HOUSE COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON INTERIOR, ENVIRONMENT AND RELATED AGENCIES
HEARING ON THE PRESIDENT'S 2014 BUDGET REQUEST

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Testimony of Lloyd B. Miller, Counsel, National Tribal Contract Support Cost Coalition

My name is Lloyd Miller and I am a partner in the law firm of Sonosky, Chambers, Sachse, Miller and Munson, LLP. I appear here today as counsel to the National Tribal Contract Support Cost Coalition. The Coalition is comprised of 20 Tribes and tribal organizations situated in 11 States and collectively operating contracts to administer $400 million in IHS and BIA services on behalf of over 250 Native American Tribes.[1] As the NTCSC Coalition has frequently stated to this Committee, the payment of contract support costs is essential to the proper administration of federal contracts awarded under the Indian Self-Determination Act.

I noted last year that no single enactment has had a more profound effect on more tribal communities than the Indian Self-Determination Act. In just three decades Tribes and inter-tribal organizations have taken control over vast portions of the Bureau of Indian Affairs and the Indian Health Service, including federal government functions in the areas of health care, education, law enforcement and land and natural resource protection. Today, not a *single* Tribe in the United States is without at least one self-determination contract with the IHS and BIA, and collectively the Tribes administer some $2.8 billion in essential federal government functions, employing an estimated 35,000 people. Contract support cost issues thus touch *every* Tribe in the United States.

Two years ago this Committee explained its views on contract support costs:

> The Committee believes that both the Bureau [of Indian Affairs] and the Indian Health Service should pay all contract support costs for which it has contractually agreed and directs the Service to include the full cost of the contract support obligations in its fiscal year 2013 budget submission.

H.R. Rep. No. 112-151, at 98 (2011). See also *id*. at 42 (addressing the BIA). The Committee was correct in its 2011 assessment of the government's liability. One year later the Supreme Court ruled that "[c]onsistent with longstanding principles of Government contracting law, we hold that the Government must pay each tribe's contract support costs in full." *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2186 (2012). The Court emphasized that "the Government's obligation to pay contract support costs should be treated as an ordinary contract promise." *Id*. at

[1] The NTCSCC is comprised of the: Alaska Native Tribal Health Consortium (AK), Arctic Slope Native Association (AK), Central Council of the Tlingit & Haida Indian Tribes (AK), Cherokee Nation (OK), Chippewa Cree Tribe of the Rocky Boy's Reservation (MT), Choctaw Nation (OK), Confederated Salish and Kootenai Tribes (MT), Copper River Native Association (AK), Forest County Potawatomi Community (WI), Kodiak Area Native Association (AK), Little River Band of Ottawa Indians (MI), Pueblo of Zuni (NM), Riverside-San Bernardino County Indian Health (CA), Shoshone Bannock Tribes (ID), Shoshone-Paiute Tribes (ID, NV), SouthEast Alaska Regional Health Consortium (AK), Spirit Lake Tribe (ND), Tanana Chiefs Conference (AK), Yukon-Kuskokwim Health Corporation (AK), and the Northwest Portland Area Indian Health Board (43 Tribes in ID, WA, OR).

2188. Two months later, the U.S. Court of Appeals for the Federal Circuit applied this ruling to the Indian Health Service, concluding that "[t]he Secretary [was] obligated to pay all of ASNA's contract support costs for fiscal years 1999 and 2000." *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, No. 2010-1013, Order at 6, 2012 WL 3599217 (Fed. Cir. Aug. 22, 2012). In short, it is now beyond any reasonable debate that the payment of contract support costs is a binding contractual obligation due all Tribes that operate BIA and IHS contracts.

The Administration has not embraced the rule of law; it has instead sought to change it.

First, it has submitted a budget which falls $140 million short of what is required to honor all tribal contracts with the Indian Health Service. The budget is also $12 million short of what is required to honor all BIA contracts.

Second, it has defiantly proposed a statutory amendment-by-appropriation, seeking to cut off all future contract rights. It has done this by proposing to give legal effect to a "table" which the Secretary would someday provide to this Committee, specifying the maximum amount each tribal contractor would be entitled to be paid. Since each tribal contract is "subject to the availability of appropriations," the Administration hopes this language will limit what is "available" to the amount in the "table." The Administration does not propose that a Tribe cut back on its administration of a contracted hospital or clinic, or a police department or detention center. It only proposes to cut off what the government would pay for those services.

This is an outrageous and unwarranted overreaction by the Administration to another loss in the courts. But it is not surprising. For years the agencies have kept their heads in the sand about their contract obligations to the Tribes. They have acted as if these contracts were just another program to be balanced against other programs or activities the agencies felt were important to prioritize, including protecting and growing their internal bureaucracies. They have treated these self-determination contracts as second-class contracts, and the Indian Tribes as second-class contractors. They would never behave in this fashion if an IHS hospital were contracted out to Sisters of Providence, or a BIA detention center were contracted out to the Corrections Corporation of America. Yet they find it perfectly acceptable to do so when the contract is with an Indian Tribe.

What is perhaps most striking is that the Administration has proposed converting these contracts into second-class contracts only months after a Supreme Court ruling which declared these to be "ordinary contract promise[s]" which must be paid in full. It is nothing short of dishonorable—even discriminatory—for the Administration now to propose a special limitation applicable to *Indian* contracts only. I am also concerned that it may be confiscatory, and thus unconstitutional under the Fifth Amendment, for it tells the Tribes they must do their contracted work and accept less-than-full payment, to be set at the agency's whim and with no recourse.

It is, of course, the "no recourse" aspect of this new idea that is most troubling. For over 120 years it has been bedrock law that if the government cannot, or will not, pay a contractor, the contractor has recourse through the courts. *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892). If an overall appropriation is capped (as has been the case with contract support costs), there is recourse in the courts for those tribal contractors who suffer underpayments. A judicial remedy

for any underpayment permits a cap to withstand legal, and constitutional, scrutiny. But once that relief valve is shut off, the risk of unconstitutional action rises. In *Cherokee Nation v. Leavitt*, the Supreme Court warned that "[a] statute that retroactively repudiates the Government's contractual obligation may violate the Constitution." 543 U.S. 631, 646 (2005). The Court also warned against the "practical disadvantages flowing from governmental repudiation." *Id.*

Consider what it is the Administration is actually proposing. The Administration is not proposing that the Appropriations Act include a line-item specifying the maximum amount of funding available to pay a given contractor. That is what occurred in *Sutton v. United States*, 256 U.S. 575 (1921), and that is one of the options the Supreme Court described in *Ramah*, 132 S. Ct. at 2195 ("Congress could elect to make line-item appropriations, allocating funds to cover tribes' contract support costs on a contractor-by-contractor basis."). Instead, the Administration is proposing that the agencies, and ***not*** Congress, would specify how much each Tribe would be paid—but just in contract support costs—and the agencies would do so only *after* the contract support cost appropriation is enacted and after the agencies have made an assessment about how they wish to divide up that appropriation. They would do all this long after the Tribes had signed their contracts, long after the Tribes had substantially performed those contracts, and long after the Tribes had incurred costs carrying out those contracts.

In essence, the Administration proposes that a Tribe should contract to run a hospital, clinic or detention center for a full year, but that if any shortfall occurs in the required administrative costs—costs that *the government*, itself, sets—then the Tribe must somehow contribute the unpaid balance. That sort of forced volunteer services may well violate the Appropriations Clause, by effectively taking away from Congress the power to regulate spending on federal projects. Serious constitutional problems are also implicated when the agency makes an after-the-fact determination that the government is not going to pay for services rendered. These are certainly not the straightforward "line-item appropriations" that the Supreme Court said were possible if Congress wanted to limit the government's exposure for contract damages.

For the foregoing reasons, the National Tribal Contract Support Cost Coalition respectfully urges the Committee to reject the Administration's effort to radically alter both the structure of the annual appropriations bill and the fundamental nature of Indian Self-Determination Act contracts. If a sea change in federal Indian policy is to be considered by Congress, and if the change potentially implicates issues of constitutional dimension, due deliberation should begin with the authorizing committees, starting with the Natural Resources Committee's Subcommittee on Indian and Alaska Native Affairs.

In sum:

1. The Coalition respectfully suggests that this Committee reject the Administration's proposed restructuring of the appropriations Act.

2. The Coalition further respectfully suggests that the Committee either eliminate the current caps (as was the case with the IHS appropriation until FY 1998, and with the BIA until FY 1994), or raise the IHS cap to $617 million and the BIA cap to $242 million. Whatever

funding levels are fixed in the bill, tribal contractors should not be denied the remedies that every other government contractor possesses, and which the Supreme Court in the *Ramah* and *Cherokee* cases confirmed protect Indian contractors, too.

3. The Coalition also respectfully suggests that the Administration be directed to engage Tribes in true and thoughtful government-to-government consultation, consistent with President Obama's November 5, 2009 Memorandum directing full implementation of Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"), 65 Fed. Reg. 67,249 (2000). In so doing, the Administration should be directed to work with the National Congress of American Indians, impacted tribal organizations, and experts in the field. If legislative changes are deemed necessary, the goal should be the development of a joint federal-tribal proposal. The Administration should be directed not to bring any proposal to this Committee sooner than the FY 2016 appropriations cycle, to be sure that any federal-tribal proposal that is brought forward has been fully vetted in advance with the relevant authorizing committees.

4. Finally, the Coalition requests that the Committee take firm action to force the disclosure of IHS data the Secretary has failed to share with Congress and the Tribes, contrary to federal law. Section 106(c) of the Act requires that an annual shortfall report on past and anticipated contract underpayments be delivered to Congress by May 15. The IHS report on FY 2011 data—*two year old data*—has still not been submitted to Congress. The 2009 and 2010 Reports were only submitted last Fall, the former report *three years late*. Without accurate data, this Committee cannot perform its constitutional function. Without accurate data, Tribes cannot know what the agencies are doing with their contract funds.

Since the agencies invoke the "deliberative process privilege" under 5 U.S.C. § 552(b)(5) to resist disclosure, we request the insertion of language waiving that provision for all CSC data not disclosed on or before May 15. Past data errors are a reason to disclose data, not to keep it secret long until after it is useful. The recent withholding of CSC payment data must stop.

5. On a related note, the President's Budget now routinely omits any mention of the total projected amounts required for IHS and BIA contract payments. Until the FY 2011 Budget, such projections were routinely included in the Budget narrative. The Coalition respectfully requests that the Committee direct the Secretaries to include this data in future Budget submissions.

By any measure, the Indian Self-Determination Act has been a stunning success, most importantly for the Indian citizens served, but also in the strengthening and maturing of modern tribal government institutions. Now is not the time to adopt changes that will inevitably drive Tribes to retrocede their contracted activities to the federal government, turning back the clock on the most successful initiative the United States has ever launched in Indian affairs.

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It is a rare privilege to appear before this Committee. On behalf of the over 250 federally-recognized Tribes represented by the National Tribal Contract Support Cost Coalition, I humbly thank the Committee for this opportunity to testify on the Administration's proposed FY 2014 Budget.