

**Notes from the January 17, 2013, Meeting to  
Discuss Contract Support Costs Claims against the Indian Health Service**

Summary:

On January 17, 2013, the Public Health Division of the Office of the General Counsel (OGC), the Department of Justice (DoJ), and the OGC Regional Offices participated in a meeting with tribal attorneys regarding contract support costs (CSC) claims against the Indian Health Service (IHS). Thirty-one attorneys representing tribes with CSC claims participated in person and by phone. Although they do not represent all tribes, the participating attorneys represent many of the tribes that have already submitted claims for additional CSC. OGC indicated that the federal participants would only be listening and would not be able to make any commitments at the meeting. OGC asked for individual tribal attorney input on several issues, including options for calculating damages after the Supreme Court's decision in *Salazar v. Ramah Navajo Chapter*, whether all outstanding issues could be resolved through settlement, how to proceed in light of the requirements of the Contract Disputes Act (CDA), requirements for accessing the Judgment Fund, and the legislative options set out by the Supreme Court in *Ramah Navajo Chapter*.

Attendees:

*Federal (in person):*

Sean Dooley  
Luke Vanderwagen  
Julianna Frisch  
Melissa Jamison  
Hilary Cooper  
Stephanie Granlund  
Joe Meade  
John Griffiths  
Ryan Majerus  
Don Kinner  
Joe Pixley

*Federal (phone):*

Ryan Cobb  
Doug Ferguson  
Craig Herkal  
Meredith Farese  
Jennifer Mendola  
Shara Michalka  
Gary Fahlstedt  
Jim Cribari  
Michael Shachat  
Margaret Rosenfeld  
Jay Furtick  
Kathy Bradley Nader  
Farrah White

*Tribal attorneys (in person):*

Shenan Atcitty  
Phil Baker Shenk  
Steve Boos  
Lia Carpeneti  
Julio V.A. Carranza  
Shawn Frank  
Michael Gross  
Daniel MacMeekin

*Tribal attorneys (phone):*

Diandra Benally  
Heather Chapman  
Timothy Evans  
Paul Frye  
Lindy Grell  
Neal Malmsten  
Josh Newton  
Steve Osborne

Lloyd Miller  
Jennifer Modrich  
Lindsay Naas  
James Nichols  
Bryant Rogers  
Don Simon  
Geoff Strommer  
Joe Williams  
Patty Marx  
Matthew Kelly  
Ben Fenner  
Kate Boyce

Stephen Quesenberry  
Terri Smith  
Brian Upton

*Tribal Attorney Comments:*

Each tribal attorney attending, both in person and by phone, was given an equal opportunity to share comments. Some attendees chose to cede a portion of their time to another tribal attorney. The list below is not exhaustive, but meant as a brief summary of the salient points made at the meeting. Although the government was seeking individual input, the following general points were made by one or more tribal attorney:

- Tribes should be put in the position they would have been in if contract breach had never occurred.
- The Indian Self-Determination and Education Assistance Act (ISDEAA) statutory scheme and IHS Policy cannot be squared with the costs-incurred approach.
- The costs-incurred approach seems to be too onerous for tribes.
- The shortfall reports are the best place to start to determine unpaid CSC, although it is possible there are errors or that claims could be higher.
- Direct CSC should be paid based on the agreed-upon amount.
- Tribes feel strongly about expectancy damages and rate miscalculation claims. This may be a point for negotiation or may be an issue to litigate (either traditionally or through alternative dispute resolution).
- Settlement discussions at the contracting officer (CO) stage are feasible, but there may be some process concerns.
- Some CO letters have been confusing or inconsistent.
- The solution is to fully fund CSC, even if it is at the expense of other priorities.
- There may be a mathematical formula that could ensure this and protect direct service dollars.
- Tribes are concerned about the cost of litigation
- Tribes are concerned about IHS's response to tribal comments on the September Dear Tribal Leader Letter.
- This meeting is not tribal consultation.
- Although there can be no global agreement/settlement for IHS because IHS was not in a class action, perhaps we can arrive at a set of guiding principles for settlements.
- Tribal attorneys request additional meetings.

Next Steps:

- The Federal team is discussing the benefit of holding a follow-up meeting and will respond to the request by January 31, 2013.
- The Federal team is discussing a possible CO settlement process and is researching the question of whether claims can be withdrawn. One tribal attorney also requested that CO letters be temporarily suspended; this is contingent on agreement that tribes will not deem the claims denied. Tribal attorneys will discuss this option with their clients.
- If a tribe has a question about a letter it receives regarding individual claims, please direct those questions to the appropriate regional attorney. The Federal team will respond individually to those specific instances brought up in this meeting.
- The Federal team will strive for consistency in responses to tribes.
- The Federal team will share the meeting notes with IHS.