HOUSE COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON INTERIOR, ENVIRONMENT, AND RELATED AGENCIES
HEARING ON THE PRESIDENT'S 2015 BUDGET REQUEST

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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. Collectively, they operate contracts to administer $400 million in IHS and BIA programs and services on behalf of over 250 Native American Tribes.[1] The NTCSC Coalition was created to assure that the federal government honors the United States' contractual obligation to add full contract support cost funding to every contract and compact awarded under the Indian Self-Determination Act. I also litigated the Supreme Court *Cherokee* and *Arctic Slope* cases, and co-litigated the *Ramah* case, all of which held that IHS and BIA contracts with Indian Tribes are true, binding contracts which must be paid in full no less than any other government contract.

Every year I recall for this Committee that no single enactment has had a more profound impact on tribal communities than has the Indian Self-Determination Act. In just three decades Tribes and inter-tribal organizations have taken control of vast portions of the Bureau of Indian Affairs and the Indian Health Service, including services previously provided by the federal government 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 or the BIA, and collectively the Tribes administer approximately $2.8 billion in essential federal government functions, employing an estimated 35,000 people. Under all of these contracts, the Tribes must cover contract support costs—essentially overhead—to responsibly manage their programs. They have to make payroll. They have to manage their finances and their information technology systems. They have to buy insurance. They have to procure goods and services. All of the same things the government has to do, the Tribes have to do—and even more, including costly annual audits. Full payment of contract support costs is thus essential to carry out the contracted programs, from law enforcement to range management to full on hospital operations.

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

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[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).

> 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 remarkably prescient in its assessment of the government's liability: the very next year 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 Supreme Court emphasized that "the Government's obligation to pay contract support costs should be treated as an ordinary contract promise." *Id*. at 2188. Two months later the U.S. Court of Appeals for the Federal Circuit applied the *Ramah* 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 debate that the payment of contract support costs is a binding contractual obligation owed to all Tribes that operate BIA and IHS contracts.

Initially, the Administration did not embrace the rule of law. Instead, it asked Congress to change it. It came here and asked this Committee to adopt a new regime in which the Committee would adopt hundreds of line-items created by the agencies for the Tribes (though without any public input from the Tribes), effectively converting these enforceable "contracts" into little more than discretionary grants.

But the reaction across Indian Country was fierce, as was the reaction in both Houses of Congress, and the Administration's proposal was rejected. Instead, the Committee returned the appropriations structure to what it had been for many, many years, and to an appropriations structure that is typical in other government contract settings: the Committee eliminated all earmarking caps on the payment of the agencies' contracts, and it directed the BIA and the IHS simply to actually pay in full the contracts they award.[2]

On behalf of the over 250 Tribes that are served by the Coalition's members, we salute this Committee for its leadership and courage. The Committee proved to Indian Country that the Nation must and will honor its contracts with the Tribes on no less binding terms than its contracts with any other government contractor. Thank you for this Committee's bipartisan and steadfast commitment to the Tribes and the rule of law. You have brought to a successful close an unfortunate chapter in Indian affairs which persisted for two decades.

We also salute the Administration for stepping up to its obligations in the FY 2015 Budget by proposing to fully pay all IHS and BIA contract support cost obligations. The National Tribal Contract Support Cost Coalition fully supports the Administration's proposal, and notes the historic, indeed landmark, nature of the Administration's proposal.

[2] The Committee's FY 2014 final appropriation for the IHS returns the appropriations structure to what it was prior to 1998. In 1998 IHS persuaded this Committee to alter the appropriations structure in response to mounting breach of contract claims.

That said, our Coalition does have a few remaining suggestions to offer the Committee in connection with outstanding issues relating to contract support cost funding.

First, the Coalition supports any technical changes to the appropriations structure that would make contract adjustments easier to make. Pricing full contract support cost requirements is a formulaic but complicated process. For one thing, it depends upon the program amounts being paid to the tribal contractor, and sometimes those amounts are not known until the very end of the fiscal year. The IHS's MSPI and DVPI funds, which historically have been distributed in August or September each year, are a good example of this issue. (Other formula driven, so-called non-recurring, programs are similarly late-funded.) For another thing, it typically depends upon the tribal contractor's indirect cost rate, and the rate can and often is updated in the course of the contract year. Further, a Tribe and the BIA or IHS may renegotiate the Tribe's contract support cost requirement during the fiscal year, and that, too, may result in a necessary adjustment.

The agencies are entering into a new era in which they will seek to pay contract support costs in full. But the environment is dynamic and changing, and accordingly the risk of both underpayments and overpayments will continue, and even increase. This is not a problem, so long as the parties have the ability to make corrective adjustments. However, the ability to make such adjustments will be hampered if all agency appropriations must be obligated within or for one fiscal year. It will also be hampered if funds returned to the BIA or IHS by a tribal contractor are not available for each agency to address corresponding underpayments.

The ability to make such adjustments would be significantly enhanced if all (or at least a portion) of the IHS appropriation were available for two years, as is already the case with the BIA appropriation.

It would also be helpful to confirm that funds returned by a tribal contractor to the IHS or the BIA will remain available to the agencies to reobligate for the current or subsequent fiscal year.

Second, accuracy of annual CSC data is imperative, now more than ever. Yet in recent years the agencies have consulted <u>less</u> with tribal contractors on the content of those reports. Acting Director Roubideaux ceased sharing draft CSC data shortly after she was confirmed in 2009. (First, she cited the embargo on the budget development process, and later switched to citing rules about the deliberative process privilege.) Until this year, the BIA continued to share draft data with the tribal working group, leading to significant improvements in the accuracy of the BIA's reports. But this year the BIA announced it would no longer do so because of concerns about the Trade Secrets Act. This, of course, is nonsense.

Frankly, there is no excuse for avoiding full transparency in the development of data about tribal self-determination contracts and compacts—all of which is eventually disclosed to Congress anyway. It is disclosure to the Tribes about the Tribes. **We therefore respectfully urge the Committee to add language to the Appropriations Act's general provisions making clear that none of the foregoing claimed privileges or statutes applies to draft shortfall data, and requiring the agencies to share that data on an ongoing basis with each**

agency's respective Contract Support Cost Work Group for input and correction where indicated.

Along similar lines, **we respectfully urge the Committee to declare that, as of May 15 of each year, when the shortfall report is due to Congress, the agencies must disclose the reports to all contracting and compacting Tribes, regardless of whether the final clearance process has been completed within the respective Secretaries' offices, and waiving any applicable privilege against such disclosure**. Full transparency must be the order of the day if the Indian Self-Determination Policy is to succeed. Such language should provide as follows: "provided further, that, notwithstanding any other provision of law, as of May 15 of each year, the information contained in the Report required by subsection 450j-1(c) of Title 25, United States Code, shall be considered public and no exemption in section 552(b) of Title 5, United States Code, or at common law, shall prevent its disclosure."

Third, **we respectfully urge the Committee to adopt a general provision stating that the contract support cost reports establish a presumption regarding the damage amounts that are due in the event of an underpayment**. Far too much time and resources have been spent over the years arguing about the amounts the government owes on claims for unpaid contract support costs. To date, only a small fraction—perhaps 10%—of the 1600 claims pending against the IHS as of 2012 have been resolved. This dismal record is entirely reversible given ready access to the IHS's agency-certified contract support cost reports that were long ago submitted to Congress.

Deeming those reports admissible in any proceeding will go a very long way to expediting the claims process for the past and will make future adjudication of such claims far easier than has historically been the case. After all, it is only natural that when an agency certified the accuracy of a report to Congress, that report should be presumed accurate absent some mathematical error. If the IHS and the BIA are to receive permanent protection from any duty to repay the Judgment Fund for past historic claims (as the Administration requests in Sections 405 and 406 of the General provisions)—and we support that protection—then it is equally reasonable that the process for resolving those claims be expedited. We suggest that Section 406 be amended to add the following language: "Provided further that, in any appeal or civil action brought pursuant to subsections 450m-1(a) or (d) of Title 25, United States Code, it shall be presumed, in the absence of fraud or mathematical error, that the deficiency amounts reported to Congress under subsection 450j-1(c) of Title 25 accurately reflect the minimum damages due any tribe or tribal organization filing such appeal or civil action."

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It is a privilege to appear before this Committee once again. On behalf of the over 250 federally-recognized Tribes represented by the National Tribal Contract Support Cost Coalition, I thank the Committee for this opportunity to testify on the FY 2015 Budget.