

**HOUSE COMMITTEE ON APPROPRIATIONS  
SUBCOMMITTEE ON INTERIOR, ENVIRONMENT, AND RELATED AGENCIES  
CONCERNING THE PRESIDENT'S 2019 BUDGET REQUEST  
FOR THE BIA AND IHS**

**Testimony of Melanie Fourkiller  
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May 9, 2018**

My name is Melanie Fourkiller. On behalf of the National Tribal Contract Support Cost Coalition (NTCSCC), I am pleased to submit written testimony concerning the FY 2019 budget for the Indian Health Service (IHS) and Bureau of Indian Affairs (BIA). The Coalition is comprised of 21 Tribes and tribal organizations situated in 11 States, including my own tribe the Cherokee Nation, and the tribe I work for, the Choctaw Nation. Collectively, these 21 tribal organizations operate contracts to administer roughly \$500 million in IHS and BIA programs on behalf of over 250 Native American Tribes.<sup>1</sup>

The NTCSCC 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.

Over the past year, the IHS and BIA have been implementing their new CSC policies for calculating and reconciling CSC payments. These policies were developed in the wake of two Supreme Court cases which declared that full contract support cost funding is a statutory right, and this Subcommittee's excellent work to cement those hard-fought victories by putting in place an annual indefinite appropriation. The days of unpredictable payments and uncertain program funding levels are behind us, and we thank Congress for working in partnership with Tribes to achieve this result. Clearly Congress supports tribal self-governance, tribal self-determination, and the importance of working with tribes on a government to government basis.

But over the past year, we have been concerned that IHS at times has not shared Congress' goals. A few examples illustrate this point well.

Up until 2012, IHS routinely transferred certain funding to Tribes through our self-governance compacts and self-determination contracts. I am talking principally about Methamphetamine and Suicide Prevention Initiative Funds (MSPI) -- now called Substance

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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).

Abuse and Suicide Prevention Funding (or SASP) -- and Domestic Violence Prevention Initiative Funding (DVPI). During this period, IHS also calculated contract support cost requirements on these funds, even if IHS didn't always find the money to pay those costs.

But ironically, just months after the Supreme Court ruled in *Salazar v Ramah* that tribes were entitled to these costs in full as a matter of law, IHS under former Director Roubideaux reversed course. Director Roubideaux announced that these funds were suddenly only be paid through grants, and no contract support costs would be added to carry out these critical programs. This change caused Tribes to cut into vital program operations to fund the administrative costs of running these programs, including for grant administrators, while adding extraordinary complexity through the parallel grant funding and reporting process. Nationwide, ***IHS's change in position annually reduces behavioral health program funding by 25% from what it would be if full CSC funding were paid.***

In the FY 2017 appropriation, Congress removed the so-called "notwithstanding" clause which IHS had relied upon as justification for sweeping aside the Indian Self-Determination Act, and ignoring that Act's mandate to add CSC funding to all IHS funds. To be sure, Congress expected the agency to use its best judgment in how to allocate this funding among the tribes, but Congress did not expect the agency to continue refusing to pay these funds through existing compacts and contracts, and to continue refusing to add contract support costs to these funds.

Yet, in this last funding cycle, that is exactly what IHS did again. Nothing changed. In fact, things got worse as the use of grants proliferated. In a February 16, 2018 letter IHS was unmoved by Congress's action, saying "***IHS reaffirms its position that grants, including the IHS SASP and the DVPP, are not eligible for CSC.*** Grants are not programs, functions, services, or activities (PFSAs) funded through the Secretarial amount, as defined by the ISDEAA." We are therefore particularly grateful for Congress's action in the Omnibus Appropriations Act for FY 2018. In the Manager's Report accompanying the Act, Congress was clear as a bell:

**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.***

As of this date, we have still not heard whether IHS will abide by Congress's instruction. It would be most unfortunate if yet another round of contract support litigation became necessary to bring IHS to heel.

IHS has also disrespected the government-to-government relationship when it comes to setting contract support cost policy. In December 2017, IHS defied its own Manual mandating that advance tribal consultation must occur before any change could be made about CSC policy.

With no notice whatsoever, IHS announced it was immediately suspending a key provision for calculating CSC deductions for so-called duplicate Service Unit funding (Service Unit funding that IHS asserts goes toward administrative overhead). In February 2018, IHS refused to budge, and in March IHS explained at a CSC Work Group meeting that the actions had been taken because of illegal overpayments to various tribes. But when we examined IHS's "data," we learned—and IHS admitted—that no overpayments had occurred, and that only one tribe—not a multitude of tribes—had even raised an issue of concern to IHS. Eventually the tribal work group members worked through a Policy amendment to address IHS's obscure concern. But it was a bitter lesson about how far IHS will go in derogation of the government to government relationship—claiming an emergency requiring action when, in fact, there was no emergency at all.

And to make matters worse, when IHS did eventually announce tribal consultation, it included multiple other language "options" IHS had developed unilaterally without any tribal input that IHS is considering adding to the Policy instead of that jointly developed by the Workgroup. These IHS options attempt to limit the rights of Tribes that had been preserved in the original policy.

A last example of IHS's continuing disregard for the law is its attitude about "duplication." Again, it is bitterly ironic that, just when we've entered the era of full CSC funding, IHS chooses to adopt an aggressive position that tribal CSC payments are actually too high. IHS today asserts in various negotiations that CSC payments cannot cover all manner of costs if the Secretarial program amount could lawfully have been spent on that those costs were the program being run by IHS. This position is extreme and would wipe out most CSC funding. When IHS asserted this position to refuse to pay some facility costs, the Citizen Potawatomi Nation sued in federal court and in short order IHS folded. Yet IHS continues to raise this issue in other settings, and less assertive Tribes are losing out in the process.

This agency attitude is all wrong. IHS should be defending and advancing self-governance and self-determination; not trying to find new and creative ways to undermine it.

Going forward, we hope the Subcommittee will instruct IHS—once again:

- to pay all IHS funds (other than the Special Diabetes grants controlled by other law) through ISDA compacts and contracts. The practice of using grants much stop;
- to return to its core mission of supporting Tribes in achieving greater self-determination and self-governance;
- to conduct itself honorably and with due regard for the government to government relationship.

More generally, IHS must abandon the invention of ever new theories for reducing contract support cost requirements, and refocus its efforts on supporting tribes to provide better and expanded health care for their citizens.

More broadly, we bemoan the complexity of the IHS process, which has created a considerable and unsustainable bureaucracy backed by high-priced non-government accountants and auditors. Somehow the BIA system, which annually pays out some \$300 million dollars in contract support costs, works just fine at a fraction of the cost and with far many more contracts and tribal contractors.

The BIA genuinely embraced the Committee's instructions three years ago to adopt policies that are simple and straightforward, and to streamline the process for determining and reconciling contract support cost requirements. Tribes and agency personnel, alike, easily understand the BIA's new policy, and the BIA's simple approach leads to accurate CSC estimates. It also doesn't require extensive training, and therefore has already led to improved agency business practices.

The IHS approach, by contrast, seems to strive for maximum complexity. Consider that today, halfway through FY 2018, IHS has yet to make all CSC payment adjustments for FY 2017. In fact, **IHS hasn't made all its CSC payment adjustments for 2016, 2015 and even 2014.**

The IHS Policy is terribly over-complicated. It 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 apparently still has only one staff person across the entire country who can answer policy questions and guide the agency's policy interpretation. The agency's approach to training on the new policy is also telling—instead of partnering with Tribes that asked to be involved, IHS developed a series of YouTube videos that completely ignore the tribal position on “duplication” and “allocation” issues. The result is even more conflict in individual negotiations.

As the Subcommittee is well aware, the policy is so complicated that IHS personnel were unable to get a firm grasp on CSC calculations last year, overstating the national CSC requirement by \$90 million. Clearly, the agency's failure to simplify the CSC calculation process is impacting IHS, too.

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.

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