

**HOUSE COMMITTEE ON APPROPRIATIONS  
SUBCOMMITTEE ON INTERIOR, ENVIRONMENT, AND RELATED AGENCIES  
CONCERNING THE PRESIDENT'S 2018 BUDGET REQUEST  
FOR THE BIA AND IHS**

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My name is Lloyd Miller and I am a partner in the law firm of Sonosky, Chambers, Sachse, Miller, Monkman, & Flannery LLP. This testimony is offered on behalf of 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 Indian Health Service (IHS) and Bureau of Indian Affairs (BIA) programs on behalf of over 250 Native American Tribes.<sup>1</sup> The 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 and Education Assistance 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.

Over the past year, both IHS and BIA have worked closely with Tribes and tribal organizations on finalizing and publishing new CSC policies setting forth internal guidelines for calculating and reconciling CSC payments. Many Tribes across the country submitted comments, and some are reflected in the final results. In this respect, tribal consultation worked, and both agencies are to be applauded for their inclusive processes. But the agencies' results differ substantially, and it is on this difference that I wish to focus, especially the unnecessarily restrictive and complex approach taken by IHS.

On the one hand, you have the BIA Manual revisions. The Coalition applauds the BIA approach, which genuinely embraced the Committee's instructions to be simple and straightforward, and to streamline the process for determining and reconciling contract support cost requirements. Tribes and agency personnel, alike, can easily understand the BIA's new policy, and the BIA's simple approach will lead to accurate CSC estimates over time. It also

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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).

does not require extensive training, and therefore has already led to improved agency business practices.

On the other hand, you have the IHS. While IHS deserves genuine praise for consulting extensively with Tribes beginning last spring, the ultimate result was both complex and controversial. Despite compromises reached with Tribes on most issues, the agency's adherence to certain legal positions that the Office of General Counsel prefers to litigate left two large issues in dispute. As a result, the new IHS policy adopts the agency's position on the "duplication" and "allocation" issues, and notes the tribal position in footnotes. IHS's intransigence on these issues has left their resolution to the courts, and there are now at least three ongoing cases against IHS involving one or both of these issues.<sup>2</sup>

The final IHS policy also remains terribly over-complicated: not only does it refer to the statute instead of explaining key concepts in plain language, but it also contains several complex calculations, requires Tribes to submit additional documentation to the agency each year, and necessitates two separate CSC negotiation processes each year. Indeed, the policy is so complicated that the agency has only one staff person across the entire country that can answer policy questions and guide the agency's interpretation of its new policy. This person is currently serving a dual role as an Acting Director at Headquarters, further delaying decisions and complicating negotiations for individual Tribes. The agency's approach to training on the new policy is quite telling—instead of partnering with Tribes that asked to be involved in any agency training programs, the agency instead developed and released a series of YouTube videos that completely ignore the tribal position on the "duplication" and "allocation" issues.

The policy is so complicated that IHS personnel have been unable to get a firm grasp on CSC calculations. We understand that in 2017, IHS misstated the total CSC requirement across Indian country by over \$90 million. We believe the actual total CSC need for IHS in 2017 is around \$703 million, not the \$800 million included in the President's budget for that year and defended by IHS throughout 2016. We believe the total CSC need in fiscal year 2018 will be about \$725 million, still far below the agency's prior estimate.<sup>3</sup> Clearly, the agency's failure to simplify the CSC calculation process is impacting IHS, too.

IHS's overly complex CSC policy isn't just impacting CSC calculations and estimates; it is also overly complicating what IHS calls the post-year reconciliation process. Since the adoption of the updated policy, IHS has gone back to Tribes to "reconcile" CSC calculations for 2014, 2015 and 2016. In some instances IHS is demanding that Tribes repay millions of dollars—including dollars that were spent years ago—while other Tribes are still waiting to be paid the full CSC they were promised as much as three years ago. If the new policy remains

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<sup>2</sup> In one case, the federal district court last September ruled in favor of the tribal position on both issues. IHS's reaction was unfortunate: instead of revising the CSC policy accordingly, IHS declared it will appeal the decision to the Tenth Circuit Court of Appeals.

<sup>3</sup> We caution that our own estimate for 2018 will vary depending on where this Committee decides to make increases, since most CSC calculations are a function of the size of the IHS programs the Tribes administer.

unchanged, IHS must do a better job of committing the necessary staff to work with Tribes to perform these calculations on a timely basis and to resolve matters quickly.

In sum, while both agencies have made real progress in improving their management of their CSC accounts, we respectfully urge the Subcommittee to repeat its instructions to IHS to further simplify its calculation and reconciliation processes, and to instruct the agencies not to seek to reduce tribal contract support cost entitlements.

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

We also respectfully suggest that the Subcommittee remind both agencies to interpret and apply the Act's CSC provisions liberally in favor of the Tribes. After all, that is the law, both as stated in section 108 of the Indian Self-Determination Act and in two Supreme Court decisions.

On another note, we thank the Subcommittee for removing the "notwithstanding" clause from the 2017 appropriation addressing certain earmarked funds, including substance abuse and suicide prevention initiative (SASP) funds and domestic violence prevention initiative (DVPI) funds. Between 2008 and 2012, IHS agreed to award these funds through Self-Determination Act agreements, and to calculate contract support cost requirements on those funds. But starting in 2012 IHS reversed course, refusing to calculate CSC requirements and demanding that these funds be awarded through separate grant instruments. This change caused Tribes to cut vital program operations to fund the administrative costs of these programs, including for grant administrators, while adding extraordinary complexity through the parallel grant funding and reporting process. Nationwide, IHS's change in position reduced behavioral health program funding amounts by 25%.

IHS relied on the old "notwithstanding" clause to force Tribes into grant instruments and to dodge the Indian Self-Determination Act's mandate to add contract support costs to these program funds. We hope that in 2017 and beyond, the elimination of that clause will lead IHS to return to its former pre-2012 practice. We respectfully suggest that the Subcommittee ask IHS to report on its progress in eliminating the grant funding mechanism and in adding contract support costs to administer these precious funds.

I thank the Subcommittee for the opportunity to provide this testimony on behalf of the National Tribal Contract Support Cost Coalition.