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## MEMORANDUM

January 15, 2013

TO: Contract Support Cost Clients

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP /s/

RE: ***IHS Takes Hard Line on Resolving Past-Year CSC Claims; Tribal Attorneys to Meet with IHS Attorneys on CSC Claims***

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In a "Dear Tribal Leader" letter released yesterday, Indian Health Service (IHS) Director Dr. Yvette Roubideaux clarified the agency's position on claims for past-year contract support cost (CSC) shortfalls. The letter, issued just in advance of a January 17 meeting between tribal and federal attorneys on CSC claims, expresses a commitment to resolving such claims in a manner consistent with the Supreme Court's 2012 decision in *Salazar v. Ramah Navajo Chapter*. Unfortunately, IHS's interprets that decision, and the Indian Self-Determination and Education Assistance Act (ISDEAA), to impose on Tribes a heavy evidentiary burden to show that they actually "incurred" more CSC than the agency paid. Only if a Tribe supplemented IHS CSC funding with funds from somewhere else, such as program or tribal funding—and can document these additional expenditures beyond the amount IHS paid—will IHS recognize a claim. This approach is contrary to the ISDEAA and threatens to turn the claims resolution process into an expensive and drawn-out slog.

### ***"Dear Tribal Leader" Letter***

Dr. Roubideaux's letter, a copy of which is attached, follows up on her letter of September 24, 2012, which introduced the idea of limiting damages for past claims under a "costs incurred" approach.<sup>1</sup> As several Tribes and tribal organizations pointed out in response letters, this approach is contrary to the ISDEAA, which requires full payment upon award of the contract, not reimbursement after the costs have been incurred. Moreover, limiting damages to costs incurred penalizes tribal contractors for fiscal prudence and rewards the Government for its chronic underfunding of tribal health programs. Faced with CSC shortfalls, tribal contractors naturally spent ("incurred") less than they would have with the full CSC funding mandated by the ISDEAA, as interpreted by the Supreme Court in *Ramah*.<sup>2</sup> Finally, because most of CSC is comprised of indirect costs, which by definition are not directly attributable to any program but rather pooled, the "costs incurred" approach is unworkable in practice. IHS's apparent intent to re-audit every contract is not a rational or efficient way to resolve CSC claims, especially since reliable data on CSC shortfalls already exists in the form of the agency's annual reports to Congress.

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<sup>1</sup> See our memorandum of October 12, 2012 and attached letter.

<sup>2</sup> See our memorandum of November 2, 2012 and attached draft response letter to IHS Director Dr. Roubideaux.

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In yesterday's letter, Dr. Roubideaux expands on the costs-incurred approach and the settlement process as IHS envisions it. IHS emphasizes that no class action has been approved against it, and that the agency will therefore proceed with individual claim reviews and settlement discussions with each tribal contractor that presents claims under the Contract Disputes Act (CDA). This position dampens hopes for a global settlement that would compensate all tribes for past CSC underpayments. Tribes without the information or resources to file CDA claims will receive nothing, and even Tribes that did file claims may not be able to afford the accounting work necessary to convince IHS—and the forensic accounting firm IHS has hired—that they have a claim for additional CSC incurred. Rather than use the CSC shortfall reports as the basis for an efficient resolution of all Tribes' claims, IHS will negotiate compensation only to individual tribal contractors that can afford to demonstrate that additional costs claimed were reasonable, allowable, allocable to the contract, nonduplicative, and actually spent during the claim year. This war of attrition, as Senator Begich called it in a recent letter to President Obama, would be a tremendous drain on both tribal and federal resources better spent on providing health care to Indian communities.<sup>3</sup>

The January 14 letter also states that IHS will continue to require the inclusion of an estimated full CSC amount in funding agreement language moving forward. As we have reported, this requirement has proven to be a stumbling block in 2013 negotiations, but IHS rejected Tribes' request that it be eliminated from the common CSC language.

### *Attorneys to Meet at IHS on CSC Claims*

IHS lawyers from the Office of General Counsel (OGC) and the Department of Justice (DOJ) invited tribal attorneys to IHS Headquarters for a meeting on January 17. The purpose of the meeting is for OGC and DOJ lawyers to hear their tribal counterparts' views on how the CSC claims resolution process should proceed. It is not clear whether OGC and DOJ will share any thoughts beyond those contained in Dr. Roubideaux's letters. IHS denied tribal attorneys' request that interested tribal leaders be allowed to attend. We will attend that meeting and report to you on developments there.

### *Conclusion*

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

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<sup>3</sup> See our memorandum of December 3, 2012 and attached letter.