



Toward a New Era of Tribal Funding: CSC After *Becerra v. San Carlos Apache Tribe* and Federal Advocacy for Mandatory Appropriations

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Disclaimer

I am but a policy nerd. I am not a lawyer. Nothing in this presentation should be construed as legal advice – please consult with your attorneys regarding legal questions.

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Agenda

- Overview of SCOTUS decision in *Becerra v. San Carlos Apache Tribe*
- Where things stand now:
 - Results of the IHS CSC Workgroup meeting
 - Upcoming Tribal consultation
 - Current appropriations bill drafts
- The future: Policy priorities and ongoing advocacy efforts
 - CSC and 105(I) reclassification to mandatory funding
 - Mandatory funding for all of Indian Health System

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Background - What are Contract Support Costs? (CSC)

- ISDEAA outlines Tribal authority to assume responsibility for healthcare services, IHClA created authority for third-party reimbursements
- Amendment to ISDEAA required IHS to reimburse self-governance programs for “reasonable costs” associated with complying with their self-determination contracts = Contract Support Costs (CSC)
- Tribal Self-Determination programs funded on parallel structure: “Secretarial amount” and “program income”
- Prior to *Becerra v. San Carlos Apache Tribe*, IHS only paid CSC for services funded through the Secretarial amount, not on services funded by program income

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Definitions Recap

Funny picture (find one)

- CSC = \$\$ IHS pays to self-gov programs for costs associated with running the program
- Program income = third-party revenues. Medicare, Medicaid and private insurance reimbursements for our purposes
- Secretarial amount = amount paid to program equal to the amount IHS would have spent on said program

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SCOTUS Opinion in *Becerra v. San Carlos Apache Tribe*

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How did the case get to SCOTUS?

- Combination of two cases involving self-gov contracts between IHS and Northern Arapaho Tribe and San Carlos Apache Tribe
- Split decision between District and Circuit Court levels
 - District courts dismissed initial claims
 - Circuit Courts reversed and ruled in favor of Tribal Nations

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Majority Opinion Holding

Held: “[ISDEAA] requires IHS to pay the contract support costs that a [T]ribe incurs when it collects and spends program income to further the functions, services, activities, and programs transferred to it from IHS in a self-determination contract.”

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Majority Opinion Grounds

- Governing statutes peg CSC to requirements of the self-determination contract
- Contracts require Tribal Nations to collect revenue from third-party payers and spend that revenue to further the relevant healthcare program
- Taken together, crux of the issue is the Tribal Nations' contractual obligations:
 - Because a self-determination contract requires reinvestment of third-party revenues back into their programs and statute requires that IHS pay CSC on activities carried out to "ensure compliance with the terms of the contract," IHS must then pay CSC on services funded through program income (third party revenues)
- Third-party CSC also eligible under statutes defining direct and indirect CSC

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Slide 9

LMO This is getting a bit too high-level/legalistic for this crowd. Strike.
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Rejection of Government's Arguments

- Rejected assertion that CSC are limited to programs funded by the Secretarial amount
- Rejected argument that reimbursing CSC on third-party would give Tribal Nations flexibility to spend program income on a broader range of activities than IHS itself
- Most importantly, rejected because a contrary reading of the statute (i.e., a decision favoring the government) would “impose a penalty” on Tribal Nations for opting in favor of greater self-determination by entering into self-governance contracts with IHS

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Slide 10

AMO Thinking that I'll put this slide in but skip it for time, and then come back if we have extra time/people are curious

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LMO 0 **Strike.**

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Timeline

- June 6, 2024: SCOTUS releases opinion in *Becerra v. San Carlos Apache Tribe*
- June 13, 2024: IHS publishes DTLL with initial steps for complying with decision, including plan for CSC Workgroup, Tribal consultation and interim guidance for submitting claims
- July 24-25, 2024: CSC Advisory Workgroup (CSCAG) meets for initial dialogue on methodology ahead of consultation
- Early August: CSCAG reconvenes to discuss outstanding issues
 - **We are here**
- Late Aug. – Sept. 2024: Tribal Consultation on Methodology
- Ongoing: Claims submittals, advocacy efforts

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IHS DTLL on Initial Approach and Interim Guidance

- Released June 13, 2024
- Acknowledged obligation, stated intent to develop action plan and implement decision
- Intention to convene CSC Advisory Workgroup in July 2024 with Tribal consultation to follow
- Enclosed interim guidance for submitting claims prior to consultation/methodology finalization
- Urged Congress to reclassify CSC and 105(I) as mandatory funding

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What is mandatory funding?

Discretionary Funding

- Annual appropriations process
- National defense, education, transportation, foreign aid
- Vulnerable to govt. shutdowns

Mandatory Funding

- Authorizing legislation
- Required by law, many are entitlement programs
 - Medicare, Medicaid, VA, SNAP, TANF, Social Security

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Why do we want mandatory funding?

- Reclassifying from indefinite discretionary to mandatory important for range of reasons:
 - Most important = Fulfillment of trust and treaty obligations
 - Impact to IHS budget/Interior title
 - Better bookkeeping

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IHS Contract Support Cost Advisory Group (CSCAG) Meeting

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CSCAG Meeting

- July 24 -25, 2024 in-person in Washington, DC
- Met with IHS leadership and negotiators with the intention to develop a recommended methodology for IHS reimbursement
 - Recommended methodology would then be put out for full Tribal consultation
- Hot topics of discussion:
 - Definition of program income
 - Reimbursement of CSC on third-party revenue generated by serving non-beneficiaries
 - How Tribal Nations can/should certify/attest that program income being spent in accordance with contract
 - How Tribal Nations can renegotiate agreements to include third-party CSC

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Biggest Issue: Program Income Generated by Serving Non-Beneficiaries

- IHS Interim Guidance says that CSC appropriation “not legally available” to pay costs associated with services to non-beneficiaries
 - i.e., IHS will only pay CSC generated by qualifying expenditures for services to IHS beneficiaries
- Attempting to implement a reduction (by means of a formula/calculation) of third-party CSC reimbursement based on a Tribal program’s serving of non-bens
- When discussions failed to reach a way forward, CSCAG Tribal representatives and TAs collectively drafted a new position paper

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Other Hot Issues at CSCAG

- Definition of program income
- How Tribal Nations can/should certify/attest that program income being spent in accordance with contract
- How Tribal Nations can renegotiate agreements to include third-party CSC

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Slide 18

LMO All of this is also on slide 14. You can strike.
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LMO

Workgroup Reconvening and Tribal Consultation

- Follow-up Tribal position paper outlining issues with IHS's position on the non-ben issue
- IHS developed revised program income definition, ACC template, certification statement, possible consultation framing questions
- Workgroup reconvened August 12, 2024
 - Continued negotiations on hot topics
 - No consensus reached on non-bens, program income definition

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LMO

Condense.

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Workgroup Reconvening and Tribal Consultation (continued)

- Next steps:
 - Tribal reps to transmit edited documents back to IHS
 - IHS to draft DTLL
 - Consultation tentatively September – October
- IHS intention to finish by end of calendar year

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Moving Forward: Policy Priorities and Ongoing Advocacy Efforts

What do we want now and how are we going to get there?

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Toward a New Era of CSC Funding: What do we want now?



- Immediately: mandatory funding for CSC and 105(I)
- Ultimately: mandatory funding for IHS, BIA, BIE and all Indian programs

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Why mandatory funding?

- Reclassifying from indefinite discretionary to mandatory important for range of reasons:
 - Fulfillment of trust and treaty obligations
 - Impact to IHS budget/Interior title
 - Better bookkeeping

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CSC/105(I) Mandatory Funding Requires Congressional Action



- Congress would have to reclassify as part of the appropriations process or in separate authorizing legislation
- President's budget requests included since FY 2022
 - Congress yet to take the proposal up

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CSC and 105(I) in FY 2025 Appropriations Process



FY 2025 House Interior Appropriations Bill

- Passed full committee
- Indefinite appropriation of \$2.036 billion for CSC
- Indefinite appropriation estimate of \$400 million for 105(I)
- Does not reclassify

FY 2025 Senate Interior Appropriations Bill

- Passed full committee
- Indefinite appropriation of \$2.036 billion for CSC
- Indefinite appropriation estimate of \$400 million
- Does not reclassify
 - Amendment to reclassify offered and withdrawn during markup

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Mandatory and Full Budget for IHS

- USET SPF and others long advocated for mandatory funding for whole of IHS budget
- Since FY 2022, President's Budget Request also proposed shifting full IHS budget to mandatory funding in 10-year plan to substantially increase funding
 - Congress has not taken this request up either
- USET SPF supporting efforts at IHS to determine an appropriate full funding figure and a detailed proposal for a full, mandatory IHS budget

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IHS Appropriations in FY 2025 Bills

FY 2025 House Interior Appropriations Bill

- \$8.56 billion, including advance appropriation
 - \$1.6 billion increase over FY24 enacted
- \$5.274 billion for FY 2025
 - Increase of \$326 million over FY24 enacted
- No reclassification to mandatory

FY 2025 Senate Interior Appropriations Bill

- \$8.5 billion total, including advance appropriation
 - \$1.5 billion increase over FY24 enacted
- \$5.211 billion for FY 2025
 - Increase of \$263 million over FY24 enacted
- No reclassification to mandatory

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What to we do now??

- Not too late to get CSC/105(I) mandatory in this appropriations cycle
 - Likely to see a CR before a full budget this year
- Continue advocacy for those line items and mandatory funding for all Indian Country funding

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Actions to Take Now

- Schedule meetings with Congressional members and staff
- USET SPF circulated requests/opportunities to reach out to House Representatives and Senators
 - Internal sign-on letters in both chambers
 - Request for letters to Senators urging support for reclassification
- USET SPF continuing to sign onto letters as an organization and is engaging in efforts to educate and advocate with Congressional members and staff

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Tips for Advocating with Congress

- Find the right office/staff members and the right timing
- Be prepared!
 - Supporting documents
 - Intentions for the meeting
 - Staying on topic
 - Telling your story
- Don't be nervous – remember that you are sovereign nations and are the experts on your communities
 - You are not lobbying! The government has trust and treaty responsibilities in perpetuity!

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Target Offices/Committees

House

- Approps Committee members
 - Interior Appropriations subcommittee
- House Natural Resources

Senate

- Approps Committee and SCIA members
- Sen. Susan Collins (R-Maine)
- Sen. Angus King (I-Maine)
- Sen. Tim Kaine (D-Virginia)
- Sen. Mark Warner (D-Virginia)
- Sen. Thom Tillis (R-North Carolina)
- Sen. Jeanne Shaheen (D-New Hampshire)
- Sen. Chris Van Hollen (D-Maryland)

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Need assistance? USET SPF can help!

- Contact information for offices
- Tips and tricks for scheduling and having meetings with Congress
- Talking points or prep materials for meetings*
- Assistance in developing the ask/story

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Questions?

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