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## MEMORANDUM

April 30, 2010

TO: SELF-GOVERNANCE TRIBES

FROM:  HOBBS, STRAUS, DEAN & WALKER, LLP

RE: ***Indian Health Service Contract Support Costs Developments***

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In this memorandum, we summarize the following developments related to contract support costs (CSC) in the Indian Health Service (IHS):

- **CSC Litigation**: Most of the litigation over past CSC shortfalls is on hold while the federal appeals courts sort out issues related to the statute of limitations and the CSC spending "caps." Challenges to IHS's policy of allocating no funding for new and expanded contracts continue, with mixed results.
- **FY 2010 CSC Appropriations**: The IHS appropriations bill contains a \$116 million increase in CSC, by far the largest increase ever. While this has significantly increased the level of CSC need funded, it has not eliminated the CSC shortfalls for most tribes. CSC will be funded on average at about 80% of need this year.
- **FY 2011 CSC Budget**: The Administration has proposed another increase of almost \$46 million for IHS's CSC appropriation, which would raise the average level of need funded to over 81%.

### ***CSC Litigation***

Current CSC litigation encompasses a number of claims and issues: statute of limitations, the effect of the CSC "caps," indirect cost rate miscalculation claims, and the legality of IHS's policy of allocating no CSC to new and expanded awards.

### **Statute of Limitations**

Many tribes have filed claims seeking to recover CSC shortfalls from FY 1997 and earlier, the years before Congress began imposing CSC "caps" in the appropriations acts for IHS. Most of those claims were not filed within the six-year limitations period

prescribed by the Contract Disputes Act (CDA),<sup>1</sup> however, so IHS has argued they are time-barred. Tribes have relied on the established rule that class actions, such as those filed by the Cherokee Nation and the Pueblo of Zuni in the CSC arena, suspend or "toll" the running of the statute of limitations. In 2008, the Civilian Board of Contract Appeals (CBCA), in three companion decisions, agreed with IHS that the CDA statute of limitations is "jurisdictional" and cannot be tolled. The affected tribes—the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians; the Metlakatla Indian Community; and the Arctic Slope Native Association (ASNA)—appealed the CBCA's ruling to the Federal Circuit Court of Appeals.

Last year the Federal Circuit reversed the CBCA in part, holding that the CDA statute of limitations is not an absolute "jurisdictional" bar and may be tolled in appropriate circumstances. But the court also ruled that class action tolling does not apply to members of the *Cherokee* class who did not present claims before or during the pendency of the class certification decision.<sup>2</sup> The court reasoned that "presentment" to the contracting officer is a prerequisite to a court's jurisdiction over CDA claims. The *Cherokee* court could never have had jurisdiction over the claims of tribes that did not present their claims until well after the court denied the class. Such tribes, the Federal Circuit held, are not entitled to class action tolling since they could never have been members of the class. The court sent the claims back to the CBCA to decide if the facts warranted equitable tolling of the statute.

Our clients, Coos and Metlakatla, asked the Federal Circuit to reconsider its ruling on class-action tolling, which is mandatory on courts and thus a much stronger doctrine than equitable tolling. We argued that tolling is determined by membership in the asserted class, not whether a court would later have jurisdiction in the event a class is certified. Recently, however, the Federal Circuit declined to rehear the issue. ASNA has petitioned the Supreme Court to review the Federal Circuit's decision on class-action tolling. Metlakatla will soon file a petition as well. The Court is expected to issue a decision this summer on whether it will hear the case.

In another appeal, involving our client the Menominee Tribe, the Court of Appeals for the District of Columbia Circuit is also considering whether legal and/or equitable tolling applied to asserted members of the *Cherokee* class during the pendency of the certification decision. Oral argument in that case took place November 17, 2009.<sup>3</sup>

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<sup>1</sup> 41 U.S.C. § 605(a).

<sup>2</sup> *Arctic Slope Native Ass'n. v. Sec'y of Health & Human Servs.*, No. 2008-1532 (Sept. 29, 2009). In this decision, the court decided three related appeals: one by the Arctic Slope Native Association, and two consolidated appeals by our clients the Metlakatla Indian Community and the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians.

<sup>3</sup> The Menominee appeal includes an additional issue: whether the district court correctly dismissed the Tribe's 1995 claim, which was not subject to the CDA statute of limitations, on the basis of laches, a judge-made doctrine barring claims unreasonably delayed to the prejudice of the other party. The CBCA ruled that laches did *not* bar similar claims by Coos and Metlakatla.

If the D.C. Circuit rules differently than the Federal Circuit on class-action tolling, the odds of the Supreme Court addressing the issue would rise substantially.

### Effect of the CSC "Caps"

Most CSC claims for the "cap" years (FY 1998 and later) do not have statute of limitations problems, but the courts so far have held such claims barred by the caps. Under the Indian Self-Determination and Education Assistance Act (ISDEAA), CSC (like other funding) is "subject to the availability of appropriations." The caps limit the amount IHS has "available," the courts have held, thus precluding further liability provided the agency distributes the entire capped amount.

The Ramah Navajo Chapter has appealed a ruling to this effect in its long-running CSC class action against the Bureau of Indian Affairs (BIA). Ramah argues that (1) funds *were* legally available despite the caps; and (2) the caps limit only the amount the agencies may spend, not the ultimate liability of the United States for full CSC under the contracts. Although the case involves BIA rather than IHS, the cap issue is essentially the same for the two, so the Tenth Circuit's decision in the Ramah appeal will be a powerful precedent for cap claims against IHS as well. Briefing was completed in July. NCAI filed an amicus brief, drafted by our firm, in support of the tribal contractors. Oral argument was held in November, with a ruling expected in the next few months.

The CBCA has also ruled, in the Coos, Metlakatla, and ASNA cases, that the caps protect IHS from liability, since IHS spent its entire appropriation. Coos and Metlakatla asked the CBCA to reconsider that decision, arguing that more funds were available and that the FY 1998 appropriations act did not cap CSC for new and expanded contracts. The CBCA declined to reconsider, however. Metlakatla will soon file an appeal to the Federal Circuit. ASNA has appealed the CBCA's cap-year ruling to the Federal Circuit, arguing that the caps limit only the amount IHS can pay, not the United States' liability for full CSC funding.

### Indirect Cost Rate Miscalculation Claims

Indirect cost rates are calculated by dividing the indirect cost pool by the program "base" the pool supports. The Ramah Navajo Chapter's class action against the BIA resulted in a ruling that the agency improperly used indirect cost rates "diluted" by inclusion in the base of programs that pay little or no indirect costs.<sup>4</sup> The Tunica-Biloxi Tribe of Louisiana and the Ramah Navajo School Board (RNSB) continue to try to establish a CSC class action against IHS similar to the Ramah Navajo Chapter's class action. But in late 2008 the D.C. district court dismissed Tunica's and RNSB's "rate dilution" claims.<sup>5</sup> The court arrived at a different interpretation of the ISDEAA than did

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<sup>4</sup> *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1463 (10<sup>th</sup> Cir. 1997).

<sup>5</sup> *Tunica-Biloxi Tribe of Louisiana v. United States*, 577 F. Supp. 2d 382 (D.D.C. 2008).

the *Ramah Navajo* court, based in part on an intervening change in the law.<sup>6</sup> Claims regarding the legality of certain carryforward procedures remain pending in the case.

#### CSC for New and Expanded Awards

In 2005, the IHS adopted the policy of allocating no CSC to new and expanded ISDEAA agreements, despite the fact that each year Congress makes "not to exceed \$5,000,000" available for that purpose. The IHS reasons that \$0 does not exceed \$5,000,000, and the agency has the discretion to allocate the entire CSC appropriation to ongoing contracts. This policy has had a chilling effect on the expansion of self-determination and self-governance, and has been challenged in at least three cases.

The Southern Ute Tribe sued IHS when the agency declined the Tribe's proposal to assume operation of a clinic on the ground that the Tribe refused to waive its right to CSC. The federal court in New Mexico held the IHS's declination improper under the ISDEAA,<sup>7</sup> but subsequently ruled that the IHS need not award any CSC if the entire appropriation was obligated to ongoing contracts. The Tribe appealed that ruling, but on May 4, 2009, the Tenth Circuit ruled that the appeal was premature and the parties must negotiate a contract and funding agreement under the district court's supervision. RNSB received a declination very similar to that at issue in the Southern Ute case, and also received a ruling from the court that the agency's declination was unlawful, but the issue of entitlement to CSC has not yet been ruled on in that case.<sup>8</sup>

The IHS adopted a different approach when the Three Affiliated Tribes of the Fort Berthold Reservation proposed to include CSC associated with expanded services in FY 2008. IHS approved the contract and included the program (or "Secretarial") funding for the new and expanded services, but declined to include any CSC associated with those services. The Three Affiliated Tribes, represented by our firm, challenged this partial declination in federal court. The Tribes argued that the ISDEAA requires that IHS pay up to the available limit of appropriations, that \$5 million was available for new and expanded activities, and that the refusal of IHS to use those funds in the way Congress intended violated the ISDEAA.

The Government asked the court to dismiss the Tribes' claims. If successful, the Three Affiliated Tribes would have received some of the \$5 million that IHS would otherwise have allocated to ongoing shortfall. The Government argued that "ongoing

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<sup>6</sup> See 25 U.S.C. § 450j-2 (prohibiting funds available to IHS from being expended for CSC or indirect costs associated with any entity other than IHS).

<sup>7</sup> *Southern Ute Tribe v. Leavitt*, 497 F. Supp. 2<sup>d</sup> 1245 (D.N.M. 2007).

<sup>8</sup> *Ramah Navajo Sch. Bd. v. Leavitt*, Civ. No. 07-289 MV/ACT (D.N.M.), Mem. Op. and Order (Feb. 6, 2008).

contractors" who would be hurt by such a decision were necessary and indispensable parties to the lawsuit but could not be joined due to their sovereign immunity. Therefore the whole case must be dismissed under Rule 19 of the Federal Rules of Civil Procedure, the Government concluded.

In an important ruling last year, the U.S. District Court for the District of Columbia rejected this Rule 19 argument. Even if the CSC appropriation did constitute a "limited fund," which the court assumed but did not decide,<sup>9</sup> the ongoing contractors were not required parties because the Government's interest in defending its own policy was congruent with that of the ongoing contractors who benefit from it. The Government could represent those contractors adequately, and Rule 19 did not require that they participate in the case.

The court also recognized the troubling practical implications of the Government's "limited fund" argument: the agencies would have "unfettered discretion" to allocate underfunded CSC—and by extension, any other limited fund—since its decisions would be unchallengeable due to the inability to join other sovereign tribes under Rule 19. This result would clash with the ISDEAA and the general presumption that courts can review agency actions. Thus the court denied the Government's motion to dismiss the CSC claim. The parties settled the case. The case will be dismissed after the IHS pays the negotiated settlement amount.

### ***FY 2010 CSC Appropriation for IHS***

The FY 2010 appropriations act includes a significant \$116 million increase for IHS CSC.<sup>10</sup> The Obama Administration requested a \$107 million increase, to which Congress added an additional \$9 million.

FY 2009 Enacted	\$282,398,000
FY 2010 Admin. Request	\$389,490,000
FY 2010 Enacted	\$398,490,000

The IHS budget Justification states that the proposed increase over FY 2009 "is projected to be applied against existing CSC shortfalls associated with ongoing contracts

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<sup>9</sup> The court suggested that the amounts earmarked in the appropriations acts for CSC were *not* the only funds from which IHS could pay CSC to ongoing contractors—in other words, the "caps" did not limit the amount of CSC available. "[C]ongressional appropriations specifically earmarked for CSCs are not the only fund from which to pay the ongoing contractors' CSCs." This remark was not part of the court's holding, as it decided the Rule 19 issue on other grounds, but it supports at least indirectly the tribal position on the "cap" issue discussed above, which is currently on appeal in the Tenth Circuit in the *Ramah Navajo Chapter* case and the Federal Circuit in the *ASNA* case.

<sup>10</sup> See Dep't of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, 123 Stat 2904, 2946 (Oct. 30, 2009). See also Conference Report H. Rpt. 111-316; House Report 111-180; Senate Report 111-38.

and compacts. The proposed increase will make significant progress in addressing the CSC needs of tribally operated programs to improve quality of care for AI/ANs." The Act continues language stating that up to \$5 million of the total "may" be used for the Indian Self-Determination (ISD) Fund to support new or expanded self-determination agreements. As discussed above, however, IHS will not allocate any CSC for new or expanded agreements as long as there is a shortfall for ongoing agreements.

The Act also continues the CSC spending "cap," stating that "not to exceed \$398,490,000" will be available. In addition, the Act, consistent with the Interior Appropriations Acts for FYs 1999-2009, attempts to limit the ability of the IHS and BIA to fund past-year shortfalls in CSC funding from remaining unobligated balances for those fiscal years.

### ***CSC in IHS's FY 2011 Budget***

Late last year, ten Senators wrote to President Obama requesting that his FY 2011 budget include significant increases in CSC.<sup>11</sup> OMB Director Peter Orszag responded to the Senators on November 25, 2009. Mr. Orszag recognized the importance of CSC funding to tribal self-determination and self-governance, but also cautioned that the Administration must make "tough choices necessary to restore fiscal discipline." In light of Mr. Orszag's message and reports last week that the Obama Administration would seek a three-year freeze on discretionary domestic spending, some observers feared that CSC funding for FY 2011 would be flat and shortfalls would jump.

At least in the initial budget, those fears proved unfounded. In the FY 2011 budget released last week, the Administration asked for \$444,332,000 for CSC for IHS, an increase of almost \$46 million. Based on IHS projections, the total CSC need for FY 2011 will be \$546,149,646, so the shortfall will still be over \$100 million, with an average level of need funded of about 81.4%.

Interestingly, the FY 2011 proposal would double the amount available in the ISD Fund from \$5 million to \$10 million—despite the IHS policy of allocating no funding at all to new and expanded agreements.

### ***Conclusion***

If you have questions about this memorandum, please do not hesitate to contact Geoff Strommer ([gstrommer@hobbsstrauss.com](mailto:gstrommer@hobbsstrauss.com)).

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<sup>11</sup> The ten were Senators Baucus, Begich, Cantwell, Inouye, Johnson, Merkley, Murkowski, Murray, Tester, and Udall.