

## United States Senate

WASHINGTON, DC 20510

November 28, 2012

The Honorable President Obama  
The White House  
1600 Pennsylvania Ave. NW  
Washington, DC 20500-0005

Dear Mr. President:

I write to convey my growing concern about the failure of the Indian Health Service (IHS) to promptly resolve outstanding contract support cost claims in the wake of this summer's Supreme Court decisions in the *Ramah Navajo Chapter* and *Arctic Slope Native Association* cases. IHS has had five months to settle claims with all underpaid Tribes but instead of settling, IHS appears to be engaging in attrition against all of the Tribes which have filed claims and refuses to deal with the hundreds of other Tribes that have not filed claims. This is unacceptable because, as you know, contract support costs help Tribal health organizations meet the basic operational functions for the hospitals and clinics they run.

IHS Director Roubideaux announced in a September 24, 2012, "Dear Tribal Leader" letter that resolution of these ancient claims, some already pending for several years and reaching back well over a decade would not occur until a new audit had determined how much in contract costs had been "incurred" by each contractor for each year. She took the position that each contract would have to be re-audited even though all contracts are audited annually. More recently I was informed IHS has retained an anti-fraud accounting firm to re-audit all of the contracts.

I am bringing this to your attention because this is not a just, rational or efficient way to bring these matters to a conclusion. It will delay an already burdensome process and likely lead to more costly litigation, adding tremendous costs to the federal government and to the tribal health care providers whose rights were violated when their contracts were breached years ago. Worse yet, the agency's approach is contrary to the Indian Self-Determination Act (ISDA) and will deprive hundreds of Tribes of their full contract support costs.

IHS's approach to this issue treats these contracts as cost-reimbursable government contracts. But they are not cost-reimbursable contracts they are fixed-price contracts, as the ISDA plainly states. Each year the ISDA requires IHS add a tribal contractor's full contract support cost requirement to the program amount to be paid that year under the contract. The agency's manual explains that most contract support costs are automatically calculated using the contractor's most recent federally-approved indirect cost rate, multiplied against the program portion of the contract amount. Neither the program dollars nor the contract support cost dollars that fund a contract are provided on a cost-reimbursable basis. Director Roubideaux's letter is simply wrong as a matter of law in suggesting otherwise. Rather, contract support costs must be added to the contract in "full" upon contract award, and in a

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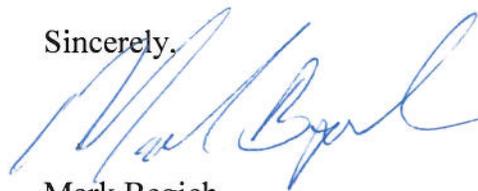
single lump-sum payment. The Act then authorizes these funds to be rebudgeted and reallocated as the Tribe deems best, so long as all funds are spent for health care. The Act also authorizes any unspent funds (including funds paid to the tribal contractor late in a fiscal year) to be carried over and spent in the next year. While contract support costs must “include” certain “incurred” costs, they are nowhere limited to such costs.

Most importantly, in the recent *Ramah* case, the Supreme Court clearly stated “the Government must pay each Tribe’s contract support costs in full.” Indisputably, the IHS did not do so and continues to fail to meet this law. It is critical pressure be placed on the IHS to meet its obligations to the Tribes by paying the full amount due through the Judgment Fund. Outstanding claims for unpaid contract support costs should be resolved based upon the Contract Support Costs Shortfall Reports. If additional damages are claimed because of the agency’s breach of contract, those issues can be resolved through negotiation but there should be no further delay in paying the basic shortfall claim.

In Alaska alone, three contractors suffered over \$218 million in contract support shortfalls reaching as far back as 1997, according to IHS’s own certified and approved Shortfall Reports. Similar sums are dues Tribes across the Nation according to the agency’s own records. It is shocking the agency would now delay justice, call for new audits, or seek 15 years later to renegotiate the amounts that were due at the time. All Tribes should be compensated as the Administration’s trust responsibility and legal obligations command. Further, the Administration should proactively inform Tribes of their rights in this regard.

I request your assistance in seeing to it the IHS immediately reassesses its position on these claims and commits to a prompt resolution of all claims before the year is out. Congressional oversight of the claims process should not be necessary when the Supreme Court has spoken so decisively. I look forward to working with you and your staff to promptly resolve this very important issue.

Sincerely,



Mark Begich  
United States Senator

cc: Secretary Sebelius, HHS  
Dr. Roubideaux, IHS