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MEMORANDUM

May 2, 2016

TO: Tribal Health Clients

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP

RE: ***Amicus Brief Effort to Address Indian Health Service's New Legal Position that Tribal Self-Insurance is an Alternate Resource Under § 2901(b)***

We wanted to bring your attention to the Indian Health Service's (IHS) new position that tribal self-insurance must now be considered an alternate resource—meaning that available tribal self-insurance must pay before IHS Purchased/Referred Care itself is responsible for any payment. We just became aware that the IHS is taking a *new* legal position about this in litigation that is currently pending before the U.S. District Court for the District of Columbia in *Redding Rancheria v. Burwell,* Civ. No. 14-2035 (D.D.C.). This new position reverses prior IHS policy, and was developed without any consultation with Tribes. If upheld, it would prevent tribes with tribal self-insured plans and those that supplement Purchased/Referred care with tribal funds from accessing the Catastrophic Health Emergency Fund (CHEF) or Medicare-Like Rates. We are in the process of preparing and filing an amicus brief in support of the Redding Rancheria on behalf of several of our tribal clients.

You may be aware that the IHS proposed in its new Catastrophic Health Emergency Fund (CHEF) regulations (which remain open for comment until May 10, 2016) that tribal self-insurance plans are an alternate resource and that CHEF will not be made available by the IHS when a patient has available tribal self-insurance that could pay first. We have just learned the IHS's legal argument behind this new position: IHS believes that tribal self-insured health plans must be treated as alternate resources based on the IHS's interpretation of the payer of last resort rule that was enacted as Section 2901(b) of the Patient Protection and Affordable Care Act (ACA), P.L. 111-148 (Mar. 23, 2010).

One of the issues raised in the *Redding* lawsuit is the Rancheria's challenge of the IHS's denial of CHEF payments. Redding has a self-insurance program for tribal members that it uses to supplement its compacted Purchased/Referred Care (PRC) program. In a brief filed in the *Redding* case, IHS admits that its existing policy made an exception to treating tribal self-insurance as an alternate resource: under the IHS's payer of last resort regulations for the PRC program and policy guidance in the IHS Manual, IHS provided that certain tribally-funded health insurance plans "would not be considered 'alternate resources' under IHS' payer of last resort regulation in an effort to be consistent with the then-prevailing Congressional intent not to burden tribal resources." Memorandum of Law in Support of Defendants' Motion for Summary

Judgment at 6, *Redding Rancheria* (Civ. No. 14-2035). IHS argues, however, that this all changed in 2010 with the enactment of Section 2901(b) of the ACA, and thus that exception is no longer legally valid.

> Section 2901(b) establishes the following payer of last resort rule:
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> Health programs operated by the Indian Health Service, Indian tribes, tribal organizations, and Urban Indian organizations (as those terms are defined in section 4 of the Indian Health Care Improvement Act (25 U.S.C. § 1603)) shall be the payer of last resort for services provided by such Service, tribes, or organizations to individuals eligible for services through such programs, notwithstanding any Federal, State, or local law to the contrary.

25 U.S.C. § 1623(b).

IHS argues in the *Redding* case that tribal self-insurance is not a "health program" under this new payer of last resort rule and thus tribal self-insurance must pay before IHS. Defendants' Motion for Summary Judgment, *supra*, at 35. IHS also says that this language "invalidated" the IHS's prior policy-based exception for treating tribal self-insurance as an alternate resource, and thus if the IHS were to use CHEF funds to pay claims when tribal self-insurance is otherwise available to pay, such a payment would violate the payer of last resort provision in § 2901(b) of the ACA. *Id* at 33. Therefore, IHS argues that "tribal self-insurance programs . . . qualify as alternate resources which must be considered before IHS will assume liability under [PRC] programs." *Id.* at 35.

This appears to be the legal position behind the IHS's proposed CHEF regulations and we anticipate that it will be the IHS's argument in any future tribal consultations on the CHEF rules. Because this is a significant departure from the IHS's previous treatment of tribal self-insurance and is wholly inconsistent with the federal government's trust responsibility to tribes, we will be filing an amicus brief in support of the Redding Rancheria on behalf of several of our tribal clients. The Redding Rancheria has authorized us to do so, though the Department of Justice objects due to the timing, given that the Department just filed its last brief in the case last week. The court will thus need to decide whether to allow the amicus filing or not. We nevertheless think it is important to prepare and file the brief in order to bring critical issues to the court's attention that are not otherwise already addressed in the parties' briefs. We intend to file the brief as soon as possible, likely within the next week.

Please contact us if you are interested in joining in this effort, or if you have any questions. You can reach Geoff Strommer or Starla Roels at 503-242-1745, gstrommer@hobbsstraus.com, sroels@hobbsstraus.com, or Elliott Milhollin at 202-822-8282, emilhollin@hobbsstraus.com.