

**HOUSE COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON INTERIOR, ENVIRONMENT, AND RELATED AGENCIES
CONCERNING THE FISCAL YEAR 2021 BUDGET FOR THE IHS AND BIA**

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(revised)**

My name is Lloyd Miller and I serve as legal counsel to the National Tribal Contract Support Cost Coalition. The Coalition is a voluntary organization of 20 Tribes and inter-tribal organizations across 11 States. Collectively, these tribal organizations operate over \$500 million in IHS and BIA contracted programs on behalf of over 250 Native American Tribes. I am pleased to submit this written testimony for the Coalition to address fiscal year 2021 contract support cost issues in the Indian Health Service and Bureau of Indian Affairs budgets.¹

The Coalition was launched in 1996 to press Congress and the agencies to honor the Government’s legal obligation to add contract support cost funding to every contract and compact awarded under the Indian Self-Determination Act. During the same period, tribal members of the Coalition carried on massive litigation—pressing multiple cases that eventually resulted in two Supreme Court decisions cementing the federal government’s duty to pay these costs in full.² Ultimately, Treasury ended up paying some \$2 billion in damages to the Tribes for broken contract promises, some stretching back 20 years.

Adjusting to the legal regime in the wake of the *Cherokee* and *Ramah* cases wasn’t easy. Initially the agencies tried to roll back these courtroom victories by pushing for destructive appropriations riders. In FY 2014, their failure to work with this Committee led IHS to undertake a massive reprogramming of agency funds to meet current year contract obligations. But after that unfortunate experience, the House and Senate appropriations committees worked closely and creatively with the Tribes and OMB to develop and later refine a new and uncapped appropriation to address contract support cost requirements. Today, the risk of insufficient appropriations to pay the Tribes is gone, and for that we thank this Committee.

Unfortunately, other problems persist. I will turn to those now.

¹ The Coalition members are 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 (OK), Choctaw Nation (OK), Citizen Potawatomi 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), Muscogee (Creek) Nation (OK), 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).

² See *Cherokee Nation v. Leavitt* (2005) and *Salazar v. Ramah Navajo Chapter* (2012).

Payment delays and underpayments. The BIA and the Office of Self-Governance seem structurally incapable of making timely payments to the Tribes. Although delays in regular contract payments are rampant, delays are especially severe when it comes to contract support costs. Government contractors are routinely paid on a timely basis. Yet, tribal governments are left to wait months, even years, before they receive their payments. Today, five months into the new fiscal year, the BIA and OSG have still not paid many Tribes—and possibly not paid most Tribes—*any* contract support cost amounts to operate their FY 2020 contracts and compacts.

Worse yet, the BIA and OSG have still not paid many Tribes in full *for FY 2019*. At issue are substantial portions of the Tribes’ CSC obligations, and not mere post-year reconciliations. OSG, in particular, is far behind in making 2019 payments, although the BIA is also far behind. Some Coalition member Tribes have yet to receive full payment from the BIA for 2018, and *some underpayments reach as far back as 2015*.

The Coalition respectfully asks this Committee to charter a task force to develop regulatory and legislative solutions to these persistent BIA and OSG payment problems. Interior should also be required to promptly report in writing to this Committee (and to the Tribes) on the status of the BIA’s and OSG’s FY 2019 and FY 2020 payment obligations to the Tribes.

Nonexistent or delayed agency reporting. It has been years since the BIA honored Congress’s directive for an annual written report on contract support cost obligations. This is so, even though the annual reporting mandate is unmistakable in Section 105(c) of the Act: “Not later than May 15 of each year, the Secretary *shall* prepare and submit to Congress an annual report” *See* 25 U.S.C. § 5325(c).

For IHS, the problem is delay. Although annual reporting is mandatory, not until May 2019 did IHS submit its reports to Congress for fiscal years 2016 and 2017 (posting them that month on its website). The more recent IHS report for fiscal year 2018 was more timely, but still posted 19 months after the May 2018 statutory deadline (in November 2019). While we salute IHS for doing better, timely reporting needs to be a higher priority.

Annual contract support cost reports are vital not just for Congress but for the Tribes too. After all, CSC dollars are obligations to the Tribes—none are for agency programs. Only by seeing these reports can the Tribes learn how each agency is managing this important account. In the past, reports have often disclosed errors in tribal payments (sometimes also leading to corrective action). These reports have also revealed systemic agency shortcomings, such as inconsistent practices across Areas or Regions, as well as inconsistent practices between contracting and compacting Tribes. Transparency and regular reporting are essential for self-governance to succeed and to honor the agencies’ government-to-government obligations to the Tribes. If Congress and the Tribes are to have effective oversight of a collective \$1,091,000,000 account, timely reports are essential.

The Coalition respectfully requests that the Committee direct the BIA to promptly provide FY 2017 and FY 2018 reports to Congress and the Tribes, that IHS and the BIA expedite their preparation of their FY 2019 reports (due last May), and that the agencies timely honor their statutory reporting duties for FY 2020 and future years.

The Coalition also respectfully requests that the agencies be required on a semi-annual basis to update their reports for specific fiscal years, because both agencies continue making payment adjustments for up to 5 years.

Establishment of a permanent appropriation account for CSC. The Committee is, of course, well aware that contract support costs are a mandatory obligation of the United States. As a result, when CSC payments are placed inside the agencies' annual discretionary appropriation, this Committee's ability to address other agency needs is severely restricted.

The Coalition therefore supports the enactment of legislation establishing a permanent and indefinite appropriation for contract support cost payments.

(For the same reason, the Coalition supports identical treatment of tribal lease payments made under the mandatory authority of section 105(l) of the Indian Self-Determination Act (25 U.S.C. § 5324(l)). Such payment obligations, mandated by law, should be set off in the mandatory side of the Federal budget so they are no longer a burden on limited discretionary appropriations.)

CSC payments on Substance Abuse and Suicide Prevention (SASP), Domestic Violence Prevention Initiative (DVPI) and similar appropriations accounts. Prior to FY 2012, IHS transferred these types of accounts to Tribes through their compacts and contracts. CSC requirements were calculated, though for the most part in this pre-*Ramah* era IHS failed to pay them. But ironically, just months after the Supreme Court *Ramah* decision in 2012, IHS reversed course and demanded new grant instruments for these funds.

Today, Tribes must cut into very limited program accounts to cover program administration costs (such as accounting, hiring, facility and auditing costs). Tribes continue to struggle with the Nation's highest rates of substance abuse, domestic violence and suicide than the general population, so it is essential that they receive necessary CSC funding in order that scarce program funds are not diminished to cover unavoidable administrative costs.

Further, employing unnecessary grant instruments and grant reporting conditions and the like simply perpetuates a whole agency grant administration bureaucracy. This can be avoided (or at least diminished) by placing these accounts into tribal contracts and compacts.

Two years ago, the Committees pressed IHS to return to the prior practice of transferring these and similar funds through compacts and contracts.³ IHS eventually launched—but then

³ See 164 Cong. Rec. at H2629 (daily ed.) (Mar. 22, 2018) (Joint Explanatory Statement to the FY 2018 Appropriations Act) (“*ISDEAA Contracts*.-The Committees encourage the transfer of amounts provided to tribal organizations for the Substance Abuse and Suicide Prevention Program, for the Domestic Violence Prevention Program, for the Zero Suicide Initiative, for aftercare pilots at Youth Regional Treatment Centers, and to improve collections from public and private insurance at tribally-operated facilities to such organizations through Indian Self-Determination Act compacts and contracts, and not through separate grant instruments. This will ensure that associated administrative costs will be covered through the contract support cost process.”)

stalled—a tribal consultation process to explore the issue. Last December the Committees directed IHS to complete the process by next month.⁴

If IHS fails promptly to act and to reform the process for awarding these accounts, the Coalition respectfully requests that the Committee include bill language for 2021 *mandating* the transfer of these accounts to Tribes through their contracts and compacts.

Tribal consultation and engagement. Both the BIA and IHS are required to meet annually with the Tribes under the auspices of each agency’s Contract Support Cost Work Group. Only the BIA (not IHS) convened its CSC Work Group in 2019 (but not in 2018, when errors were made to the BIA’s Manual provisions addressing CSC Policy). The last CSC Work Group meeting with IHS was held in March 2018, and a subsequent Work Group conference call was limited to discussing IHS’s unilateral decision to change the IHS CSC Policy in one manner that the Tribes opposed.

Just as is the case with CSC reporting, active engagement and consultation with the Tribes is not only essential for an effective and open government-to-government relationship; it is also essential for identifying problems and developing collaborative tribal-federal solutions.

The Coalition therefore respectfully requests that the Committee direct IHS and the BIA to convene their respective CSC Work Groups on an annual basis, as mandated by each agency’s Manual.

Thank you for the opportunity to offer this testimony on behalf of the National Tribal Contract Support Cost Coalition.

⁴ 165 Cong. Rec. H10316, H11295 (daily ed. Dec 17, 2019) (Managers’ Explanatory Report on H.R. 1865, the Further Consolidated Appropriations Act, 2020) (“IHS is finishing Tribal consultation for the substance abuse, suicide prevention, and domestic violence funding and the Service is urged to complete this phase of the process within 90 days of the date of enactment of this Act so that funds can be distributed expeditiously.”)