
NATIONAL TRIBAL CONTRACT SUPPORT COST COALITION

HEARING BEFORE THE HOUSE SUBCOMMITTEE ON INTERIOR, ENVIRONMENT,
AND RELATED AGENCIES ON THE FY 2011 BUDGET

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My name is Lloyd Miller. I am a partner in the law firm of Sonosky, Chambers, Sachse, Endreson & Perry, LLP of Washington D.C. and I serve as counsel to the National Tribal Contract Support Cost Coalition, comprised of 16 Tribes and tribal organizations situated in 10 States and collectively operating contracts to administer over \$414 million in IHS and BIA programs. I am here to discuss the legal duty and urgent need to fully fund the “contract support costs” that are owed these and other Tribes performing contracts and compacts on behalf of the United States.

Since the “contract support cost” issue arises in the context of the 1975 Indian Self-Determination Act, it is perhaps best understood in the context of what came before and after that Act. As the Committee is well aware, for much of the nineteenth and twentieth centuries tribal governments were marginalized and suppressed, and on occasion altogether extinguished, by a succession of deeply ill-conceived federal policies. By the late 1960s, so subjugated were tribal communities that hardly anything remained under the control of their governments. The BIA and IHS controlled every aspect of reservation life, from where children were schooled, to what they spoke, to what crimes were prosecuted, to who would and would not receive health care, to where and under what conditions the dead would be buried. The tribal governments that were active were often forced to be the BIA’s agents, compelled to sign documents whenever the call came. In short, by the late 1960s the Federal Government had taken control of virtually all essential governmental services in Indian country, and the BIA and IHS maintained tribal communities in a perpetual state of dependence.

I mention this past because soon it would all change. Pressed by the civil rights movement, Presidents Kennedy, Johnson and Nixon gradually developed a very radical new direction in Indian affairs. In 1970 President Nixon formally called upon the BIA and IHS to release their grip on tribal communities, and to facilitate the return to the Tribes of their rightful role as the governments of and by their people, providing for themselves the essential governmental services that for too long the BIA and IHS had controlled from this distant Capitol. Five years later Congress responded by enacting the Indian Self-Determination and Education Assistance Act of 1975.

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No single enactment has had a more profound effect on more tribal communities than has the Indian Self-Determination Act. In virtually the blink of an eye, Tribes and inter-tribal organizations began seizing control of the BIA and IHS, taking over the administration of vast areas including 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 each agency (either individually or as part of an inter-tribal consortium). From their humble beginnings in 1975, today the Tribes administer over **\$2.82 billion** in essential governmental functions that have been transferred under self-determination contracts and self-governance compacts, employing an estimated 35,000 people.

In the IHS Aberdeen Area, over 20% of the IHS budget is under contract to the Tribes. In Alaska, 100% of the IHS budget and most of the BIA budget has been contracted out to the Tribes. From the Navajo Nation to the Pacific Northwest to California to the Eastern Seaboard, Tribes in 35 States have demanded their self-determination rights and secured control over IHS and BIA programs.

The ISDA has by any measure been a success unprecedented in the history of America's relations with its Tribes. It has served not only to shift back to the Tribes the primary role of controlling and administering essential governmental services, but to reinvigorate those Tribal governments so that they would be in a position to engage in meaningful economic and resource development to better their communities.

But as a 1987 Senate committee noted—and as four successive amendments attest—it has not all been smooth sailing. Predictably, at first the agencies fiercely resisted relinquishing control and funding to the Tribes. Later, a larger issue rose up as the “single most serious problem with implementation of the Indian self-determination policy.” And that was both agencies' failure to pay their full “contract support costs” obligations.

“Contract support costs” are the necessary costs of operating a federal program under contract. After all, when the BIA and IHS operate these programs, the agencies have the benefit of their own massive bureaucracies to support the programs with personnel and financial management systems, legal resources, procurement systems and the like, both from within their two Departments and from other departments like the General Services Administration and the Office of Personnel Management. So, too, tribal contractors require similar resources to properly carry out the contracted programs. Moreover, Federal law demands more of the tribal contractors, such as annual independent audits, reporting requirements and workers' compensation and other insurance. For the most part these fixed contract support costs are set by government-issued indirect cost rates. The rates are based upon certified independent audits, and the costs are then reaudited once each contract year is over. (Indirect cost rates are a common feature of government contracting generally.)

These costs are the fixed costs which tribal contractors must incur, which the agencies under the law are required to reimburse in full—but which the agencies have historically failed to pay in

full. As a result, tribal contractors have been left with no choice but to cut program positions and services and thus divert program funds to pay the contract costs that the agencies' should have paid. Although Congress 23 years ago directed that the agencies "must cease the practice of requiring tribal contractors to take indirect costs from the direct program costs, which results in decreased amounts of funds for services," S. Rep. No. 100-274, at 9 (1987), today the practice continues.

For instance, from 2000 to 2008 (and with one exception for the BIA only), President Bush failed to request any funds to make for up the contract support cost shortfall—even after the Supreme Court in the 2005 Cherokee Nation case held that these contract amounts by law must be paid. President Obama has set a decidedly different course, and thanks to this Committee's leadership Congress recently enacted increases of \$116 million for IHS contract payments and \$18.6 million for BIA contract payments. Even still, this year IHS will fall short of its contract support cost obligations by an estimated \$105 million, and the BIA will fall short by \$64 million.

The President's Budget for FY 2011 once again proposes serious increases for both IHS and the BIA, increases which the Coalition certainly supports. But it must be pointed out (as the Budget Justification explains) that the \$45 million increase requested for IHS will only be sufficient to cover the increased contract support cost requirements associated with the program increases being proposed in the Budget. Not one penny will be available to pay down the **\$105 million** historic IHS shortfall. While the \$21.5 million increase for BIA contract payments will actually reduce a substantial portion of the BIA's historic shortfall, there, too, a significant shortfall of **\$46 million** will nonetheless remain.

Ideally, these shortfalls should at long last now be eliminated. But if that is not feasible in the current budget environment, then the Coalition requests that sufficient increases over the President's proposed Budget be made to close the gap in three years for the IHS (representing an additional **\$35 million** per year) and in two years for the BIA (and additional **\$23 million** per year).

The status quo is not acceptable for many reasons. First, in the absence of any increase, the combined projected contract support cost shortfall in FY 2011 will be nearly \$220 million for the two agencies. Since the Tribes have to cover that shortfall through continuing program reductions, the Tribes will have only \$2.6 billion to carry out their contracted \$2.82 billion programs for their communities. In contrast, paying the full shortfall would permit Tribes to restore over 4,000 jobs in these programs at a time of urgent national economic crisis.

Second, the *status quo* penalizes Tribes for their self-determination contracting activities, an inequity Congress should not permit to continue. Today, a \$1 million IHS-operated clinic has \$1 million to employ staff and serve the local community. But a \$1 million tribally-operated clinic on average has only \$800,000 to serve the same community. The same is true of the BIA. It is a cruel and unfair burden imposed on the very tribal communities that seek greater tribal self-determination.

Third, the continuing shortfalls have all but brought to a halt forward progress under the ISDA. For years, new contracting activities have slowed to a trickle, and each agency is stuck at no

more than 60% of its budget operated by Tribes. This is not a product of Tribes not wanting to contract more of those agencies' operations—witness the Standing Rock Sioux Tribe or the Shoshone-Paiute Tribes, each of which has expressed an interest in expanding their contracts to cover, respectively, an IHS clinic and a BIA roads program, but neither of which can afford to operate those contracts with no contract support costs. The Southern Ute Tribe is mired in litigation over the operation of its IHS clinic, again because of conflicts over contract support costs. Although three years ago the Cherokee Nation contracted to operate the IHS Tulsa Hastings Hospital, the Cherokee Nation is still not receiving any contract support for those operations, and its contract actually acknowledges that program funds are being diverted to make up for the difference.

Fourth, investing funds here is wise. No part of the IHS or BIA budgets is more highly scrutinized than funds awarded under these contracts. There is a transparency and accountability here that is unrivaled in other government contracting work.

Fifth, fully paying CSCs is legally required. In Cherokee Nation the Supreme Court admonished that these contracts are no less enforceable than other government contracts, and the government is ordinarily liable even if it has insufficient funds to pay all of the contracts it has made. Indeed, section 106(g) of the ISDA expressly commands that the Secretary “shall add the full amount” of contract support and program funds to every contract. It is not a matter of writing a better law; it is a matter of honoring the law that Congress has already written.

Finally, it is a stain on America when the Nation honors to the penny all other government contracts, even when honoring those contracts demands supplemental appropriations, but not contracts with Indian Tribes. As much as law, policy, fairness and good sense, the Nation's honor demands that these contracts be paid in full for services duly rendered to the United States.

In addition to these recommended funding levels, the Coalition recommends that the Committee require each agency to consistently project and budget for the budget year additional CSC requirements associated with new contracts and program expansions (on average, 13.5 cents for each new IHS dollar, and 10.4 cents for the BIA). The IHS did this in FYs 2010 and 2011, but the BIA did not. Also, both agencies must calculate the projected shortfalls using the best available estimates for the budget year. Because the BIA used 4 year old numbers, it incorrectly stated that the proposed budget will fund CSCs at 94% of need, when in fact it will fund only 80%. Finally, the Committee should reconcile the different language used in the IHS and BIA portions of the bill, eliminate old “section 314” (a useless provision after the Cherokee case), and assure each agency has an ISD Fund within the overall CSC appropriation. Proposed language is attached to this testimony.

Thank you again for the opportunity to offer these recommendations.

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SUGGESTED CHANGES TO IHS AND BIA BILL LANGUAGE REGARDING CONTRACT SUPPORT COSTS

IHS Language:

Provided further, That, notwithstanding any other provision of law, of the amounts provided herein,

not to exceed [\$398,490,000] \$444,332,000

shall be for payments to tribes and tribal organizations for contract or grant support costs associated with contracts, grants, self-governance compacts, or annual funding agreements

between the Indian Health Service and a tribe or tribal organization pursuant to the Indian Self-Determination Act of 1975, as amended, prior to or during fiscal year [2010] 2011,

of which not to exceed [\$5,000,000] \$10,000,000 may be used for contract support costs associated with new or expanded self-determination contracts, grants, self-governance compacts, or annual funding agreements

BIA Language:

and of which, notwithstanding any other provision of law, ~~including but not limited to the Indian Self-Determination Act of 1975, as amended,~~

not to exceed [\$166,000,000] ~~\$187,526,000~~
\$192,526,000

shall be ~~available~~ for payments for contract support costs associated with ongoing contracts, grants, compacts, compacts, or annual funding agreements entered into

~~between with~~ the Bureau of Indian Affairs ~~and a tribe or tribal organization pursuant to the Indian Self-Determination Act of 1975, as amended,~~ prior to or during fiscal year [2010] 2011, as authorized by such Act

~~, of which not to exceed \$5,000,000 may be used for contract support costs associated with new or expanded self-determination contracts, grants, self-governance compacts, or annual funding agreements~~

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