

MEMORANDUM

April 1, 2015

TO: Contract Support Cost Clients

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP

RE: *IHS TSGAC and DOI SGAC Discuss CSC at Quarterly Meetings;
CSC Amendments to Senate Budget Resolution Adopted*

On March 24 through March 26, 2015, the Indian Health Service (IHS) Tribal Self-Governance Advisory Committee (TSGAC) and the Department of the Interior (DOI) Self-Governance Advisory Committee (SGAC) met for quarterly meetings in Washington, D.C. Both Committees devoted a significant portion of their meetings to discussion of contract support cost (CSC) issues, particularly relating to the CSC mandatory funding proposal advanced by the Administration in its FY 2016 Budget and now under consideration by Congress. In this memorandum, we report on those discussions and recent developments with regard to the mandatory funding proposal. We also report on a CSC-specific amendment to the Senate Budget Resolution that was adopted late last week.

CSC Mandatory Funding

As we have previously reported, the Administration's proposal for CSC mandatory funding differs somewhat from the original mandatory funding proposal set out in our white paper last year and adopted by former Senator Mark Begich (D-AK) in his bill, S. 2669, introduced in the previous session of Congress. That original proposal would have created a permanent, indefinite appropriation for CSC, meaning that the appropriation would not need to be reauthorized each year (or every few years) and that it would appropriate amounts "as necessary" to fully pay CSC, with no caps. The Administration's proposal, on the other hand, is to create a three-year mandatory appropriation, which would need to be reauthorized after the three years is up, and to appropriate specific, capped amounts (though these amounts are intended to be more than sufficient to fully meet all CSC requirements). The Administration's proposal also includes a 2% set-aside for both the IHS and the BIA for administrative capacity, and was proposed to begin in FY 2017.

Several Tribes and Tribal organizations have submitted letters in support of the Administration's proposal, with some minor caveats. For example, Tribes generally do not appear to support the 2% set-aside, as the agencies have offered no justification or explanation of how much funding is actually needed for administration. Also, most

Tribes have commented that they would like the proposal to be implemented immediately for FY 2016, rather than delayed to FY 2017. Some of the letters submitted by Tribes have also requested that Congress still consider a permanent, indefinite appropriation, but affirmed support for the Administration's three-year, capped proposal if that is not feasible. During the opening Tribal caucus discussion for the TSGAC meeting, Rhonda Butcher, Tribal representative to both the TSGAC and the IHS CSC Workgroup, said that she believes her Tribe is one of many that have submitted letters along those lines, and that her Tribe has begun to take the next step by meeting with their Congressional delegation in order to build support for the proposal in Congress. However, she said that the Congressional delegation has asked her whether any bill had been introduced with legislative language supported by Tribes.

Geoffrey Strommer, of our firm, addressed the TSGAC and explained that at this point in time, no bill has been introduced to implement the mandatory funding proposal, and the Administration has not offered any specific bill language. Mr. Strommer suggested that Tribes could ask the agencies to share the language they are considering. However, Melanie Fourkiller, technical workgroup member, reported that at the last meeting of the IHS CSC Workgroup Dr. Yvette Roubideaux, former Acting Director of the IHS and current Senior Advisor to the Secretary for American Indians and Alaska Natives, indicated that the Administration is now waiting for Congress to give further instruction and may not be planning to draft language. Another member of the Committee commented that Senator Murkowski has indicated that the Administration is not giving Congress what it needs to move forward with the proposal. Thus, it is not clear whether the Administration plans to propose any specific language to implement its proposal.

Mr. Strommer said that tribal attorneys, including our firm, have been working on various options for legislative language, and that it would be helpful if the agencies would share the comments received during their consultation on the proposal. We agreed to coordinate with other tribal attorneys to refine our legislative language and finalize some options for the tribal leadership to consider. Mr. Strommer also pointed out that Congress already has the language to implement the option most favored by Tribes (a permanent, indefinite appropriation), as it is the language introduced by Senator Begich in S. 2669 in the last Congress. Still, we will continue working with other tribal attorneys on alternative language. At this time, further discussion is needed to refine some of the technical aspects of the language and to identify strategic decisions that need to be made by tribal leadership.

Later during the TSGAC meeting, the TSGAC discussed the mandatory funding initiative with Dr. Roubideaux. Dr. Roubideaux's tone was cautiously optimistic: while emphasizing that mandatory funding is still a huge political lift in the current budget climate, she reported that interactions with Congress regarding the proposal have been more positive than anticipated and that most individuals she has spoken with on the Hill

seem to understand why the proposal makes sense once it is explained to them. She said that she and others in the Administration have made a point of explaining, in individual conversations, the basis for the proposal—including its relation to the *Ramah* court case, the effects of funding legal obligations with discretionary funds, and the fact that mandatory funding emerged as the top recommendation in tribal consultation and is widely supported by tribes. She also noted, as she has in the past, that the IHS CSC Workgroup's progress in resolving issues related to estimating and calculating CSC need (such as the new "ACC" template, discussed below) is very helpful in making the case that CSC is not arbitrary but can be fair, consistent, and well-managed. She noted that the most common questions the Secretary has received from Congress about the proposal are how to pay for it and how to control the costs.

With regard to the cost, the Administration is not proposing any specific offset, but Dr. Roubideaux noted that the President's overall FY 2016 Budget generated \$450 billion in savings. She also emphasized that the Administration does not believe any offset should come out of Indian programs. She acknowledged that tribes have taken issue with the proposed 2% set-aside of CSC funding for administration and remarked that the 2% was essentially a place holder in recognition of the fact that the agency will need resources for administration, but that the Administration is not set on that amount. She did state, however, that including a proposal for administrative funding helps the Administration make the argument to Congress that, if funded on a mandatory basis, CSC will be well managed and responsibly administered.

Dr. Roubideaux commented that the Administration has "done its job" and what tribes need now is to find "champions" in Congress. Ms. Butcher noted that this is "just the beginning of the battle," and that tribes should try to rally around specific language or at least common principles that they can all agree on, in order to speak with one voice to Congress. Dr. Roubideaux responded that the Administration released its proposal after significant internal discussion over what they thought would be possible, but that the consultation period was designed to allow tribes to express their opinions and feelings and is the time to figure out how to attain that "one voice." Current Acting IHS Director Robert McSwain added that the IHS has received a number of comments on the mandatory funding proposal, which are now under review, and will plan to send out a second letter to tribal leaders with the results of the comments. Mr. McSwain also noted that most of the comments were quite similar.

During the SGAC portion of the meeting, Thomas Thompson, DOI Deputy Assistant Secretary – Indian Affairs – Management, offered some further comments on the design of the Administration's proposal. First, Mr. Thompson said that a primary reason for proposing an FY 2017 start date was to ensure that CSC funding would not be removed from the agencies' discretionary budget, only to have Congress reject or fail to enact a separate mandatory appropriation (thus leaving the agencies short of funding). A second reason, he said, was to make sure there would be enough time for consultation

with Congress as well as the tribes. He also stated that the Administration proposed a 3-year appropriation rather than a permanent appropriation in order to reduce the offset required under the PAYGO statute, which requires that new mandatory spending be offset by new revenues or other mandatory reductions. He said that the Administration's proposal is to transfer the discretionary budget authority used for CSC over to the mandatory side of the budget, which would largely (but not fully) reduce the need to offset the new mandatory amounts. Like Dr. Roubideaux, Mr. Thompson said that the Administration is not identifying any specific offset but points to the overall savings in the Administration's FY 2016 Budget Proposal.

IHS CSC Workgroup Update/Discussion

Ms. Rhonda Butcher updated the TSGAC on recent work by the IHS CSC Workgroup. She reported that the Workgroup has identified a need for interim guidance, since the IHS CSC Policy was designed in an environment where significant CSC shortfalls were expected, until such time as the CSC Policy can be updated. Sandra Pattea, federal co-chair of the IHS CSC Workgroup, responded that the IHS has issued "dear Tribal leader letters" as a means of communicating its interim CSC practices and policies with Tribes during this period of transition, and also plans to use tools adopted by the IHS Workgroup including an "exclusions matrix" and an "Annual CSC Calculation (ACC) template." Ms. Pattea said that the IHS Area Offices have been instructed to use the ACC template with tribes and tribal organizations to estimate their individual CSC requirement at various points throughout the year.

Dr. David Mather, also a member of the IHS CSC Workgroup, stated that the issue of reconciling final CSC payments for FY 2014 was discussed but not conclusively resolved at the last Workgroup meeting, and that in his experience tribes in Alaska were not clear on what the reconciliation process would be. He noted that under the old system, where shortfalls were expected and annual shortfall reports prepared, tribes were provided with draft shortfall numbers and given an opportunity to comment and make corrections. This year, Mr. Mather said, because no shortfall report is being prepared the tribes have not been provided with any similar sets of numbers, so they are not aware of what IHS believes the final CSC entitlement to be. Ms. Pattea said that the Workgroup's discussion envisioned that the reconciliation would occur on a tribe-by-tribe basis, and that the ACC template would be used as a tool.

With respect to reconciliation, Dr. Roubideaux also noted that the IHS has asked the Workgroup to make recommendations regarding the timeline. Dr. Mather commented that this issue had not been closed during the prior Workgroup meeting, but that tribal representatives were concerned that the IHS may be intending for reconciliation to remain open for five years (which is the amount of time that the appropriation remains available). He emphasized that tribes want a methodology to avoid such a drawn out period of reconciliation and had proposed several possibilities.

Dr. Roubideaux stated that the IHS never intended to take the position that reconciliation should go on for five years, but simply wanted to make the point that the appropriation is available for that length of time and that litigation could potentially be brought anytime within that period by a tribe claiming CSC underpayments. This issue will need further consideration and discussion by the Workgroup.

Dr. Mather noted that the multi-year fixed rate and/or lump sum pilot project that has been proposed by tribal representatives to the Workgroup is one measure that could help to reduce the length of time needed for end-of-year reconciliation. That proposal is still under consideration by the full Workgroup. Dr. Mather also noted that another proposal by Workgroup members to allow tribes to elect a flat rate of 15% of salaries for their direct CSC requirement would also simplify negotiations and reconciliation. This is the approach taken by the BIA, which historically has not had the capacity to individually negotiate direct CSC, though tribes have recently asked the BIA to increase the rate to 18%.

Ms. Butcher also reported that CSC on MSPI/DVPI was raised by tribal members of the Workgroup on its last conference call. She noted that given the time-sensitive nature of some of the other issues under consideration by the Workgroup, the MSPI/DVPI issue is not currently a high priority, but that the issue is important and tribal representatives on the Workgroup want to continue to press it. Dr. Mather stated that the issue, in a nutshell, is that tribes believe Congress intended for CSC to be available on those funds, but the IHS has now taken the position that those funds do not generate any additional CSC entitlement and that tribes should charge indirect costs to the program amounts. The tribes also point to an earlier letter from the IHS stating that CSC was owed on MSPI/DVPI amounts, but would not be paid due to funding shortfalls. The issue has progressed to litigation, and as a result the IHS has been unwilling to discuss it in the Workgroup meetings. Acting IHS Director Robert McSwain responded that the IHS needs to have further internal discussions before the issue can be resolved, and Dr. Roubideaux similarly stated that the issue is “very complicated” and requires additional review by the agency.

Review of ACC Template

As a separate agenda item, Ms. Butcher walked through the ACC template designed by the IHS CSC Workgroup to calculate individual tribes’ CSC needs. That template is attached for your review. Some have noted that the ACC template is similar to the IHS’s old shortfall report templates, flipped vertically. Ms. Butcher noted that, when filled in with a Tribe’s individual information, the tool will generate a total CSC need and summary of its components, but that the tool itself does not include backup documentation (for example, establishing a Tribe’s exclusions and passthroughs). Depending on when the tool is used and whether the information used is final, the tool may only generate an *estimate* of CSC need, to be finalized at a later time. Ben Smith,

Director of the Office of Tribal Self-Governance at IHS, noted that the tool will probably evolve over time, and that the IHS would appreciate feedback on how best to use the tool.

One issue that both Mr. Smith and Ms. Butcher noted has not yet been resolved is when and how often the ACC template will be used to generate an estimated CSC need for purposes of payment and/or reconciliation. Ms. Butcher commented that it seemed logical for the IHS to pay tribes the prior year's amount at the beginning of the year, then to calculate an updated estimate when the tribe's final rate is set for that year, and then again at the end of the year. Dr. Mather again underscored the importance of establishing a cutoff date for reconciliation. These issues will be the topic of further discussion and deliberation by the IHS CSC Workgroup.

Ms. Melanie Fourkiller commented that notifying and educating tribes about the new ACC template, so they are aware of its use, is a high priority for the IHS CSC Workgroup. She also noted that tribes should know about the template so they can ask the IHS to share it and allow tribes to double-check the numbers and identify any needed corrections. Mr. Smith responded that tribes should not need to ask—that the IHS Areas should be presenting the tribes with the template and that the numbers should be negotiated and mutually agreed upon—but that the IHS is still rolling out the template internally. Mr. Smith also noted that tribes are free to approach the IHS first with its own set of numbers using the template. Dr. Mather urged tribes to double check the accuracy of the numbers in the template (for example, the indirect cost rate, exclusions, and any additional nonrecurring dollars added at the end of the year) and to keep a historical record of templates and back-up calculations used and agreed to in prior years.

DOI CSC Discussion and Workgroup Update

Director of the Office of Self-Governance (OSG), Sharee Freeman, gave a short update on CSC issues within DOI. She noted that DOI had been using a form (similar in some respects to the new ACC template being used by IHS), but that DOI was recently foreclosed from using the form because it did not have an OMB number. She also reported that 17 CSC overpayment letters went out from OSG for FY 2014, but that the amount of money believed to have been overpaid was only \$388,000 out of a total of \$92 million. Nevertheless, she said, the Solicitor General and others within DOI were not happy that any overpayments were made. She also noted that she hopes to reconcile all of the suspected overpayments before DOI submits its CSC report to Congress.

SGAC members also on the DOI CSC Workgroup said that the Workgroup would be willing to work with DOI to design a new estimate template similar to the IHS ACC template and other tools to ensure the most accurate CSC need estimates possible. They also asked Ms. Freeman whether DOI was working on revisions to the BIA CSC Policy, and requested that the Workgroup be involved in that effort. Ms. Freeman said that a draft revised Policy would be presented to the Workgroup for review.

Ms. Freeman reported that OSG is analyzing three possible methods of making CSC payments. The first would pay CSC on a “piece-by-piece” basis, meaning that whenever program funding is distributed, associated CSC would also be distributed. The second and third method would be to pay 85% or 90%, respectively, of the total estimated need at the beginning of the year, then reconcile the difference later. Ms. Freeman said that even with the 90% payment method, there may be overpayments that need to be reconciled later; hence consideration of 85% as an alternative. Tribal representatives on the SGAC did not favor the “piece-by-piece” approach, and noted that the DOI Workgroup should meet to discuss this issue, among others.

During the SGAC’s discussion with Thomas Thompson, Deputy Assistant Secretary for Management, Mr. Thompson stated that the Department has “two overriding principles” with regard to calculating CSC. First, he said the determination should be as simple as possible; second, he said the money should be paid out as soon as possible. He also commented that the rate system needs to be simplified, and that indirect costs “should be like a sales tax at Walmart.” Ms. Butcher responded that the tribes have proposed some options to simplify the process, and that the onerous requirements and significant delay involved in obtaining an indirect cost rate from the Interior Business Center (IBC) is a significant issue for tribes that impacts the whole CSC system. The Workgroup has previously recommended that IBC attend a Workgroup meeting to discuss these issues.

In discussions with Ms. Freeman, Mr. Thompson, and Assistant Secretary – Indian Affairs Kevin Washburn, tribal representatives consistently made two requests: first, the DOI CSC Workgroup, which has not met in person for several months, should be convened for a meeting; and second, CSC funding should not be held up for all tribes while DOI works with a small number of tribes to correct overpayments. They also expressed strong support for the BIA CSC Workgroup’s recommendation to increase the direct CSC rate to 18% of salaries. Mr. Thompson said the proposal is still under consideration, and Assistant Secretary Washburn said also that the rate should be high enough to incentivize tribes to adopt the simpler, flat-rate process, while reasonably reflecting actual expenses. Ms. Butcher commented that further analysis could be undertaken to substantiate the 18% rate request.

CSC Amendment to Senate Budget Resolution

At the end of the debate and voting on the Senate Budget Resolution in the late hours of Thursday, March 26, an amendment by Senator John Barrasso (R-WY), Chairman of the Senate Committee on Indian Affairs, was offered for consideration with a long list of other amendments. Senator Barrasso’s amendment recommended \$25 million over the FY 2015 amount for IHS CSC and \$26 million over the FY 2015 amount for BIA CSC. This increased amount is the same as the Administration’s request for

BIA, but about \$30 million short of the Administration's request for a \$55 million increase for IHS. The amendments were approved en bloc by unanimous consent.

It is not clear why Senator Barrasso's amendment did not track the Administration's projected need for IHS CSC; however, we were advised by Committee Minority staff that they opted not to challenge the amendment because the budget resolution is not binding.

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