

# California Rural Indian Health Board & Northwest Portland Area Indian Health Board

## 15<sup>th</sup> Biennial Board of Directors Joint Board of Directors Meeting July 15-18 2019

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## Discussion Topics

- IHS Advance Appropriations Initiative
- SDPI Reauthorization and Funding
- Section 105(I) Leasing
- Contract Support Cost and IHS Policy
- *Texas v. United States* – ACA Litigation
- Opioid Litigation

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## Advance Appropriations

- For many years tribes have sought advance appropriations for IHS funding to address negative impacts of CRs and government shutdowns
- Advance appropriations is **not** the same as forward funding
- Advance appropriations has applied to VA medical accounts for many years
- Legislation was previously introduced in House that would implement this initiative and House directed GAO to conduct a study on feasibility
- GAO issued study last year making it clear concepts can work for IHS
- Recent 35-day government shutdown increased interest in advance appropriations and led to introduction of new legislation

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## Advance Appropriations (cont.)

- There are 3 pending bills
  - **HR 1135** by Rep. Don Young (R-AK). It would authorize advance appropriations for IHS Services and Facilities Accounts. There are 23 co-sponsors from both parties. Referred to the following committees: Natural Resources, Energy and Commerce, and Budget.
  - **HR 1128** by Rep. Betty McCollum (D-MN) who is Chair of the House Appropriations Subcommittee on Interior. It would authorize advance appropriations for IHS Services and Contract Support and some BIA/BIE programs. There are 32 co-sponsors from both parties. Referred to the following committees: Natural Resources, Energy and Commerce, and Budget.
  - **S. 229** by Sen. Tom Udall (D-NM) who is Ranking Member on the Senate Interior Appropriations Subcommittee. There are 9 co-sponsors, all Democrats. It is the same as HR 1128 and it was referred to the Senate Budget Committee.

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## Advance Appropriations (cont.)

- "Advance Appropriations.—In 2018, the Government Accounting Office (GAO) identified considerations for Congress when considering whether to advance appropriate funds to IHS, including whether IHS has the processes in place to develop and manage an advance appropriation. The Committee directs IHS to examine its existing processes and determine what changes are needed to develop and manage an advance appropriation and report to the Committee within 180 days of enactment of this Act on the processes needed and whether additional Congressional authority is required in order to develop the processes." (House Appropriations Committee FY 2020 Interior, Environment, and Related Agencies bill Committee report (House Report 116-100))

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## Advance Appropriations (cont.)

- House Interior Appropriations Chair McCollum noted at the May 22, 2019 markup that the Committee is asking both the IHS and Indian Affairs for additional information as part of the effort to move forward on providing both agencies advance appropriations, although Committee Report mentions only the IHS.

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## Advance Appropriations (Cont.)

- Numerous national and regional tribal organizations, as well as many tribes support this initiative
- The ABA is about to enact resolution in support of advance appropriations
- Not clear when hearings will happen or when bills will move
- Including ask for extension of advance appropriations to BIA in addition to IHS complicates the landscape

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## SDPI Reauthorization and Funding

- Authorization for SDPI expires on 9/30/2019
- SDPI has been level funded at \$150 million per year since fiscal year 2004
- NCAI and NIH are advocating that Congress increase the annual appropriation for SDPI to \$200 million for fiscal year 2020 to begin to address this unmet need

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## SDPI Reauthorization and Funding (Cont.)

- [H.R. 2680, the SDPI Reauthorization Act of 2019](#).
- On May 10, 2019, bipartisan legislation was introduced in the House of Representatives to extend both SDPI and the Type 1 Diabetes Research Program for five years at \$200 million per year (a \$50 million annual increase).
- Referred to Committee on Energy and Commerce.
- 379 House Members and 67 Senators signed letters of support urging the extension of these important programs dedicated to preventing and treating diabetes.

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## SDPI Reauthorization and Funding (Cont.)

- [S. 1895](#).
- This broad healthcare package legislation would extend SDPI authorization through 2024.
- It does not include an increase in appropriations for the program.
- There is concern that other healthcare extenders in the package are too expensive, which may create challenges in securing wide bipartisan support for the bill.

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## SDPI Reauthorization and Funding (Cont.)

- On June 4, 2019, the House Committee on Energy and Commerce Subcommittee on Health held a hearing which included legislation to extend SDPI and the Type I Special Diabetes Program.
- A total of 12 health care bills, set to expire September 30, 2019, were the subject of the hearing.
- Even though there is bipartisan and bicameral support for extension of these health programs Republican Subcommittee members object because there is no funding offset for the funding increases.

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## SDPI Reauthorization and Funding (Cont.)

- A National Tribal Summit on SDPI will take place on September 17, 2019, in conjunction with the NIHB 36<sup>th</sup> Annual National Tribal Health Conference in Temecula, California.
- The Summit is intended to foster a collaborative discussion on extending 638 authorities to SDPI.
- Additional details will be posted on the NIHB website closer to the conference.

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## Section 105(I) Leasing

- All tribes use tribal facilities to provide services under ISDEAA agreements
- Appropriated funds for both BIA and IHS have historically been inadequate to fully fund these facility costs
- Section 105(I) of ISDEAA:
  - Tribally owned/leased
  - Used for the purpose of providing PFSA in FA
  - Mandatory: *Manilaq I and II*

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## Section 105(I) (Cont.)

- 105(I) leasing has spread throughout Indian Country – approx. 125 leases/lease proposals so far.
- Virtually all of the leases negotiated to date have been with IHS. But the provision applies to BIA and BIE as well.
- Supplemental tribal clinics appropriation: Congress has appropriated additional funds for VBC program and 105(I) lease compensation since 2016.
- Not enough has been appropriated to fully fund and IHS has had to use other discretionary funds.
- **The ideal solution: a separate, indefinite appropriation for 105(I) like that for contract support costs.**

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## Section 105(I) (Cont.)

- The FY 2019 appropriations act included a \$36 million supplemental tribal clinics appropriation for IHS—an increase of \$25 million to match the amount IHS had to reprogram in FY 2018.
- In 2018 IHS reprogrammed mandatory inflation cost funds to pay the total amount.
- With 105(I) leasing expected to continue growing in FY 2019, \$36 million will almost certainly not be enough to cover all of the 105(I) lease obligations.
- Where will IHS find funds to pay any amount over \$36 million?

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## Section 105(I) (Cont.)

- The House Appropriations Committee's Interior, Environment, and Related Agencies Subcommittee has marked up its FY 2020 Appropriations bill. The recommendation for clinic leases (both VBC and 105(I)) is \$53 million, which is \$42 million over the Administration's request.
- The Senate Interior Appropriations Subcommittee has not yet marked up its FY 2020 appropriations bill.
- The House and Senate have not agreed to a funding cap number for domestic discretionary spending.
  - The House has proceeded to mark up its funding bills anyway with about a 10% increase over FY 2019 enacted levels.
  - The House- recommended funding amounts are generally seen as a starting point for negotiations with the Senate.

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## Section 105(I) (Cont.)

- At the TSGAC meeting on July 16-17, 2019, IHS reported that they are struggling with how to estimate costs going forward:
  - Current estimate of need is \$54-56 million (per IHS)
  - Recognition of need to convene a dedicated technical workgroup
  - Adding 105(I) leases as a funding needs to the FAAB facilities construction report
  - National Tribal Budget Formulation Workgroup seen as natural entity to host further discussion with tribal leaders
- IHS also wants to conduct a survey on tribally-owned and leased facilities being used under ISDEAA and invite feedback on the level of information that would be appropriate to request from tribes

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## Contract Support Cost

- IHS CSC policy has been partially suspended for a number of months: disagreement with tribes over duplication issues and 97/3 default formula for new program funds.
  - At TSGAC meeting earlier this week, RADM Weahkee reported that the CSC Policy is almost ready for the CSC Workgroup's review, but he did not specify exactly when that would be.
- Recent court ruling that may impact future CSC payments: *Navajo Health Foundation – Sage Memorial Hospital v. Burwell*
  - Ruling in one Federal District Court that IHS owed CSC on health care programs and services funded by third-party revenues such as Medicare, Medicaid, and private insurance.
  - IHS dropped the appeal in 10<sup>th</sup> Circuit so decision has limited applicability.
  - Same issues are currently being litigated by the Swinomish Tribe in Federal Court in the District of Columbia, a court that all tribes have access to.
- Status of other litigation:
  - *Cook Inlet Tribal Council v. Mandregan.*
  - *Seminole Tribe of Florida v. Azar.*
  - *Norton Sound v. Azar.*

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### Legal Challenges to the Affordable Care Act: *Texas v. United States*

- **District Court Decision.** In December 2018, a federal district court in Texas held that, following passage of the Tax Cuts and Jobs Act of 2017, the “individual mandate” provision of the Affordable Care Act (ACA) can no longer be considered a valid exercise of Congress’s power to tax and is therefore unconstitutional.
- The district court also held that the individual mandate is not severable from the remainder of the Act (meaning it cannot be separated out without affecting the operation of the rest of the law) and went on to declare the Act invalid in its entirety.
- **Appeal.** The district court’s decision was appealed to the Fifth Circuit Court of Appeal, where the case is now pending.

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### *Texas v. United States (cont.)*

- **Tribal Health Impact.** The district court’s ruling extends to Section 10221 of the ACA, which amended and permanently authorized the Indian Health Care Improvement Act (IHCIA), and to other Indian-specific health care provisions incorporated into the Act, even though they are not dependent on the ACA’s individual mandate.
- If the district court’s decision is upheld in full, the IHCIA and other Indian-specific provisions in the ACA would therefore be struck down.

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### *Texas v. United States (cont.)*

- **Tribal Amicus.** On April 1, 2019, an amicus brief was submitted in the appeal on behalf of a national coalition of Tribes and tribal organizations, arguing:
  - That the district court did not correctly apply long-established severability rules when it invalidated the ACA in its entirety. These rules state that a court should preserve as much of a statute as possible when one provision is found unconstitutional.
  - The IHCIA and certain other Indian-specific provisions in particular should be preserved, because: (1) they can operate as intended by Congress without the individual mandate in place; (2) the IHCIA’s legislative history shows that it originated as a freestanding bill in 1976, separate from the rest of the ACA, underscoring that it operates independently of the remainder of the ACA; and (3) there is no evidence whatsoever that Congress would have wanted the IHCIA and other Indian provisions to fail if the individual mandate were deemed unconstitutional.

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## Texas v. United States (cont.)

- **United States' Litigation Position.** In the district court, the United States agreed that the individual mandate is now unconstitutional, but argued that most of the rest of the ACA should be preserved.
- The United States changed its position in the court of appeals, supporting the district court's decision holding that the entire law is invalid.
- The United States brief, filed on May 1, argues that "minor" provisions included in ACA should not be severed.
  - Essentially argues that the IHCA and Indian provisions are invalid.

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## Texas v. United States (cont.)

- **Jurisdictional Questions on Appeal.** Shortly before argument was scheduled, the 5<sup>th</sup> Circuit asked the parties to file supplemental briefs addressing three questions relating to the court's jurisdiction to hear the appeal:
  - (1) Do the state intervenors and the U.S. House of Representatives—the parties defending the ACA in the litigation—have standing to intervene in the appeal, and were their interventions timely;
  - (2) if not, is there still any live case or controversy between the plaintiff states and the federal defendants, given the federal government's new legal position on appeal; and
  - (3) what is the appropriate conclusion if there is no live controversy between the plaintiff states and the federal defendants and no other party has standing to appeal?

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## Texas v. United States (cont.)

- This raised the question of whether the Fifth Circuit would even consider the merits of the appeal, and if not, whether it would leave the district court's decision in place or order the district court to vacate its ruling.
- However, in their briefs all parties agreed that there is still a live controversy between the plaintiff states and the federal government and that the Fifth Circuit can and should hear the appeal.
- The parties said the federal government is still enforcing the ACA for now, and the Department of Justice is arguing on appeal that the district court's relief was too broad.

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## Texas v. United States (cont.)

- **Oral Argument.** A three-judge panel heard the case on July 9, 2019.
- Panel made up of judges appointed by Carter Bush and Trump.
- None of the Judges, and none of the parties' attorneys, specifically raised or addressed the Indian Health Care Improvement Act or other Indian-specific provisions of the ACA.
- One Judge noted that some provisions of the ACA, like a provision requiring certain restaurant menus to include calorie counts, are not related to the law's health insurance reforms.

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## Texas v. United States (cont.)

- Attorneys for the intervenor states and the House argued that Congress clearly intended for the rest of the law to survive when it eliminated the mandate penalty.
- They also pointed out that several Republican lawmakers represented to the American public that they were not touching protections for preexisting conditions or other popular provisions of the law by zeroing out the tax penalty.

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## Texas v. United States (cont.)

- The judges were confused by the Trump Administration's legal position.
  - After defending the ACA in the district court, the DOJ now supports the lower court's *legal* conclusion that the entire ACA is invalid.
  - At the same time, however, the DOJ argued that the district court's *judgment* striking down the whole law is overbroad, and that some unspecified provisions of the law should not be included in the judgment because they don't affect the plaintiffs in the case.

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## Texas v. United States (cont.)

- Possible Outcomes:
  - Back the lower court decision invalidating the ACA, or overturn it entirely.
  - Determine that the elimination of the individual mandate penalty only renders certain parts of the ACA unconstitutional.
  - Dismiss the entire lawsuit if they determine that no party has standing to pursue the appeal, in which case they would either leave the lower court judgment in place or require that it be vacated.

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## Opioid Litigation

- Disproportionately impacting Indian Country
  - Health services have been overwhelmed
  - Education and addiction therapy costs have substantially increased
  - Evictions from housing for drug-related criminal activity
  - Almost every tribal member has been affected

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## Opioid Litigation (cont.)

- Well over 2,000 suits have been filed in the last few years by states and their political subdivisions, insurance carriers, hospitals, individuals, and Indian tribes and tribal organizations.
- There are 3 classes of defendants who bear significant liability for the crisis – and who benefitted from it:
  - Manufacturers
  - Distributors
  - Retail Pharmacies in some cases

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## Opioid Litigation (cont.)

- All federal court cases have been combined as "Multidistrict Litigation" (MDL) under the leadership of Cleveland Federal Judge Dan A. Polster.
- MDL is a unique federal court process different than a class action.
- Judge Polster has stated he would prefer to see the parties reach a "global settlement" of opioid claims, although litigation is proceeding in the meantime on a number of tracks.
- Various "bellwether" (test) cases have been selected for pre-trial briefing and, if necessary, trial.
- First bellwether trial in MDL scheduled this October, involving local government plaintiffs.

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## Opioid Litigation (cont.)

- There are over 100 tribal cases on behalf of over 340 tribes pending in the MDL litigation.
- Two "tribal track" bellwether cases have been established: Muscogee (Creek) Nation and Blackfeet Tribe.
- In October an amicus brief was filed on behalf of 448 Tribes in both cases.
- Earlier this year the Defendants filed Motions to Dismiss in both cases, asking the court to make a threshold ruling that the Tribes' complaints were not sufficient to state any legal claims for relief.
- On June 13, 2019 the Judge issued an Opinion and Order ruling that rejected most of the Defendants' dismissal arguments.
- Both tribal bellwether cases now proceed to discovery and trial phases. No trial dates scheduled yet.

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## Opioid Litigation (cont.)

- A Tribal Leadership Committee (TLC) has been appointed by the Court to advise the Plaintiff's MDL Leadership Committee on litigation and settlement strategy for the tribal cases.
- The TLC has had several meetings with State Attorney Generals who have committed to support a key principal: Tribes will be treated independently (and as sovereigns) in any settlement.
- Methodology that is used to calculate the overall set aside for tribal claimants in any global settlement might be different than the methodology that will be used to reallocate settlement amount among tribes.
- Settlement discussions are still very preliminary. Plaintiffs have claims for past damages, but settlement focus has so far been mainly on prospective remedies to help fix the problem.

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## Opioid Litigation (cont.)

- Other plaintiffs in the MDL continue to pursue a settlement as well.
- In one approach, on June 14, 2019 cities and counties across the country filed a Motion to establish a "Negotiation Class."
- If approved, the class would be solely for the purpose of negotiating a comprehensive settlement with regard to such entities—it would not create a class action for purposes of litigation.
- Momentum on all settlement discussions is directly linked to aggressive litigation: more pressure on the defendants is brought through trial dates and removal of cases to State courts for more trials.

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## Questions?

For more information, please contact:

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