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## MEMORANDUM

February 22, 2018

TO: CONTRACT SUPPORT COST CLIENTS  
FROM: HOBBS, STRAUS, DEAN & WALKER, LLP  
RE: ***IHS Issues Letter Largely Rejecting Tribal CSC Proposals;  
CSC Provisions in FY 2019 President's Budget***

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The Indian Health Service (IHS) continues to frustrate tribal representatives with its restrictive reading of the Indian Self-Determination Act, apparently designed to minimize contract support cost (CSC) payments. On February 16, 2018, Acting IHS Director RADM Michael Weahkee issued a letter responding to several recommendations and requests of tribal representatives on the IHS CSC Workgroup. We also report on the CSC provisions in the President's budget for FY 2019.

### ***IHS Issues Letter Largely Rejecting Tribal CSC Proposals***

In the year-plus since the approval of IHS's new CSC policy in October 2016, the agency and tribes have continued to discuss several issues, some of which IHS agreed to revisit. But in the February 16 letter, a copy of which is attached, Acting Director Weahkee reports that on all of the major issues, IHS refuses to reconsider its positions.

- **97/3 Option**: Late in December, IHS unilaterally amended its CSC policy by revoking the "97/3" option for calculating a duplication offset when tribes receive new or expanded base funding.<sup>1</sup> Tribal representatives on the Workgroup called on IHS to reinstate the provision pending Workgroup consideration and tribal consultation. But RADM Weahkee reports that IHS will not do so. It will, however, entertain Workgroup recommendations and engage in national tribal consultation on the issue.
- **CSC on CHEF**: IHS has always refused to pay CSC on Catastrophic Health and Emergency Fund (CHEF) reimbursements, even though there are strong arguments that CHEF payments should generate CSC.<sup>2</sup> As supplemental

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<sup>1</sup> See our reports of December 27, 2017 and January 3, 2018 for detailed discussions of the 97/3 option and the IHS rescission.

<sup>2</sup> See the CHEF white paper attached to our report of October 11, 2016 for a detailed exposition of these arguments.

Purchased and Referred Care (PRC) funding, CHEF payments should generate CSC to the same extent as PRC funds (which may depend on how these funds are treated in a tribe's indirect cost rate proposal). At the last Workgroup meeting in August 2017, IHS agreed to reconsider this issue, but RADM Weahkee's letter reaffirms IHS's position refusing to pay CSC on CHEF reimbursements.

- CSC on Substance Abuse and Domestic Violence Funds: Similarly, tribes have long argued that IHS should pay CSC on Substance Abuse and Suicide Prevention (SASP) and Domestic Violence Prevention Program (DVPP) funding. But the February 16 letter reaffirms IHS's position rejecting the tribal position.
- Subgroup on IHS Need Projections: IHS also rejects the Workgroup's suggestion to establish a subgroup to help IHS develop accurate CSC need projections. IHS believes tribes already have enough opportunities to provide input during budget formulation and consultation meetings.

On a more positive note, the letter states that IHS agreed with the Workgroup to take steps to standardize training for IHS staff on negotiation of start-up costs, and also agreed to update its CSC Negotiation Template to reflect Workgroup discussions.

The full tribal-federal Workgroup will meet in Albuquerque on March 6-7, 2018. We will attend and report to you on that meeting.

### ***CSC Provisions in FY 2019 President's Budget***

The Administration's proposed FY 2019 budget for IHS and the Bureau of Indian Affairs (BIA) does not make any major changes in the structure of CSC appropriations. Funding for CSC in each agency remains a separate appropriation account with an indefinite amount—"such sums as may be necessary." This achieves the twin objectives of full payment of CSC with no impact on program funding.

Evaluating and reporting on the Administration's proposed budget remains difficult because very few budget justifications are available, including those for the IHS and the BIA. Available sources are limited to the federal budget Appendix and a section in the Health and Human Services and Interior Departments' "budgets in brief" materials, neither of which contains the amount of information contained in an agency budget justification.

### **IHS CSC Appropriations**

The Administration estimates IHS's total FY 2018 CSC need to be \$717,970,000, down from the FY 2017 estimate of \$800 million. The FY 2019 proposed budget, however, uses as a base the FY 2018 Continuing Resolution, which is, in effect, funding

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at FY 2017 levels. The estimated amount for IHS CSC in the Administration's FY 2019 proposal is \$822 million in their Budget in Brief document and \$797 million in the Appendix. Whatever the actual amount turns out to be, the indefinite appropriation will accommodate it.

The Administration's proposed FY 2019 bill language would reinstate two provisions of the FY 2016 appropriations act that tribes succeeded in having removed from the Consolidated Appropriations Act for FY 2017 and which fortunately are not included in the pending FY 2018 IHS appropriations bills:

- Carryover clause: The proposed FY 2019 bill would reinstate the FY 2016 appropriations act language that could be read to deny the carryover authority granted by the Indian Self-Determination and Education Assistance Act: "amounts obligated but not expended by a tribe or tribal organization for contract support costs for such agreements for the current fiscal year shall be applied to contract support costs otherwise due for such agreements for subsequent fiscal years."
- "Notwithstanding" clause: The IHS proposal includes language the agency has used as part of the justification to not pay CSC on SASP, DVPP, programs to improve collections from public and private insurance, and for accreditation emergencies. The language which the IHS says precludes CSC for these programs is the phrase "Notwithstanding any other law," the funding for these programs "shall be allocated at the discretion of the Director." Congress dropped the "notwithstanding" phrase in the Consolidated Appropriations, FY 2017 Act, which gave tribes a better argument for CSC on these funds. But with the "discretion" clause retained, it is not clear that IHS will agree to pay CSC on them even in the absence of the "notwithstanding" clause.

The Administration proposed reinstating these two clauses in the FY 2018 appropriations act as well, but Congress so far has ignored the proposal, and hopefully will continue to do so.

#### BIA CSC Appropriations

The proposed FY 2019 budget reduces the estimated CSC need for the BIA by \$47 million for a total of \$231 million—roughly in line with the overall cut to the agency's budget. As noted above bill language would continue to provide "such sums as may be necessary," so tribes will continue to be paid their full CSC, whatever the program funding levels may be.

#### General Provisions – Applicable to Both IHS and BIA

The FY 2019 budget proposal would continue prior language in the General Provisions section:

*Contract Support Costs, Prior Year Limitation*

*Sec. 404.* Sections 405 and 406 of division F of the Consolidated and Further Continuing Appropriations Act, 2015 (Public Law 113-235) shall continue in effect in fiscal year 2019.

*Contract Support Costs, Fiscal Year 2019 Limitation*

*Sec. 405.* Amounts provided by this Act for fiscal year 2019 under headings “Department of Health and Human Services, Indian Health Service, Contract Support Costs” and “Department of the Interior, Bureau of Indian Affairs and Bureau of Indian Education, Contract Support Costs” are the only amounts available for contract support costs arising out of self-determination or self-governance contracts, grants, compacts, or annual funding agreements for fiscal year 2019 with the Bureau of Indian Affairs or the Indian Health Service: *Provided,* That such amounts provided by this Act are not available for payment of claims for contract support costs for prior years, or for repayment of payments for settlement or judgments awarding contract support costs for prior years.

This language prohibits BIA and IHS from using FY 2019 CSC funds to pay past-year CSC claims or to repay the Judgment Fund for judgments or settlements related to past-year CSC claims. It does not preclude tribes from recovering such judgments or settlements from the Judgment Fund.

***Conclusion***

If you have any questions about this memorandum, please do not hesitate to contact Joe Webster ([jwebster@hobbsstrauss.com](mailto:jwebster@hobbsstrauss.com) or 202-822-8282), Geoff Strommer ([gstrommer@hobbsstrauss.com](mailto:gstrommer@hobbsstrauss.com) or 503-242-1745), or Steve Osborne ([sosborne@hobbsstrauss.com](mailto:sosborne@hobbsstrauss.com) or 503-242-1745).