



MAR 26 2013

Dear Tribal leader:

I am writing to provide an update on contract support costs (CSC) as a follow-up to my Tribal Leader letters on September 24, 2012 (September DTLL) and on January 14, 2013 (January DTLL). In both letters, I indicated that the Administration was reviewing the Supreme Court's decision in *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012), and the impact of that decision on the Indian Health Service (IHS or Agency), which was not a party to the *Ramah* case. We have made progress in many ways since the January DTLL, and I am writing to update you on our activities, all of which are leading us toward resolution of CSC claims.

#### **January Meeting with Attorneys Representing Tribes**

With my approval, the Office of the General Counsel (OGC) organized a meeting on January 17, 2013, with approximately 30 attorneys who represent Tribes that have presented claims to the IHS for additional CSC funding. The meeting did not include settlement discussions regarding any particular case but provided an opportunity for the Tribes' legal representatives to make general suggestions for how to proceed with the claims.

One of the options discussed at the meeting was extending the time for IHS to answer claims presented to the contracting officer (CO) for a sufficient amount of time to allow for discussions of the claims at the CO decision stage. In February, I approved this new process. As a result, IHS will extend the time to answer claims for at least six months so that we can begin dialoguing with Tribes earlier in the process. Although IHS still cannot pay claims due to unavailability of funds and inability to access the Judgment Fund at the CO decision stage, the Agency is hopeful that this process will result in a collaborative effort that resolves claims more expeditiously. We will be issuing extension letters consistent with this process, which will begin with an exchange of documents relevant to the claims, a time period for everyone to review the documents, and then a time period to meet and discuss the claims.

Another option discussed at the meeting was withdrawing recently issued decision letters to allow for Tribes to take advantage of discussions at the CO decision level. In February, I approved this new process for Tribes that submit such a request within ninety days of issuance of a decision letter.

#### **February Meeting with the Civilian Board of Contract Appeals**

On February 27, 2013, the Civilian Board of Contract Appeals (Board) held a meeting with OGC and an attorney that represents all but three of the Tribes that have claims pending before the Board. The attorneys for both sides explained the need to establish a plan for management of the many cases before the Board, including establishing a system for ordering the cases. The OGC volunteered to provide a report to the Board that identifies the following issues:

1. Cases with outstanding motions pending before the Board.
2. Legal issues that one or more parties expect may require further litigation.
3. Cases in which the parties propose to litigate those issues.
4. Cases the parties propose to prioritize for settlement discussions.
5. Cases the parties propose to stay, which will be selected for litigation or settlement discussions based on the progress in cases currently listed under sections 1, 3, and 4.

After the meeting, OGC reached out to attorneys who represent all other Tribes with cases before the Board to ensure that the report has input from representatives of all parties. The report is currently due to be filed with the Board on April 2, 2013.

### **Settlement Discussions**

As explained in my previous DTLLs, IHS wants to affirm its continued commitment to resolving Tribal claims for unpaid CSC in an efficient and mutually agreeable manner. We are following the established requirements and procedures of the Indian Self-Determination and Education Assistance Act (ISDEAA) and the Contract Disputes Act (CDA) for settling individual Tribal claims. We are actively engaged in settlement discussions with several Tribes, and I am happy to report that those settlement discussions are proving successful. In addition, the settlement discussions have been useful for establishing a foundation for future settlement discussions and are helping us find a more efficient path forward. The IHS looks forward to engaging in these discussions with each Tribe.

Thank you for your input to date. IHS will continue working with Tribes on resolving claims for unpaid CSC in previous years. I will continue to provide regular updates to ensure you have the most updated information and welcome your continued input on this issue. If you have any questions, please do not hesitate to contact us.

Sincerely,

/Yvette Roubideaux/

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## MEMORANDUM

April 1, 2013

TO: Contract Support Cost Clients

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

RE: ***IHS Issues Third "Dear Tribal Leader" Letter on Resolving Past CSC Claims; Favorable Appeals Court Ruling on CSC Statute of Limitations Stands—for Now***

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The Indian Health Service (IHS) has expressed once again its commitment to resolving contract support cost (CSC) claims for past years, but also its commitment to an arduous and inefficient settlement process. In this memorandum, we briefly discuss IHS's latest pronouncements on CSC settlement, and also provide an update on the *Arctic Slope* case involving the statute of limitations for bringing CSC claims.

### *IHS Letter on CSC Settlement Process*

In a "Dear Tribal Leader" letter dated March 26, 2013, a copy of which is attached, IHS Director Dr. Yvette Roubideaux describes recent agency efforts to move toward resolution of CSC claims in the wake of the Supreme Court's 2012 decision in the *Ramah* case. She first describes the January 2013 meeting of tribal and agency attorneys involved in CSC cases, and IHS's subsequent decisions to allow contracting officers to begin settlement discussions and to withdraw recently issued decisions on CSC claims.<sup>1</sup> She then describes a meeting conducted by the Civilian Board of Contract Appeals (CBCA) regarding CSC case management in that forum.

The IHS letter concludes with a brief account of settlement discussions involving active past-year CSC claims. While the letter paints a rosy picture of an "efficient" settlement process grounded in the "established requirements and procedures of the Indian Self-Determination and Education Assistance Act (ISDEAA)," the reality has been rather different so far. As we have reported, IHS has insisted on a settlement framework that requires tribal contractors to document "actual CSC incurred" beyond what IHS paid.<sup>2</sup> This approach is not consistent with the ISDEAA—let alone "established" by it—and would systematically lowball tribal claims, because generally tribes can only expend ("incur") what IHS provides. Limiting claims in this way would reward IHS for the very CSC underpayments that limited the amounts of CSC

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<sup>1</sup> For more details on the meeting, please see our report dated January 18, 2013.

<sup>2</sup> See our reports of October 12, 2012, November 12, 2012, and January 15, 2013 for more detailed discussions of the "costs incurred" approach and the problems with it.

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"incurred." Moreover, IHS's approach to determining "costs incurred" would ignore the wealth of relevant data in the agency's CSC shortfall reports and essentially require a re-audit of every claim year for every tribal contractor. Despite the costliness and inefficiency of such an approach, the March 26 letter appears to reconfirm that IHS still views it as the "foundation for future settlement discussions."

### *Federal Circuit Lets Stand its Ruling on Statute of Limitations on CSC Claims*

IHS has frequently invoked the six-year statute of limitations under the Contract Disputes Act as a defense to CSC claims for older years. In the *Arctic Slope* case, the CBCA agreed with IHS and dismissed CSC claims filed more than six years after accrual. As we have reported, however, on appeal the Federal Circuit reversed the CBCA, holding that the statute was equitably tolled (suspended) due to Arctic Slope's reasonable reliance on a then-pending CSC class action.<sup>3</sup> The Government asked for a re-hearing, either by the same panel or en banc (by all of the Federal Circuit judges). On March 14, 2013, the Federal Circuit denied both petitions for rehearing, and the court's mandate issued on March 21, 2013. Thus the decision, which could set a helpful precedent for other CSC cases involving older claims, is now final for the Federal Circuit.

We understand that the Solicitor General is considering petitioning for Supreme Court review of the Federal Circuit's decision. Such a petition would have to be filed within 90 days of the March 14 decision, or by June 12.

### *Conclusion*

If you have any questions about this memorandum, please do not hesitate to contact Joe Webster ([jwebster@hobbsstrauss.com](mailto:jwebster@hobbsstrauss.com), 202-822-8282), Geoff Strommer ([gstrommer@hobbsstrauss.com](mailto:gstrommer@hobbsstrauss.com), 503-242-1745), Steve Osborne ([sosborne@hobbsstrauss.com](mailto:sosborne@hobbsstrauss.com), 503-242-1745), or Stephen Quesenberry ([squesenberry@hobbsstrauss.com](mailto:squesenberry@hobbsstrauss.com), 510-280-5135).

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<sup>3</sup> See our report dated November 20, 2012 for a detailed account of the Federal Circuit's decision.