

**HOUSE COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON INTERIOR, ENVIRONMENT, AND RELATED AGENCIES**

HEARING ON THE PRESIDENT'S 2017 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 21 Tribes and tribal organizations situated in 11 States. Collectively, they operate contracts to administer almost \$500 million in IHS and BIA programs 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 against the Indian Health Service, and co-litigated the *Ramah* class action case against the Bureau of Indian Affairs, 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. As a direct result of these litigations, the government since 2012 has agreed to pay over \$1.75 billion in contract damages to Native American Tribes and tribal organizations, and close to \$2 billion if we include judgments awarded in earlier years.

Every year I recall for this Committee that no single enactment has had a more profound impact on tribal communities than the Indian Self-Determination Act of 1975. Since its enactment, Tribes and inter-tribal organizations have taken control over 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. 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

¹ 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).

Tribes have to do—and even more: the Tribes must complete costly annual audits, negotiate indirect cost rates, and comply with a raft of unfunded federal mandates.

Full payment of contract support costs is essential to 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. And since these costs are fixed, when the government does not pay them, Tribes pay them out of program funds or tribal trust funds. For many years this Committee has well understood the nature of the government’s obligation in this area:

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 Supreme Court has agreed with this Committee’s assessment: “Consistent 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). See also *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) (applying the *Ramah* ruling to the Indian Health Service). 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 had missed the mark by millions of dollars. A major reprogramming action was necessary to make Tribes whole, threatening direct services. Although IHS weathered the storm with a minimum of disruption to direct service operations, doing so required diverting nearly all of the increases this Committee had appropriated that year for program services.

The 2014 disruptions were avoided in fiscal year 2015, thanks to better planning and more accurate agency projections. Even still, the threat to ongoing program operations was palpable, given the prior year’s experience. That threat led directly to this Committee’s bold and unprecedented action for fiscal year 2016 in establishing an entirely separate contract support cost account, and allocating to that account an uncapped amount for the payment of these costs. The solution was as elegant as it was brilliant: (1) it removed any possible threat to ongoing program operations; and (2) at the same time it assured full payment of the government’s contract obligations to the Tribes. The tribal experience in 2014, 2015 and 2016 is that the new system is now working, and even working quite well. The National Tribal Contract Support Cost Coalition fully supports the Committee’s approach and encourages the Committee, with one modification, to continue this year’s approach in future years.

The one modification we strongly request is to eliminate the agency-requested “proviso” that was included in these new IHS and BIA accounts. The proviso addresses contract funds that go unspent in a given fiscal year. However, existing law already addresses that issue. See 25 U.S.C. 450(a)(4) (“For each fiscal year during which a self-determination contract is in effect, any savings attributable to the operation of a Federal program, function, service, or activity under a self-determination contract by a tribe or tribal organization (including a cost reimbursement construction contract) shall (A) be used to provide additional services or benefits under the contract; or (B) be expended by the tribe or tribal organization in the succeeding fiscal year, as provided in section 13a of this title.”). At the risk of stating the obvious, all funds paid under self-determination contracts or compacts must be spent under those contracts to deliver (or support the delivery of) health care to Indian people. The new proviso is somewhat in conflict with this existing law. Worse yet, it will require new accounting rules to track subaccounts across fiscal years, at significant expense but with no discernible benefit to the taxpayer, the Treasury, or Indian people. Nothing in the new mechanism for contract support cost payments justifies changing the longstanding rules controlling how those funds are accounted for and spent. We therefore respectfully request that the Committee delete the proviso going forward.

As it did last year, the Administration has also proposed to transfer CSC appropriations from the discretionary side of the budget to the mandatory side of the budget, starting in FY 2018. The National Tribal Contract Support Cost Coalition strongly supports the President’s proposal. That said, we recognize that the proposal will have difficult sledding without an offset, and unfortunately none has been proposed by the Administration. We stand ready to work with the Committee this year and next to explore how best to move forward with a mandatory appropriation.

We applaud the IHS and BIA for their efforts over the past several months to work closely with Tribes in the development of internal guidelines for calculating and reconciling CSC payments. Each agency now has a draft policy ready for tribal consultation, and we are encouraged by these efforts. That said, the Coalition is quite concerned that the IHS approach remains terribly over-complicated, partly due to the agency’s insistence on maintaining what we believe are untenable legal positions that the Office of General Counsel prefers to litigate.

For instance, IHS wants to litigate the proposition that a Tribe may not receive any contract support costs for an activity (say, information technology costs or facility support costs) if that activity was already partly funded in the program budget that was paid to the Tribe under the contract. But Congress has already stated precisely the opposite—that if program funds for given costs are insufficient as compared to what is necessary and reasonable under the circumstances, then contract support costs are to be paid to make up the difference. *See* S. Rep. No. 103-374, at 9 (1994) (“[I]n the event the Secretarial amount under [§ 450j-1(a)(1)] for a particular function proves to be insufficient in light of a contractor’s needs for prudent management of the contract, contract support costs are to be available to supplement such sums.”).

We respectfully urge the Committee to underscore these instructions, direct the agencies to further simplify the contracting process, and instruct the agencies not to seek to reduce tribal contract support cost obligations.

To further simplify and streamline contracting activities, we also respectfully suggest that the Committee urge the agencies to explore using multi-year arrangements for fixed rates or fixed lump-sum amounts subject to inflationary adjustments.

Finally, the Coalition respectfully urges the Committee to clarify once and for all that other funds under this Subcommittee's jurisdiction that are paid to Tribes and tribal organizations that contract with IHS under the Indian Self-Determination Act, shall be paid to the Tribes under those contracts and compacts—not under separate grant agreements—and that tribal contract support cost requirements are to be calculated on such funds. Although this was the agency's practice between 2008 and 2012, the agency changed course after the 2012 *Ramah* decision and for the last two years has only awarded methamphetamine and suicide prevention initiative (MSPI) funds and domestic violence prevention initiative (DVPI) funds under grant instruments. Not only does using grants instead of existing contracts and compacts considerably over-complicate the accounting and reporting process; denying Tribes contract support costs on these funds and future behavioral health funds means diverting scarce program dollars to cover overhead costs. On average, IHS's change in position—undertaken without any tribal consultation whatsoever—has reduced these behavioral health 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 2017 Budget.