



February 20, 2015

Kevin Washburn
Assistant Secretary – Indian Affairs
U.S. Department of the Interior
Mail Stop 4141 MIB
Washington, DC 20240

Robert G. McSwain, Acting Director
Indian Health Service
The Reyes Building
801 Thompson Ave., Suite 400
Rockville, MD 20852

**RE: *Support for Administration’s Proposal to Reclassify Contract Support
Costs as Mandatory Funding***

Dear Assistant Secretary Washburn and Acting Director McSwain:

On behalf of the Alaska Native Health Board,¹ the Aleutian Pribilof Islands Association,² the Native Village of Barrow, the Bristol Bay Area Health Corporation,³ the Consolidated Tribal Health Project,⁴ the Council of Athabascan Tribal Governments,⁵ the Cowlitz Indian Tribe, the Eastern Band of Cherokee Indians, the Indian Health Council,⁶ the Jamestown S’Klallam Tribe, the Klamath Tribes, the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin, Maniilaq Association,⁷ the Mohegan Tribe, the Northwest Portland Area Indian Health Board,⁸ the Norton Sound Health Corporation,⁹ the Oglala Sioux Tribe, the Santa Clara Pueblo, the Seminole Tribe of Florida, the Shoalwater Bay Tribe, the Suquamish Tribe, the Susanville Indian Rancheria, the Swinomish Indian Tribal Community, and the United South and Eastern

¹ The Alaska Native Health Board is a 26-member inter-tribal health organization located in Alaska.

² The Aleutian Pribilof Islands Association is a regional inter-tribal consortium of 12 federally recognized tribes located in Alaska.

³ The Bristol Bay Area Health Corporation is a tribal organization representing 34 federally recognized tribes in the Bristol Bay Region of Alaska.

⁴ The Consolidated Tribal Health Project, Inc. is a regional inter-tribal health consortium of 9 tribes in Mendocino County, California.

⁵ The Council of Athabascan Tribal Governments is a regional inter-tribal consortium of 10 federally recognized tribes located in the Yukon Flats region of Alaska.

⁶ Indian Health Council is a regional inter-tribal health consortium of 9 tribes in northern San Diego County, California.

⁷ The Maniilaq Association is a tribal organization that represents 12 federally recognized tribes in Northwest Alaska.

⁸ The Northwest Portland Area Indian Health Board is a regional inter-tribal health organization representing 29 federally recognized tribes from Washington, Oregon, Idaho, and Utah.

⁹ The Norton Sound Health Corporation is a tribal health organization representing 20 federally recognized tribes in western Alaska.

Tribes, Inc.,¹⁰ we write in strong support of the proposal, included in the FY 2016 President's Budget, that contract support cost (CSC) funding be reclassified as mandatory rather than discretionary.

If adopted by Congress, the proposal would correct “underlying contradictions in current law” identified by the appropriations committees.¹¹ It would also ensure the full payment of CSC—a legal entitlement, as the Supreme Court has twice held—without endangering already underfunded Indian programs. Our clients fully support the Administration's proposal, but strongly urge that the Administration and Congress work towards FY 2016 implementation.

The Full CSC Mandate, Congress's “Untenable Position,” and the Tribal Proposal

Under the Indian Self-Determination and Education Assistance Act (ISDEAA),¹² a keystone of modern federal Indian policy, Indian tribes and tribal organizations are empowered to enter into binding contracts with the federal government to operate their own health, education, and social programs and services. The ISDEAA requires that the Indian Health Service (IHS) and the Bureau of Indian Affairs (BIA) pay to each contractor not only “program” funds—the amount the Secretary would have provided for the contracted programs, functions, services or activities had the federal government run them¹³—but also CSC, the reasonable administrative and overhead costs associated with carrying out the contracted programs, functions, services or activities.¹⁴ The U.S. Supreme Court has twice affirmed that the payment of full CSC is a legal requirement.¹⁵

When Congress lifted the longstanding “caps” on CSC spending in FY 2014, the entire unrestricted IHS Services appropriation and BIA Operation of Indian Programs appropriation became available to fund CSC, which ensured full payment of CSC but created other problems. Because CSC requirements change over the course of the year, the agencies have to hit a “moving target” in terms of their CSC allocation. Set aside too much for CSC and funds could go unused; set aside too little, and the agency would be forced to reprogram funds away from Indian programs to meet its legal CSC obligations. As it turned out, IHS had to reprogram over \$35 million from other line items in FY 2014

¹⁰ United South and Eastern Tribes, Inc. is a regional inter-tribal organization made up of 26 federally recognized Tribes.

¹¹ 160 Cong. Rec. H975 (daily ed. Jan. 15, 2014).

¹² 25 U.S.C. § 450 *et seq.*

¹³ 25 U.S.C. § 450j-1(a)(1). These funds are sometimes referred to as the “Secretarial amount” or the “106(a)(1) amount.”

¹⁴ 25 U.S.C. § 450j-1(a)(2) and (3). Contract support costs are critical to the functioning of the ISDEAA, since the program amount does not include all costs actually expended by the federal government in the operation of Indian programs but which are necessary for their administration.

¹⁵ *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005); *Salazar v. Ramah Navajo Chapter*, 567 U.S. ___, 132 S. Ct. 2181 (2012).

to fully fund CSC—a result condemned by both direct service and ISDEAA tribes.

Congress has recognized the fundamental disconnect between the mandatory nature of the CSC obligation and the discretionary appropriation from which CSC is currently paid. In an explanatory statement accompanying the FY 2014 appropriations act, the Committees on Appropriations described both the “underlying contradictions in current law” and a potential way out.

Until such matters are resolved, the House and Senate Committees on Appropriations are in the untenable position of appropriating discretionary funds for the payment of any legally obligated contract support costs. Typically obligations of this nature are addressed through mandatory spending, but in this case since they fall under discretionary spending, they have the potential to impact all other programs funded under the Interior and Environment Appropriations bill, including other equally important tribal programs.”¹⁶

The Committees directed IHS and the Department of the Interior (DOI) to consult with the Tribes to recommend “long-term accounting, budget, and legislative strategies to address the situation.”

Shortly after that, our firm, on behalf of our tribal clients, developed and circulated a white paper and legislative proposal to establish CSC as a permanent, indefinite appropriation like other legal entitlements.¹⁷ The paper argued that separating the CSC appropriation from the discretionary program appropriation would solve the two biggest problems associated with full CSC funding. The agencies would not have to hit a moving target since the appropriation would be indefinite, and the agencies would never be forced to reduce program funding to meet CSC requirements. As the consultation on long-term solutions unfolded, tribes made mandatory appropriations the centerpiece of their recommendations. The National Congress of American Indians (NCAI) and the National Indian Health Board (NIHB), among many other tribes and tribal organizations, adopted resolutions supporting the creation of a permanent, indefinite CSC appropriation.¹⁸

Comments on the Administration’s Proposal

The Administration’s proposal differs from the one in the white paper, but would achieve the same outcome, albeit for a limited period. Instead of the permanent,

¹⁶ 160 Cong. Rec. H975 (daily ed. Jan. 15, 2014).

¹⁷ Proposal to Enact Permanent Mandatory Appropriations for Contract Support Costs Under the Indian Self-Determination and Education Assistance Act (April 2014).

¹⁸ NCAI Resolution #ANC-14-003; NIHB Resolution 14-01. In the last Congress, Senator Begich introduced a bill, S. 2669, mirroring the Hobbs Straus legislative proposal, but it was not enacted.

indefinite appropriation advocated by our firm and endorsed by many regional and national tribal organizations, the Administration's proposal would establish a three-year mandatory appropriation with specific amounts for each year. But the amounts identified appear large enough to fund 100% of national CSC need, and any unused balance would roll over to the next year. Ultimately we believe CSC should be a permanent, indefinite appropriation, but we acknowledge that the Administration's proposal is a huge step for IHS, DOI, and the Office of Management and Budget (OMB). If the three-year, capped entitlement works as expected, Congress may well be inclined to extend or lift the term of the mandatory appropriation.

Up to 2% of the appropriations each year could be used for "administrative capacity and program management." We understand that this refers to funds available to the agencies to increase their capacity to fulfill the requirements of administering the mandatory CSC funding. It may be that IHS and DOI could use more staff to administer the CSC full-funding mandate, and that these needs may increase due to the heightened oversight associated with mandatory funding. More discussion needs to take place, however, regarding the amount needed, other available sources of funding, and the nature of the activities associated with this proposal.

The Administration initially proposed that the three-year capped entitlement start in FY 2017, with FY 2016 devoted to consultation and fine-tuning. But tribal leaders on the IHS CSC Workgroup and the Tribal Self-Governance Advisory Committee, among others, quickly called for expedited consultation, with the goal of implementing the proposal in FY 2016. To its credit, the Administration has agreed with these leaders, recognizing that the mandatory appropriation proposal implements "the top Tribal recommendation" from last year's consultation on long-term solutions.¹⁹ Our tribal clients concur, and will join the Administration in asking Congress to adopt the proposal beginning in FY 2016. The solutions it contains are too important to be delayed another year. Moreover, discussions of the FY 2017 appropriations bills will take place during the run-up to the 2016 election, in an unpredictable and likely difficult political environment. Now is the time to implement the measures that the Administration and Tribes agree are central to any long-term solutions.

With Tribes and the Administration united on the general contours of the proposal, perhaps the biggest obstacle to enactment is identifying offsets under the Pay-As-You-Go Act of 2010 (PAYGO). We understand that the structure of the Administration's proposal, with limits on the term and amounts of the appropriations, was selected in part to help minimize the Congressional Budget Office "score" of the eventual legislative proposal and thus the required offset. Our clients believe the score should be minimal, since the payment of full CSC is already a legal obligation imposed by the ISDEAA as interpreted by the Supreme Court. This issue will require careful coordination with the authorizing and appropriations committees.

¹⁹ IHS "Dear Tribal Leader" letter dated February 9, 2015.

Conclusion

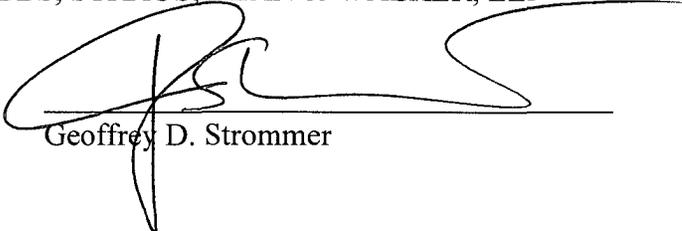
Our tribal clients strongly support the Administration's CSC proposal, with the qualifications described above, and stand ready to work with the Administration and Congress to implement the proposal beginning in FY 2016.

If you have any questions about these comments, please do not hesitate to contact me (gstrommer@hobbsstraus.com or 503-242-1745), Joe Webster (jwebster@hobbsstraus.com or 202-822-8282), or Steve Osborne (sosborne@hobbsstraus.com or 503-242-1745).

Sincerely,

HOBBS, STRAUS, DEAN & WALKER, LLP

By:


Geoffrey D. Strommer

cc: Tribal Clients

Rep. Ken Calvert, Chair, House Interior Appropriations Subcommittee on Interior,
Environment and Related Agencies

Rep. Betty McCollum, Ranking Member, House Interior Appropriations
Subcommittee on Interior, Environment and Related Agencies

Sen. Lisa Murkowski, Chair, Senate Interior Appropriations Subcommittee on
Interior, Environment and Related Agencies

Sen. Tom Udall, Ranking Member, Senate Interior Appropriations Subcommittee on
Interior, Environment and Related Agencies

Rep. Tom Price, Chair, House Budget Committee

Rep. Chris Van Hollen, Ranking Member, House Budget Committee

Rep. Mike Enzi, Chair, Senate Budget Committee

Sen. Bernie Sanders, Chair, Senate Budget Committee