

**HOUSE COMMITTEE ON APPROPRIATIONS  
SUBCOMMITTEE ON INTERIOR, ENVIRONMENT, AND RELATED AGENCIES  
HEARING ON THE PRESIDENT'S 2016 BUDGET REQUEST**

**March 25, 2015**

**Testimony of Lloyd B. Miller  
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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 21 Tribes and tribal organizations situated in 11 States. Collectively, they operate contracts to administer almost \$500 million in IHS and BIA programs and services on behalf of over 250 Native American Tribes.<sup>1</sup> 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 nearly \$3 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: the Tribes must complete costly annual audits, negotiate indirect cost rates, and comply with a raft of federal mandates.

These costs are fixed, and they must be paid. Otherwise, they are paid out of program funds or paid out of tribal trust funds. Thus, full payment of contract support costs is essential to

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<sup>1</sup> The NTCSCC is comprised of the: Alaska Native Tribal Health Consortium (AK), Arctic Slope Native Association (AK), Central Council of Tlingit & Haida Indian Tribes (AK), Cherokee Nation (OK), Chickasaw Nation, 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 Northwest Portland Area Indian Health Board (43 Tribes in ID, WA, OR).

keeping faith with the Government's contractual commitments, honoring the Government's trust responsibility, and permitting the Tribes to prudently carry out the contracted programs, from law enforcement to range management to full-on hospital operations.

Four 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 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), *on remand from* 133 S. Ct. 22 (2012).

Today it is 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. The only issue remaining has been how to meet that obligation.

Thanks to this Committee's vision and decisive action, fiscal year 2014 was the first year in which contract support costs were paid in full through the ordinary appropriations process. For the agencies, particularly IHS, it was a rocky start, as early mistaken estimates gave way to the reality that the agency has missed the mark by millions of dollars. A major reprogramming action was necessary to make Tribes whole, but the agency weathered the storm with a minimum of disruption to direct service operations, and all contracts were paid in full.

Last year's appropriation followed a crooked path to final enactment. But an unintended benefit of the delayed FY 2015 appropriations cycle was that this Committee, the agencies and tribal advocates (including this Coalition) were able to compare notes last December and this Committee was able to adjust the FY 2015 final appropriation levels to assure that all Tribes will be paid in full for carrying out their government contracts—and this time, without any disruption to ongoing program or agency operations. We are truly in a new era.

## **FY 2016**

For FY 2016 the Administration has proposed contract support costs payment levels of \$718 million for IHS and \$272 million for the BIA. Based upon actual experiences in FY 2014, there is every reason to believe these amounts will be sufficient to cover all contract

requirements next year. The National Tribal Contract Support Cost Coalition fully supports the President's proposed FY 2016 funding levels, reflecting a full Administration commitment to tribal self-determination and self-governance.

### **FY 2017 and Beyond**

Going forward, the Administration has proposed a three-year mandatory appropriation at stated dollar amounts for each agency, with up to 2% of the sums so designated to be available for agency administration. The National Tribal Contract Support Cost Coalition deeply appreciates the President's effort to find a solution to the multi-decade underfunding of contract support costs, and agrees that the long-term solution lies in a mandatory appropriation. A mandatory appropriation is an effective answer to the dilemma posed by locating a legally binding obligation within an appropriation structured to address discretionary requirements. It protects the discretionary side of the ledger while assuring that tribal contractors and compactors will be paid in full for services duly rendered to the United States.

But care in this area must be taken, and a half measure could be more disruptive than no measure at all. A time-limited mandatory appropriation is ill-suited to paying a permanent obligation, because each renewal is subject to the vagaries of the political process. The best example of those vagaries is reflected in the history of the time-limited mandatory appropriation enacted for the Special Diabetes Program for Indians (SDPI).<sup>2</sup> This instability is orders of magnitude more destabilizing when it comes to the payment of contract support costs for the delivery of core governmental functions, including the annual operation of police departments, schools and entire hospitals and clinics serving many of the Nation's most vulnerable populations. It is one thing for a discrete program to end; it is quite another thing for an entire hospital or police department to close or be cut back by a third because contract support cost payments suddenly cease. One can imagine the grave instability that would ensue if by March 2019, Congress had not yet renewed the measure and yet the Budget Committee was developing its discretionary caps for the coming year and this Committee was holding these hearings.

Given these practical considerations, the Coalition respectfully urges all Members of this Committee to build upon the President's proposal by supporting a permanent mandatory appropriation.

The Coalition also respectfully urges this Committee's Members to support a mandatory appropriation which only appropriates what is needed, and not a penny more.<sup>3</sup> In recent listening sessions the agencies have explained that the specific sums requested are somewhat higher than the sums each agency projects it will actually need. This makes no sense to us, and will only drive up the cost of any measure.

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<sup>2</sup> Pub. L. No. 105-33, § 4922, 111 Stat. 251 (1997) (5 years); Pub. L. No. 107-360, § 1(b), 116 Stat. 3019 (2002) (6 years); Pub. L. No. 110-173, § 302(b), 121 Stat. 2492, 2515 (2007) (one year); Pub. L. No. 110-275, § 303(b), 122 Stat. 2494, 2594 (2008) (2 years); Pub. L. No. 111-309, § 112(2), 124 Stat. 3285, 3289 (2010) (2 years); Pub. L. No. 112-240, § 625(b), 126 Stat. 2313, 2352-53 (2014) (1 year); Pub. L. No. 113-93, § 204(b), 128 Stat. 1040, 1046 (2014) (1 year).

<sup>3</sup> See 31 U.S.C. § 1305 (appropriating "such amounts as may be necessary" for specified purposes).

To the extent the higher amounts are designed to make available up to 2% of the designated sums for agency overhead, the Coalition strongly opposes those amounts. A flat 2% would authorize IHS to spend over \$20 million on overhead costs to pay tribal contractors, 10 to 20 times what the agency currently spends on this activity out of its discretionary appropriation. No explanation has been offered for such excessive sums, and IHS has readily acknowledged that far lesser sums would be sufficient.

The Coalition appreciates that the agencies would each benefit from additional resources to administer their obligations under the law to pay full contract support costs. But before increasing existing sums, the Committee should direct the BIA and IHS to perform an assessment to determine their exact staffing needs and associated funding requirements. Whatever sum is necessary for agency overhead, those costs should be left within each agency's discretionary appropriation, where the Appropriations Committees can continue to monitor and respond on an annual basis to agency and tribal concerns. No reason has been offered by anyone for transferring such sums to a mandatory appropriation.

On an issue closely related to agency overhead, the Coalition respectfully requests that the Committee caution the agencies against developing any new initiatives that would leave contract support cost accounts open for five years. IHS is already moving in this direction, which would be both unprecedented and directly at odds with standard grant practices, including IHS's own grant programs. Contracts should be closed out within 60 days of the close of the fiscal year, and both agencies should be directed to develop initiatives which make contract implementation and close-out more efficient and speedier, not more complex. Multi-year arrangements for fixed rates, or fixed lump-sum amounts subject to inflationary adjustments, should be strongly encouraged as an efficient alternative to lengthy annual recalculations and reconciliations.

Finally, the Coalition respectfully urges the Committee to amend the Appropriations Act's language to require that contract support costs be added to program funds covering the domestic violence prevention initiative (DVPI) and methamphetamine and suicide prevention initiative (MSPI). A recent federal court confirmed that such funds are subject to the Indian Self-Determination Act, consistent with IHS's position since 2010. But this past year, just when full CSC funding finally became a reality, IHS unilaterally—and without any consultation whatsoever—changed position, announcing that hereinafter Tribes must divert their domestic violence and methamphetamine and suicide prevention program dollars to cover all overhead costs. On average, this will reduce the program funding amounts nationwide by 25%. Congress should not tolerate this irrational change to these programs.

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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 2016 Budget.