriations Act.

IHS Director's Comments on Past CSC Claims

With respect to past CSC claims, Director Roubideaux stated at the TSGAC meeting that the IHS has committed more staff to assist in getting settlement offers out to tribes and that the number of claims analyses completed by the agency has significantly increased. She said that she is asked on a daily basis to approve a settlement range for tribal contractor claims, citing that as evidence of increased settlement negotiation activity. She also noted that if a tribe would like to learn more about the settlement process, IHS will schedule a meeting to explain the process and discuss the tribe's questions or concerns (without negotiating any specific claims).

IHS CSC Workgroup Meeting and OMB Meeting Report

The TSGAC also discussed the meeting of the IHS CSC Workgroup that took place in Rockville, Maryland on January 7 and 8, 2014, which we also summarized in our January 15 memorandum. In that meeting, the Workgroup was charged with examining the process for arriving at an estimate of CSC need in the pre-award negotiations context, and with identifying areas of agreement and disagreement between IHS and tribal

¹ Director Roubideaux reported that Congress provided \$878.6 million, a \$77 million increase over the FY 2013 actual level, for CHS, which is now referred to as "Purchased and Referred Care."

contractors. Director Roubideaux stated her impression that the Workgroup made good progress and identified several areas of agreement, as well as areas for further discussion. She reported that she spoke with the Office of Management and Budget (OMB) after the meeting and that OMB seemed pleased with the Workgroup's progress. Director Roubideaux has stated that she believes a show of progress by the Workgroup would likely help in getting OMB to work toward full funding of CSC.

Director Roubideaux also said that an earlier meeting between a small group of tribal leaders and OMB officials had helped to lay the groundwork for her discussion with OMB. Lynn Malerba, Chairwoman of the TSGAC, was one of the tribal leaders present in that meeting. She reported that tribal leaders spent much of the meeting explaining to OMB why CSC is important to tribes. She said that OMB understands that tribes want full funding for CSC, but that OMB wants practical solutions and concrete recommendations from tribes on how to achieve that goal. She reported that tribal leaders felt positively overall about the impact of that meeting.

BIA CSC Remarks

In his remarks to the SGAC, Assistant Secretary Washburn noted that DOI Indian Programs received a modest budget increase for FY 2014 and that as a result the BIA has the freedom to fully fund CSC. He said that BIA requested \$230 million for CSC funding, and that \$190 million was added to Indian Programs. The additional \$40 million, he said, would have to come from somewhere else within the Indian Programs budget.

Tommy Thompson, Director of the Office of Budget Management, said that the Appropriations Act posed a challenge for the BIA. In particular, he said that the agency now needs to try to fully fund CSC without a known cap. In addition, he said that Congress directed the BIA to provide funding for the Housing Improvement Program (HIP), Welfare Assistance, Education and other specific programs at specific levels. Mr. Thompson reported that the BIA has begun working with OMB to put together the Operating Plan for Congress within 30 days.

Tribal representatives on the SGAC emphasized their desire that BIA sort out its budget quickly and prioritize disbursing funding to the tribes, without allowing determination of CSC to hold up the process. They suggested that the BIA convene a meeting of the CSC Workgroup for assistance in estimating CSC funding need for purposes of the budget. Mr. Thompson said the BIA is looking at the most recent shortfall report for an estimate, but that the data is already two years old (from 2012). He said that the agency wants to fully fund, but does not want to over-estimate and therefore withhold program funding from tribal budgets.

Mr. Thompson noted that though the budget increase is enough to restore the overall BIA budget to pre-sequestration levels, restoration will not be across-the-board due to the earmarks for a few specific programs imposed by Congress. Tribal representatives on the SGAC expressed concern that funding would be pulled from program operations budgets to cover CSC funding, pointing out that such a move would not only strain tribal budgets but also “move the goal posts” on CSC by reducing the CSC owed. Therefore, tribal representatives urged the BIA to prioritize full restoration of sequestration cuts to tribal programs.

Letters on CSC Matters Submitted to IHS and BIA

On January 22, 2014, the TSGAC and the SGAC jointly submitted a letter to Director Roubideaux and Assistant Secretary Washburn, with several recommendations regarding consultation on CSC appropriations. The letter urged: (1) that the agencies begin consultation on CSC appropriations immediately; (2) that the agencies conduct such consultation jointly; (3) that the agencies hold monthly, joint meetings of their respective CSC Workgroups; (4) that the agencies hold a set of four regional consultation sessions; and (5) that the agencies hold a national consultation session as part of their efforts. The letter also urged that IHS state to Congress in the operating plan to be submitted within 30 days that the agencies will fully fund CSC, and that any necessary reductions will be made to direct operations, not to services or direct care.

The National Indian Health Board and the National Congress of American Indians also sent a joint letter to Director Roubideaux and Assistant Secretary Washburn requesting tribal consultation on the FY 2014 operating plan and the CSC work plan. That letter made substantively the same recommendations as the TSGAC/SGAC letter and asked the agencies to “consider adjusting administrative costs to fully fund CSC” in consideration of the fact that contracting tribes have taken over many of those functions. In addition, at least one tribe (the Susanville Indian Rancheria) has recently submitted letters to Assistant Secretary Washburn, urging that the Department of the Interior devote sufficient resources to robust consultation efforts (including meetings of the CSC Workgroup) and urging that the BIA does not face any significant budgetary obstacle to fully funding CSC. The letters, which we attach to this memorandum, also request that the BIA make CSC and other funding information available on the BIA website.

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).

IHS TRIBAL SELF-GOVERNANCE ADVISORY COMMITTEE DOI SELF-GOVERNANCE ADVISORY COMMITTEE

c/o Self-Governance Communication and Education
P.O. Box 1734, McAlester, OK 74501
Telephone (918) 302-0252 ~ Facsimile (918) 423-7639 ~ Website: www.tribalselfgov.org

Via Email: dajuana.blackmon@bia.gov

Rene.Joseph@ihs.gov

Original Sent Via USPS

January 22, 2014

Mr. Kevin Washburn
Assistant Secretary – Indian Affairs
Bureau of Indian Affairs
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20420

Dr. Yvette Roubideaux, M.D., M.P.H.
Director, Indian Health Service
Department of Health and Human Services
Suite 440, The Reyes Building
801 Thompson Avenue
Rockville, MD 20852-1627

Re: Immediate Tribal Consultation Needed on Contract Support Cost Funding

Dear Mr. Washburn and Dr. Roubideaux,

On behalf of the Self-Governance Tribes within the Department of the Interior – Bureau of Indian Affairs – Office of Self-Governance (DOI-BIA-OSG) and the Department of Health and Human Services – Indian Health Service – Office of Tribal Self-Governance (DHHS-IHS-OTSG), we write to urge you to begin immediate efforts to consult with and solicit the advice and participation of tribes in formulating a plan to address funding of contract support costs (CSC) as directed by Congress.

As you are aware, in the FY 2014 Consolidated Appropriations Act just recently passed, Congress rejected the Administration’s proposal to cap CSC funding on a contract-by-contract basis and affirmed the right of tribes to payment of full CSC under the ISDEAA. Congress further removed the caps on aggregate CSC spending that had been imposed in recent years, making CSC payable from each agency’s lump-sum appropriations.

In the Joint Explanatory Statement accompanying the Act, Congress directed 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 CSC funding. The agencies were directed to submit an operating plan (showing funding allocations to the activity level) to the Committees within 30 days, and to develop work plans and announce consultation with Tribes within 120 days.

Tribes must be included in this critical decision making process, and action must be taken to begin consultation immediately if there is to be meaningful tribal participation within the deadlines set by Congress. As noted in the Joint Explanatory Statement from Congress, the Administration's FY 2014 proposal was developed without tribal consultation and was strongly and overwhelmingly opposed by tribes. In order to avoid a repeat of that situation, we recommend as follows:

- That the agencies conduct consultation and pre-consultation jointly, which will conserve considerable resources for the Tribes to allow for maximum participation;
- That the agencies hold monthly, joint meetings of their respective CSC Workgroups as one component of the consultation;
- That the agencies hold a single set of four regional consultation meetings; and
- That the agencies hold an additional, joint national consultation meeting.

In addition, we urge the agencies to clearly state in the operating plan due to Congress within 30 days of enactment of the Consolidated Appropriations Act that the agencies will fully fund CSC, if necessary through reductions in direct operations, and that no reductions will be made to services or direct care.

We look forward working in partnership with you to address the immediate and ongoing challenges relating to CSC funding.

Sincerely,



W. Ron Allen, Tribal Chairman/CEO
Jamestown S'Klallam Tribe
Chairman of the SGAC



Chief Lynn Malerba
Mohegan Tribe
Chairwoman of the TSGAC

Cc: Self-Governance Tribes
TSGAC/SGAC Members and Technical Workgroup Members



National
Congress of
American
Indians

National Indian Health Board



January 27, 2014

Mr. Kevin Washburn
Assistant Secretary
Bureau of Indian Affairs
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20420

Dr. Yvette Roubideaux, M.D., M.P.H.
Director, Indian Health Service
Department of Health and Human Services
Suite 440, The Reyes Building
801 Thompson Avenue
Rockville, MD 20852-1627

Re: Request for Tribal Consultation on FY 2014 Operating Plan and CSC Work plan

Dear Mr. Washburn and Dr. Roubideaux,

On behalf of the National Congress of American Indians (NCAI), National Indian Health Board (NIHB) and the 566 Federally Recognized American Indian and Alaska Native Tribal Governments we serve, *I write today to request that you engage in thoughtful, meaningful, and thorough consultation with Tribes on contract support costs (CSC), especially as you develop the CSC consultation plan, pursuant to Congress' instructions in the Joint Explanatory Statement accompanying the Consolidated Appropriations Act of FY 2014.*

For decades, Tribes have been negotiating with the Departments of Interior and Health and Human Services to get their CSC costs paid in full. In June 2012, the Supreme Court issued a ruling in *Salazar vs. Ramah Navajo Chapter* that held that the U.S. Government must pay each Tribe's contract support costs even if the full amount to fund this has not been appropriated by Congress. In drafting the FY 2014 Appropriations Act, Congress remanded the resolution of CSC to the agencies to resolve, in addition to the appropriate Congressional committees. The agencies are required to, within 120 days, submit a work plan to Congress on how resolution of CSC will occur. The agencies must also submit an operating plan to Congress within 30 days displaying allocations to the activity level. It is imperative that Tribes be part of this plan development, as CSC and other funding levels are a matter of life and death for many across Indian Country.

NCAI and NIHB believe Congress acted wisely in rejecting the Administration's proposal in the President's FY 2014 budget request that would place individual caps on CSC. The Appropriations Committee noted that, "That proposal was developed without tribal consultation and the Committees heard from numerous Tribes voicing their strong opposition." We urge you not to make the same mistake when developing the operating plan and work plan. In order to fulfill this promise to Tribes to engage in

meaningful consultation, 1) we encourage that your agencies conduct consultation together, which will not only be cost effective, but allow for the greatest amount of participation for Tribes; 2) that there be joint meetings of each agency's CSC workgroups on a monthly basis; 3) that there are a single set of four regional consultation meetings; and 4) that the agencies also convene a national consultation on CSC that will be held jointly.

Finally, as you develop the operating plan for FY 2014, as directed by the FY 2014 Consolidated Appropriations Act, you utilize all means possible to fully fund CSC without cutting direct care for IHS patients or other Tribal programs. Please consider adjusting administrative costs to fully fund CSC, as Tribes are providing many administrative functions that were previously provided by the Indian Health Service and Bureau of Indian Affairs.

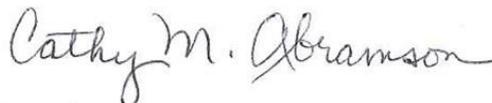
This Administration has made many positive strides when it comes to building a strong relationship between the federal government and Tribes especially when it comes to Tribal consultation. The Administration has also supported the enactment of the Indian Health Care Improvement Act (P.L. 111-148) and Tribal Law and Order Act (P.L. 111-211) which are continuing to transform Tribal communities for the better. Finally, there has also been priority given to many historic legal settlements including *Keepseagle* and *Cobell* cases. A resolution on CSC should also hold this same priority in order to continue to build the important relationship between Tribes and the federal government.

Thank you for your consideration of this matter. If you have any questions please contact Jacqueline Pata, Executive Director of NCAI at (202) 466-7767 or Stacy Bohlen, Executive Director of NIHB, at (202) 507-5070.

Sincerely,



Brian Cladoosby, President
National Congress of American Indians



Cathy Abramson, Chairperson
National Indian Health Board



SUSANVILLE INDIAN RANCHERIA

January 20, 2014

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

Dear Secretary Washburn,

The conference report to accompany the FY 2014 Consolidated Appropriations Act contains the following instructions:

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.

As the FY 2014 “Green Book” information is no longer correct, the Susanville Indian Rancheria requests that you send us a comprehensive funding table that displays for all Indian Affairs program elements the following details:

1. FY 2013 operating plan funding level
2. Internal transfers for self-governance compacts
3. Internal transfers for Consolidated Tribal Government Program (CTGP) contracts
4. Other internal transfers
5. Federal Pay Act costs
6. Tribal pay costs
7. Teacher pay costs
8. Federal health employee benefit costs
9. Other fixed costs
10. Administrative cost savings
11. Program changes
12. Final FY 2014 Enacted levels

The table is necessary to enable tribal governments to understand how the FY 2014 Indian Affairs funding levels are determined. According to the Indian Affairs FY 2014

January 20, 2014

Budget Justifications and Performance Information, “over 62 percent of appropriations [are] provided directly to tribes and tribal organizations through grants, contracts, and compacts.” (Page IA-GS-2).

We request that you post a copy of the revised FY 2014 comprehensive funding table on the BIA website in the “Budget and Finance” section.

The Susanville Indian Rancheria also requests that you direct your Central Office staff to allocate the FY 2014 funds in a timely and expeditious manner. Last year, the allocation of FY 2013 funds was unreasonable delayed due to the “implementation of FBMS”.

In your testimony to the Senate Committee on Indian Affairs on September 14, 2012 you stated, “Among the principles that will guide me if I am confirmed to be the Assistant Secretary for Indian Affairs is a strong commitment to tribal self determination and self-governance.” Last year’s delay in funding created an undue burden to Tribes across the Nation and the timely and efficient allocation of funds to tribal governments is a key component of self-determination and self-governance.

Thank you for your assistance in this matter.

Sincerely,



Mr. Stacy Dixon
Tribal Chairman

Cc: Susanville Indian Rancheria Tribal Business Council
Susanville Indian Rancheria Fiscal Controller
Susanville Indian Rancheria Tribal Office Manager
Debbie Ho, Mapetsi Policy Group



SUSANVILLE INDIAN RANCHERIA

January 20, 2014

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

Dear Secretary Washburn,

The conference report to accompany the FY 2014 Consolidated Appropriations Act contains the following language:

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.

Resources

The Susanville Indian Rancheria urges you to provide substantial resources to the consultation process which will require multiple meetings with the Contract Support Cost Work Group, regional meetings with tribal governments and the preparation of analytical reports.

Meetings with Tribes

We recommend that you meet with the Contract Support Cost Work Group (CSCWG) immediately so that the work group can participate in the development of the consultation plan. The consultation plan that is to be prepared within 120 days of enactment of the Act should be jointly developed by your office and the CSCWG.

In addition, the Susanville Indian Rancheria recommends that Indian Affairs hold at least four regional meetings to allow tribal governments to provide recommendations on

Contract Support cost funding. The BIA should allow Regional BIA personnel, including Self-Determination personnel and awarding officials, to attend the meetings to facilitate communication on this important matter.

Shortfall Report

We appreciate the FY 2012 Contract Support Cost shortfall report being posted on the BIA website. The Susanville Indian Rancheria recommends that the CSCWG meet as soon as the FY 2013 Contract Support Cost shortfall report becomes available in the Central Office in order to review it prior to being posted on the BIA website. The report should be posted on the BIA website as soon as possible to provide the most current and accurate data available for analysis by Tribal officials.

Provide CSC Information on the BIA website

The BIA website should have a special, easily accessible page that contains information on Contract Support Costs. The page should include:

- The Contract Support Cost shortfall reports
- The existing Contract Support Cost policies
- The list of the CSCWG members with their contact information
- A copy of the CSC consultation plan
- The schedule of CSCWG meetings

Analysis of Legislative, Regulatory and Procedural Obstacles to Full Funding

A draft report should be prepared that outlines the legislative, regulatory and policy issues affecting Contract Support Costs including obstacles to full funding. The draft report can be a useful tool for the CSCWG to develop legislative, regulatory and policy recommendations.

Budget

The BIA requested \$230.0 million for CSC in the FY 2014 budget request. The estimated need was \$242.0 million (Senate Committee on Indian Affairs, March 7, 2013), a difference of only \$12.0 million. The Susanville Indian Rancheria does not believe that there is a significant budget obstacle to fully funding CSC needs in the Indian Affairs budget.

January 20, 2014

In your testimony to the Senate Committee on Indian Affairs on September 14, 2012 you stated, "Among the principles that will guide me if I am confirmed to be the Assistant Secretary for Indian Affairs is a strong commitment to tribal self determination and self-governance." Full funding of Contract Support Costs is a key component of self-determination and self-governance.

Sincerely,

A handwritten signature in black ink, appearing to read "Stacy Dixon". The signature is written in a cursive style with a large initial "S" and a long horizontal stroke at the end.

Mr. Stacy Dixon
Tribal Chairman

Cc: Susanville Indian Rancheria Tribal Business Council
Susanville Indian Rancheria Fiscal Controller
Susanville Indian Rancheria Tribal Office Manager
Debbie Ho, Mapetsi Policy Group