

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

CONCERNING THE FISCAL YEAR 2024 BUDGET FOR THE INDIAN HEALTH SERVICE AND THE BUREAU OF INDIAN AFFAIRS

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The National Tribal Contract Support Cost Coalition is a voluntary organization of 20 Tribes and inter-tribal organizations located across 11 States.² Together these tribal organizations operate several hundred million dollars in Indian Health Service and Bureau of Indian Affairs programs on behalf of over 250 Native American Tribes. We submit this testimony on behalf of the Coalition to address recent contract support cost issues.

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 this same period, Tribes across the country carried on massive litigation—filing multiple cases that eventually resulted in two Supreme Court decisions cementing the Government’s duty to pay these costs in full: *Cherokee Nation v. Leavitt* (2005) and *Salazar v. Ramah Navajo Chapter* (2012). Ultimately, Treasury ended up paying nearly \$2 billion in back damages for broken contract promises to the Tribes. Simultaneously, this Committee adjusted the appropriations process to recognize the mandatory nature of these contract payments. Today, the risk of insufficient appropriations to pay the Tribes is largely gone, and for that we thank this Committee.

Still, challenges remain and it is to those challenges which we now turn.

The Reconciliation Process and Difficulties with Current Bill Language

Current bill language is significantly different for the IHS and BIA contract support cost line-items. Current bill language for the BIA (but not IHS) states that CSC appropriations shall only be “available for obligation” during the current fiscal year, impeding the ability to access

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² 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).

the appropriation to reimburse additional audited amounts that may be due after the fiscal year has closed.

Conversely, bill language for IHS (but not the BIA) states that unspent funds “shall be applied to contract support costs due” in “subsequent years”—necessitating an additional process to determine exactly how much is available to cover a future year’s CSC obligation. This language may be responsible for the fact that over the years IHS has built up a massive post-fiscal year “reconciliation” process that leaves the books open on every tribal contract until audits and indirect cost rate agreements for each year are completed.

The IHS reconciliation process is contrary to standard practice for calculating and paying contract support costs in the first place. Both agencies calculate and pay contract support costs—mostly indirect costs—based on an indirect cost rate that may be no more than 3 years old. This requires the use of recent data, but provides flexibility in case audits are late, or the rate making agencies are late (which often happens). Either way, the goal should be to pay contract support costs based upon the best available data, and then to move on to the next year (as the BIA does). IHS’s “reconciliation” practice does not facilitate tribal self-determination and self-governance, and each year it costs millions of dollars in man-hours for the agency and the Tribes combined. It also complicates Tribal accounting and indirect cost negotiations as adjustments are made years later, after the books are already closed and final rates have been negotiated.

Attached to this testimony is suggested bill language that would (1) make the two contract support cost provisions uniform, and (2) eliminate the need for any reconciliation process. The solution is simple: provide that excess funds (if any) are to remain available to Tribes until expended. In an environment where the IHS appropriation alone falls some \$50 billion short of actual need, no one should be concerned with small additional amounts being available to the Tribes. Further, the proposed language will not prevent either party to these contracts from filing claims against the other where there is a basis for such claims, and where informal mechanisms prove unsuccessful to resolve differences. Further, the indirect cost rate making process itself will adjust for underpayments and overpayments.

Whatever solution the Committee chooses, **the Coalition implores the Committee to end the crippling, years-long IHS reconciliation process, so that Tribes negotiating CSC payments in 2024 are not also engaged in reconciling payments for 2023, 2022 and 2021 (which currently happens).** The BIA sees no reason to undertake such reconciliations, and neither should IHS.

Last, the **Coalition requests that the IHS contract support cost and section 105(I) lease accounts be moved to the mandatory side of the budget** to ensure these vital operational funds remain available and are timely paid.

Payment Delays

The BIA and the Office of Self-Governance habitually violate disbursement of timely payments to compacting and contracting Tribes, especially 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. This past year, one Region failed to make any CSC payments to its Tribes. Meanwhile, OSG holds back what should be recurring indirect cost payments until late in the fiscal year, then threatens Tribes with no payment if information requested in August is not promptly provided.

This is unacceptable. Contract support costs—overhead costs—are an ongoing cost that should be paid out to the Tribes as early in the fiscal year as possible, along with program dollars. The era of delayed payments must come to an end, and the solution cannot be to force Tribes to file even more claims (this time under the Prompt Payment Act).

As we did two years ago, the Coalition respectfully asks this Committee to charter a task force to develop regulatory (and, if necessary, legislative) solutions to persistent BIA, OSG and IHS payment delays. Interior in particular 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 2022 and FY 2023 CSC payments.

IHS Misconduct in Reducing CSC Payments

The Coalition is concerned with recent actions by IHS staff that were eventually overturned, but only after a federal court intervened. In *Fort Defiance Indian Health Board v. Becerra*, 604 F.Supp.3d 118 (D. NM 2022), IHS cut a tribal contractor's CSC FY 2022 payments by 95%-- nearly \$17 million—arguing that historic overpayments had occurred in light of another court decision known as *Cook Inlet Tribal Council v. Dotomain*, 10 F.4th 892 (D.C. Cir. 2021). The federal judge ruled that existing law prohibits contract reductions of this kind, and disagreed with the *Cook Inlet* decision addressing how to determine when a CSC cost has already been covered by a program cost. When IHS tried another 95% cut for FY 2023, the Department's own hearing officer reversed the decision. Thanks to a settlement announced last month, hopefully this matter is resolved for Fort Defiance, but it demonstrates how destructive agency staff or lawyers can be when devising new contract support cost theories.

To prevent this from happening to another Tribal contractor, the Coalition is hopeful that Congress will soon legislatively overrule the *Cook Inlet* decision with enactment of a bipartisan bill, H.R. 409. If this occurs, audited and reimbursable contract support costs will no longer be denied (such as the facility costs that were categorically denied in *Cook Inlet* or the \$17 million denied in *Fort Defiance*).

The Coalition is encouraged by the new IHS Director's commitment to lifting Tribes up to maximize tribal self-determination and reduce litigation with contracting and compacting Tribes. With a congressional fix and this new commitment, we remain optimistic for the future.

Remaining Issues

A number of other issues warrant brief comment.

- Neither agency is honoring its duty to timely report to Congress on the execution of its contract support cost obligations. This duty is set forth in 25 U.S.C. §

5325(c). IHS and BIA reports are several years behind. Reporting assures accountability and oversight of government appropriations. **The Coalition requests that the Committee reinforce the agencies' contract support cost reporting obligations to Congress and to the Tribes.**

- The IHS practice of awarding new Indian health funds as grants instead of adding them to existing contracts and compacts—bypassing the ISDA's contract support cost obligation—must end. Prior to FY 2012, IHS transferred earmarked funds to address substance abuse and domestic violence through compacts and contracts. CSC requirements were calculated. But ironically, just months after the 2012 Supreme Court decision in *Ramah* upholding tribal rights to contract support costs, former IHS Director Yvette Roubideaux reversed course and demanded that grant instruments be used. Denied contract support costs, the effect was to force immediate program reductions to cover overhead costs.

Today, Tribes must cut into these and other program accounts to cover overhead costs (such as accounting, hiring, facility and auditing costs). Tribes continue to struggle with the Nation's highest rates of substance abuse, domestic violence, opioid addiction, methamphetamine addiction and suicide than the general population. It is essential that Tribes receive CSC funding support so that scarce program funds are not diminished to cover unavoidable administrative costs.

Five years ago the Committee pressed IHS to return to the prior practice of transferring these and similar funds through compacts and contracts. IHS launched, stalled, then relaunched a tribal consultation where tribes overwhelmingly supported using compacts and contracts for these funds. Yet, nothing changed. **The Coalition respectfully requests that the Committee add bill language for 2022 mandating the transfer of substance abuse, opioid, domestic violence, suicide prevention, and related targeted funds to Tribes through ISDA contracts and compacts.**

- The coalition brings to the Committee's attention the ongoing dispute between Tribes and IHS over the duty to reimburse contract support costs associated with the portion of contracted program operations funded with third-party collections from Medicare, Medicaid and private insurance. The Ninth Circuit Court of Appeals recently disagreed with the D.C. Circuit and concluded that the statutory mandate to reimburse contract support costs applies to such program operations. Compare *San Carlos Apache Tribe v. Becerra*, 53 F.4th 1236 (9th Cir. 2022) with *Swinomish Indian Tribal Cmty. v. Becerra*, 993 F.3d 917 (D.C. Cir. 2021). Although third-party revenues tend to be spent on major equipment purchases, construction, and renovation projects which generally do not generate contract support cost reimbursements, there is likely to be some impact on the contract support cost line if the tribal position is sustained in the courts.

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