

# CONTRACT SUPPORT COSTS WITHIN THE INDIAN HEALTH SERVICE AND THE BUREAU OF INDIAN AFFAIRS (PART II)

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## HEARING BEFORE THE COMMITTEE ON RESOURCES HOUSE OF REPRESENTATIVES ONE HUNDRED SIXTH CONGRESS FIRST SESSION

AUGUST 3, 1999, WASHINGTON, DC

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# **CONTRACT SUPPORT COSTS WITHIN THE INDIAN HEALTH SERVICE AND THE BUREAU OF INDIAN AFFAIRS (PART II)**

**TUESDAY, AUGUST 3, 1999**

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON RESOURCES,  
*Washington, DC.*

The Committee met, pursuant to call, at 11:09 a.m. in Room 1324, Longworth House Office Building, Hon. Don Young [chairman of the Committee] presiding.

The CHAIRMAN. The meeting will come to order.

## **STATEMENT OF HON. DON YOUNG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALASKA**

The Committee is meeting today to hear testimony on contract support costs within the Indian Health Service and Bureau of Indian Affairs.

Under rule 4(b) of the Committee rules, any oral opening statements at hearings are limited to the Chairman and the Ranking Minority Member. This will allow us to hear from witnesses sooner and help members keep up with their schedules. If other members have statements, they can be included in the hearing record, under unanimous consent.

I would especially like to extend my welcome to all of my Alaskan constituents.

I would especially like to thank everyone for their help and support during the debate on the Interior appropriations bill on the House floor three weeks ago. With your help, we were able to strike out the pro-rata language in the Interior appropriations bill for fiscal year 2000.

We held our first hearing on contract support costs on February 24, 1999, accepting testimony from the tribes and the administration. This Committee sent additional questions to the administration and directed the tribes to meet with the administration and to come up with permanent solutions for contract support costs.

Additionally, the Interior Appropriations Subcommittee requested a report from the General Accounting Office regarding contract support costs to provide Congress alternatives to existing problems.

Today, we will hear the administration's recommendations with regard to contract support costs. We will also hear from NCAI and their work with the National Policy Work Group on Contract Support Costs and their recommendation. Lastly, we will hear from the



GAO and their final report to Congress and what alternatives they recommend with regard to contract support shortfalls.

Once we have reviewed the recommendations, the Committee will make a final decision on how to proceed with the permanent solution with shortfalls and contract support costs.

I would offer my many thanks to the tribes for all of their input and patience in this important manner.

I would also like to suggest one thing. The argument that we have had with the Appropriations Committee, no one has ever addressed the concept of health care. It has always been what to do with the money. I believe that our goal should be to provide the fine health care that has been done in the past and hopefully in the present and will be in the future.

[The prepared statement of Mr. Young follows:]

STATEMENT OF HON. DON YOUNG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALASKA

I would like to extend my welcome to all—particularly my Alaskan constituents. I would especially like to thank everyone for their help and support during the debate of the Interior Appropriations bill on the House floor three weeks ago. With your help, we were able to strike out the pro-rata language in the Interior Appropriations bill for FY 2000.

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Additionally, the Interior Appropriations Subcommittee requested a report from the General Accounting Office regarding contract support costs and to provide Congress with alternatives to the existing problem.

Today, we will hear the Administrations' recommendations regarding contract support costs. We will also hear from the NCAI and their work with the National Policy Work Group on contract support costs and their recommendations. Lastly, we will hear from the GAO on their final report to Congress and what alternatives that they recommend with regard to contract support costs shortfalls.

Once we have reviewed the recommendations, the Committee will make a final decision on how to proceed with a permanent solution to the problem of shortfalls with contract support cost.

My many thanks to the tribes for all their input and patience on this important issue.

**Contract Support Costs Hearing  
Briefing Paper  
August 3, 1999**

Under Section 106(a)(2) of Public Law 93-638, the Indian Self Determination Act, American Indian and Alaska Native tribes are authorized to enter into contracts or compacts with the Indian Health Service(IHS) and the Bureau of Indian Affairs (BIA) to directly administer health care and Bureau of Indian Affairs programs previously administered by the two agencies. Congress strongly advocated this change to allow tribes to provide direct and improved services to their members. Contract support costs is directly associated with administering of these programs and is based on three cost categories: start up costs, indirect costs and direct costs.

**Start-up Costs:** One-time costs incurred in planning and assuming management of the programs. Examples include buying computers and training staff.

**Indirect Costs:** On going overhead expenses, which are often divided into three groups—management and administration, facilities and equipment, and general services and expenses. Management and administration includes financial and personnel management, procurement, property and records management, data processing, and office services. Facility and equipment includes building, utilities, housekeeping, repair and maintenance, and equipment. General services include insurance and legal services, audit, general expenses, interest and depreciation.

**Direct costs:** This category covers such costs as unemployment taxes and workers compensation insurance for direct program salaries.

However, the consistent failure of Federal agencies (IHS and BIA) to fully fund contract support costs has resulted in financial management problems for tribes as they struggle to pay for federally mandated annual single-agency audits, liability insurance, financial management systems, personnel salaries, property management and other administrative costs. Congress must remember that tribes are operating Federal programs and are carrying out Federal responsibilities when they operate self-determination contracts. Tribes, in some instances, have had to resort to using their own financial resources to subsidize contract support costs. It is the Committees' belief, and the House and Senate Interior Appropriations Committees' belief that tribes should not be forced to use their own financial resources to subsidize Federal contract support costs.

At the request of the House and Senate Interior Appropriations Committees' and Committee on Resources, the Indian Health Service increased their contract support costs for FY 2000 by \$35 million. This will bring the funding level of all tribes to 70 percent of negotiated contract support costs. The Congress must remember that in the FY 1999 Interior Appropriations bill, Congress directed the IHS and BIA to put a one year moratorium on new contracts or compacts. This increase of \$35 million reflects the existing, compacts/contracts plus \$15 million for new and expanded contract supports costs projected in FY 2000 at a 70 percent level.

The Bureau of Indian Affairs pro-rates their indirect costs, however, the funding for contract support costs does not include direct costs to tribes. For instance, in FY 1999, the BIA plans to continue not paying any direct contract support costs associated with programs transferred to tribal operation. These direct costs are primarily composed of personnel associated costs including retirement, ESC and Workmen's Compensation etc. Tribes believe that the direct costs paid by the IHS were in fact legitimate and should also be paid by the BIA as well. It is also the belief of the appropriations committees that the BIA and IHS should remain consistent and utilize similar if not, identical systems to pay contract support costs.

Secondly, the progress toward Congressional intent has not been met by the Administration. More than twenty years ago when Congress enacted the Indian Self-Determination Act the express intent was that as tribes and tribal groups contracted for Indian Health Service and Bureau of Indian Affairs programs, there would be a parallel reduction in the Federal bureaucracy and more tribal determination of services options based on local needs and priorities. Tribal administration of these programs has often resulted in substantial additions to available health care services and for more efficient operation of programs. But the parallel reduction in Federal bureaucracy does not appear to have been achieved.

The General Accounting Office (GAO) was asked to submit a report to Congress on the shortfalls of Contract Support Costs needs to be addressed. The GAO recently completed its report to Congress and made the following recommendations (1) The Secretaries of Interior and Health and Human Services should work together to (a) develop a standard policy on funding contract support costs; and (b) ensure that the BIA and IHS correctly adjust funding when tribes use provisional-final rates.

Additionally, the GAO provided four alternatives for Congress to consider (1) Fully fund contract support costs each year; (2) Amend the Act to eliminate the provision requiring that contract support costs be fully funded at 100 percent of the allowable costs identified by BIA and IHS (3) Amend the Act to limit indirect costs by imposing either a flat rate or a capped rate; and (4) Amend the Act to eliminate the provision for funding contract support costs over and above the program base and provide a consolidated contract amount. A representative from the GAO will provide testimony at the hearing and answer Members questions.

Lastly, the National Congress of American Indians National Policy Work Group on Contract Supports Cost is also submitting its report and recommendations to Congress. The Committee directed the tribal leadership to work with the Administration to submit recommendations to resolve the shortfalls in contract support costs.

The Committee conducted its first hearing on February 24, 1999 to accept testimony from the Administration and tribes and plan to provide proposed resolution to the problems associated with contract support costs to the House and Senate Interior Appropriations committees.

Staff contact: Cynthia A. Ahwinona

The CHAIRMAN. With that, I would like to bring up the first panel: The Honorable Kevin Gover, Assistant Secretary of Indian affairs, U.S. Department of Interior, Washington, DC; Mr. Richard G. Sullivan, Senior Negotiator, Division of Cost Allocation, U.S. Department of Health and Human Services, Washington, DC; Dr. Mi-

chael H. Trujillo, Director, Indian Health Service, Rockville, Maryland, accompanied by Mr. Michael Lincoln, Mr. Carl Fitzpatrick, Mr. Douglas Black, and Mr. Ron Demaray.

Would you please take your chairs?

Without objection, I would submit for the record Mr. Miller, the Ranking Minority Member, his opening comments. Without objection, so ordered.

[The prepared statement of Mr. George Miller follows:]

STATEMENT OF HON. GEORGE MILLER, A REPRESENTATIVE IN CONGRESS FROM THE  
STATE OF CALIFORNIA

Mr. Chairman. This is the second hearing we have held this year on the issue of contract support cost under funding. While the hearing in February focused on the breadth of the problem, today's hearing will focus on solutions.

In 1975 I supported enactment of the Indian Self-Determination and Education Assistance Act which authorized, for the first time, Indian tribes to contract with the Secretaries of Interior and Health and Human Services to administer programs and services previously administered by those Departments. I have strongly supported each expansion of that first Act and expect to have my bill, H.R. 1167—the so called "Title V" bill—which would make compacting under the IHS a permanent program, passed by the full House in September. Last year my legislation was bottled up in the Senate based in most part to the issue of how to pay for additional contract support costs. Chairman Young and I have promised that this Committee would look into various solutions and this series of hearings is part of that process.

The current situation where many tribes are only partially funded or not funded at all for these costs is intolerable. The costs do not disappear if funding is not provided but instead tribes are forced to take funds directly from programs and services to their members. The simplest solution is to have Congress appropriate sufficient funding each year to cover all direct and indirect costs related to tribal management of services. Both the House and Senate Appropriations committees, however, have made it clear that they will not appropriate full funding and indeed, have foisted unfair moratorium against new contracts and tried to write legislative language to force the IHS to immediately distribute funding on the pro-rata basis.

I believe the most workable solutions will come from Indian Country as those most directly affected by the shortfalls. I commend the National Congress of American Indians for its work group on contract support costs and look forward to hearing from its president, Ron Allen, as to their findings and recommendations. The NCAI report addresses a multitude of related issues and suggests numerous changes to alter the existing programs. Additionally, the GAO will testify and offer alternatives to the current situation it released through a report in June.

I also want to welcome the rest of the witnesses and especially my old friend Governor Mary Thomas of Gila River. Thank you all for coming today and I look forward to hearing your testimony.

The CHAIRMAN. I believe all of you recognize what that is. I do apologize. This is the most frustrating thing, to try to conduct a hearing. I will go back and return as rapidly as possible. If Mr. J.D. comes back, you have him take it over.

[Recess.]

Mr. HAYWORTH. [presiding.] The Committee will now come to order, pending a unanimous consent request from my good friend from Washington State.

The chair would recognize my friend from Washington State.

Mr. INSLEE. In the spirit of great comity for which this Committee is renowned, I am going to ask for unanimous consent that Congressman Hayworth be permitted to sit on the dais and participate in the hearing and to chair the hearing.

Mr. HAYWORTH. Is there objection?

Hearing none, we will continue.

I would thank my friend from Washington State and would point out for the record he is spelling C-O-M-I-T-Y rather than C-O-M-E-D-Y, as we are often accused of here in the Nation's capitol.

We have a very serious topic this morning. Our purpose this morning is to conduct this hearing on contract support costs within the Indian Health Service and the Bureau of Indian Affairs. Again, I thank my colleagues, my good friend from Washington State, and the fine gentleman from New Jersey who joins us here this morning.

We have with us Panel I, which includes the Honorable Kevin Gover, the Assistant Secretary of Indian affairs, U.S. Department of the Interior; Mr. Richard Sullivan, the Senior Negotiator, Division of Cost Allocation of the U.S. Department of Health and Human Services in Washington, DC; and we are pleased to welcome Dr. Michael Trujillo, the Director of the Indian Health Service in Rockville, Maryland. He is accompanied by Messrs. Lincoln, Fitzpatrick, Black, and Demaray.

I would like to remind the witnesses that, under our Committee rules, they must limit their oral statements to 5 minutes, but their entire statement will appear in the record. We will also allow the entire panel to testify before questioning the witnesses.

Before we move to this juncture, let me just simply check with my colleagues and see if anyone here has an opening statement that they would like to make. If there are statements at a later time, we will have them introduced into the record.

At this point I would ask Mr. Kevin Gover to offer his testimony. Good morning and welcome to the Committee.

**STATEMENT OF HON. KEVIN GOVER, ASSISTANT SECRETARY OF INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, DC**

Mr. GOVER. Thank you, Mr. Chairman. Good morning.

Mr. Chairman, I am pleased to be here today to discuss this issue again.

Since the hearing in February, GAO, BIA, our BIA Tribal Work Group on Contract Support Costs, and the national Congress of American Indians have all published recommendations concerning this issue. While GAO offers four alternatives for consideration, it does not recommend one of the approaches over the other. The BIA Tribal Work Group and NCAI both recommend increased appropriations to fully fund contract support requirements and both advocate additional studies or benchmarking of tribal needs for contract support.

In the meantime, the Federal Government is a defendant in a half-dozen lawsuits over contract support; and as part of the fiscal year 2000 budget, the Appropriations Committees have continued both the funding cap on contract support and, in the case of the Senate, the moratorium on additional self-determination contracting.

Notwithstanding the appropriations limitations, we have various decisions from courts and administrative appeals boards indicating that the language in the appropriations Act does not repeal the mandate in the Indian self-determination Act for full payment of support costs. Additionally, some courts and the administrative ap-

peals boards have found the United States liable for breach of contract, requiring payment of 100 percent of contract support costs, notwithstanding any limitations in our appropriations Act.

Finally, the constitutionality of some of the appropriation language has been called into question. Now, recent appropriations report language for the fiscal year 2000 budget indicate that the House and Senate Appropriations Committees are not supportive of this commission. Finally, the positions appear to be hardening to the extent that some tribal attorneys have seriously proposed that I be prohibited from speaking with some tribes about contract support problems in the past or any proposals for the future. So it is not an exaggeration to say that the status quo is intolerable.

Mr. Chairman, we have tried to identify some basic objectives for resolution of this issue.

The first is quite important to us. It is that the Interior Department should not be responsible for funding indirect costs associated with grants made by other Federal agencies.

Second, the current and future costs of contract support should be accurately estimated.

Third, the BIA should fully fund contract support for our self-determination awards.

Fourth, we should put to rest questions tried to be raised about the commitment of both the Congress and the administration to self-determination contracting.

And, fifth, perhaps the most important, is the Appropriations Committees have to consider the solution reasonable.

One of the primary problems in this entire issue is there is no consistency. The administration has not put forward a consistent position among all of its agencies. And I am not talking about the BIA and IHS but about the dozen or so other departments that do a substantial amount of business with the tribes. Congress seems to find no agreement between the appropriators and the authorizing committees on what the government's commitment ought to be, and that puts it in a very difficult position.

Let me just highlight a proposal that we have under consideration and that we have put out for tribal comment.

First, we would recommend, and I should emphasize, Mr. Chairman, that I am speaking for myself and not necessarily for the entire administration. It seems obvious that we have got to require the other departments and agencies who do business with the tribes to pay their indirect costs associated with those ventures. It doesn't make any sense for the BIA or the IHS to be held responsible by law for paying the indirect costs associated with grants administered by the Department of Justice Department, Housing and Urban Development, Labor or any of the others; yet that seems to be the current state of the law.

Second, within the BIA we are proposing to separate grant assistance from contracts. The intent of the Indian Self-Determination Act was to encourage tribes to take over the programs that were administered by the BIA. That is proceeding, and we should pay the indirect costs associated with that because we always received funds for the associated costs. When it comes to grants, though, we had no extra money. Those programs would not have taken place if the tribe chose not to operate them or contract them,

so there were no BIA costs associated with those. However, in order to avoid reducing commitments that we have already made to try to receive grants, we would also propose that they be allowed to retain what now is contract support on these grant payments.

Mr. Chairman, we have some technical recommendations associated with that, but the bottom line is that we have got to do something. The self-determination moratorium is unacceptable. It flies in the face of 25 years of congressional and administration policy. It is no solution to the contract support dilemma to simply say make no more contracts.

Mr. Chairman, my time is up. I appreciate the opportunity to testify.

The CHAIRMAN. I thank you, Mr. Gover.

[The prepared statement of Mr. Gover follows:]

STATEMENT OF HON. KEVIN GOVER, ASSISTANT SECRETARY—INDIAN AFFAIRS,  
DEPARTMENT OF THE INTERIOR

Mr. Chairman and members of the Committee, I am pleased to appear before you today to continue our discussion of the issues surrounding the payment of contract support to Indian tribes and tribal organizations.

#### Update

Since the Committee's hearing of last February, the General Accounting Office has submitted its report on contract support;<sup>1</sup> the Bureau of Indian Affairs (BIA)/Tribal Work Group on Contract Support Costs completed its review;<sup>2</sup> and the National Congress of American Indians published its recommendations.<sup>3</sup> GAO offers four alternatives for Congressional consideration, but does not recommend one approach over the others. The Work Group and NCAI recommend increased appropriations to fully fund contract support requirements and both advocate additional studies or "bench marking" of tribal needs for contract support.

In the meantime, the Federal Government is a defendant in a half-a-dozen law suits over contract support, and as part of the FY 2000 budget, the Senate Appropriations Committee would continue the moratorium on additional Self-Determination contracting. Based on broad interpretation of the Indian Self-Determination Act, a court found the United States liable for breach of contract, and required the Department to pay indirect costs for Interior and other Federal agencies contracting under the Act.

Mr. Chairman, while I recognize the reluctance of the Committee to amend the Indian Self-Determination Act, I have come to the conclusion that the authorizing committees, appropriations committees and the Administration must jointly seek a resolution of the contract support dilemma.

#### Objectives in Resolving Contract Support Funding

My objective is to reach agreement in the following areas:

- We need to develop a reliable mechanism to ensure funding for indirect costs associated with grants made by other Federal agencies;
- The current and future costs of contract support should be accurately estimated;
- The BIA should fully fund contract support for our self-determination awards within existing resources; and
- We should put to rest the questions Tribes are raising about the commitment of both Congress and the Administration to self-determination contracting.

#### BIA's Option

Mr. Chairman, with these goals in mind, and considering court decisions as well as the recommendations contained in the other reports and studies on contract support, we are developing an option that could be implemented to resolve the contract support problems that have bedeviled us for two decades.

<sup>1</sup> "Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to be Addressed," (GAO/RCED-99-150), June 1999.

<sup>2</sup> "A Study of Contract Support Costs in the Bureau of Indian Affairs and Recommendations for Reform," June 1999.

<sup>3</sup> "Final Report of the National Policy Work Group on Contract Support Costs," July 1999.

I will briefly summarize the key elements of the option proposed:

- A mechanism must be devised to ensure fair compensation for the indirect costs incurred by Indian Tribes in administering grants awarded by Federal agencies.
- Within the BIA, separately identify "grant assistance" from Self-Determination awards. The goal of the Self-Determination Act was to turn federally operated programs over to Tribes. There are a number of programs that the BIA funds that were never operated by BIA employees and would not be operated by BIA employees if a Tribe declined an award. In our implementation of Self-Determination, however, we have acted as if every award were a Self-Determination contract, and thus eligible for contract support payments.
- For those programs identified as grants, grandfather into the programs the amount of contract support currently obligated for those programs.
- For the remaining activities that are actual or potential Self-Determination contracts or Self-Governance compacts, estimate the total cost of contract support if all tribes contracted for all programs and use this information to structure budget requests.
- Evaluate tribal requests for payment of certain direct costs.

### Conclusion

Mr. Chairman, working together, I believe that we can fashion a contract support proposal that keeps faith with Tribes so that they are not penalized for assuming program operations that would otherwise be run by BIA employees, while recognizing that not all funds that flow through the BIA should be accorded the special status of Self-Determination awards.

I would be pleased to answer any questions you may have.

The CHAIRMAN. [presiding.] Mr. Sullivan, you are up next to testify. We ask questions after everybody is done.

I apologize. I just got back in the room. Has anybody else testified?

Mr. Sullivan, you are next. Pull that mike up to you.

### STATEMENT OF RICHARD G. SULLIVAN, SENIOR NEGOTIATOR, DIVISION OF COST ALLOCATION, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, WASHINGTON, DC

Mr. SULLIVAN. Good morning Mr. Chairman. It is a pleasure to come before the House Resources Committee this morning to represent the Division of Cost Allocation, Program Support Center of the Department of Health and Human Resources.

My name is Richard Sullivan. I am a branch chief of the DCA Washington field office and am here to represent Mr. Charles J. Seed, Director of the Division of Cost Allocation.

The CHAIRMAN. Move the mike a little closer, please. I can hardly hear you.

Mr. SULLIVAN. The DCA is part of the Program Support Center, an operating division of HHS, which was established in 1995 to provide centralized support services for HHS and other government agencies.

The DCA is responsible for negotiating indirect costs between the Federal Government and approximately 3,000 organizations. The negotiations involve more than \$12 billion a year in Federal program charges from State and local governments, universities and colleges, hospitals, and other nonprofit organizations. Many negotiations include reviews of complex specialized service facilities such as computer facilities, libraries, pension funds and labs.

The DCA is also responsible for resolving audit findings on cost allocation plans and indirect cost rates; providing advice on accounting matters affecting grant programs; and assisting in activities related to improving grantee accounting systems and devel-

oping government-wide and department-wide accounting policies, procedures, and regulations. The indirect cost rates HHS and other Federal agencies issue are accumulated centrally and distributed to about 35 Federal government activities.

DCA operates through four field offices in New York, Washington, Dallas and San Francisco. Our offices have established rates with 14 Indian entities. Seven of these entities are subject to OMB Cost Principles for State and local governments. They include the Kenaitze Indian Tribe, Mount Sanford Tribal Consortium, Ninilchik Village Tribal Council, Seldovia Village Tribe, Tanana IRA Native Council, Native Village of the Eyak Tribal Council, the Red Lake Band of Chippewa Indians in Minnesota.

There are also seven organizations that are subject to OMB Cost Principles for nonprofit organizations. These include the Eastern Allusion Tribes, Valdez Native Tribe, Eight Northern Pueblos Council, Five Sandoval Indian Pueblos, the Inter-Tribal Council, American Indian Community House, and North American Indian Center of Boston.

A recent GAO reports states that there are 382 tribes and related tribal organizations with negotiated rates. Nearly all rate setting is performed by the Department of the Interior. DCA currently establishes rates for only 14 of these tribal entities and therefore plays only a minor role in this area.

I would be pleased to respond to any questions that the members may have.

The CHAIRMAN. Thank you, Mr. Sullivan.

[The prepared statement of Mr. Sullivan follows:]

STATEMENT OF RICHARD G. SULLIVAN, BRANCH CHIEF, COST ALLOCATION DIVISION,  
DEPARTMENT OF HEALTH & HUMAN SERVICES

Good morning Mr. Chairman:

It is a pleasure to come before the House Resources Committee this morning to represent the Division of Cost Allocation (DCA), Program Support Center, Department of Health and Human Services.

My name is Richard Sullivan. I am a branch chief in the DCA Washington Field office and am here to represent Mr. Charles J. Seed, Director of the Cost Allocation Division.

The DCA is part of the Program Support Center, an operating division of HHS, which was established in 1995 to provide centralized support services for HHS and other government agencies.

The DCA is responsible for negotiating indirect costs between the Federal Government and approximately 3,000 organizations. The negotiations involve more than \$12 billion a year in Federal program charges from State/local governments, universities and colleges, hospitals, and other nonprofit organizations. Many negotiations include reviews of complex specialized services such as computer facilities, libraries, pension funds, and labs. The DCA also is responsible for resolving audit findings on cost allocation plans and indirect cost rates; providing advice on accounting matters affecting grant programs; and assisting in activities related to improving grantee accounting systems and developing Government-wide and Department-wide accounting policies, procedures, and regulations. The indirect cost rates HHS and other Federal agencies issue are accumulated centrally and distributed to 35 Federal government activities.

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- Kenaitze Indian Tribe
- Mount Sanford Tribal Consortium
- Ninilchik Village Tribal Council
- Seldovia Village Tribe



- Tanana IRA Native Council
- Native Village of Eyak Tribal Council
- Red Lake Band of Chippewa Indians (Minnesota)

There also are seven organizations that are subject to OMB Cost Principles for nonprofit organizations. These include the:

- Eastern Allutian Tribes, Inc.
- Valdez Native Tribe
- Eight Northern Pueblos Council
- Five Sandoval Indian Pueblos, Inc.
- Inter-Tribal Council, Inc.
- American Indian Community House
- North American Indian Center of Boston

A recent GAO report states that there are 382 tribes and related tribal organizations with negotiated rates. Nearly all rate setting is performed by the Department of the Interior. DCA currently establishes rates for only 14 of these tribal entities and therefore plays only a minor role in this area.

I would be pleased to respond to any questions the members may have.

The CHAIRMAN. Mr. Trujillo.

**STATEMENT OF MICHAEL H. TRUJILLO, DIRECTOR, INDIAN HEALTH SERVICE, ROCKVILLE, MARYLAND; ACCOMPANIED BY MICHAEL E. LINCOLN, DEPUTY DIRECTOR, IHS; CARL FITZPATRICK, DIVISION OF FINANCIAL MANAGEMENT; DOUGLAS BLACK, OFFICE OF TRIBAL PROGRAMS; AND RON DEMARAY, DIRECTOR, SELF DETERMINATION SERVICES**

Dr. TRUJILLO. Yes, good morning, Mr. Chairman. It is a pleasure to be here before this Committee.

We do have a written statement for the record which was submitted, and these are my opening comments.

Over 40 percent of the Indian Health Service's budget, or \$1 billion, is allocated to tribal operated programs under the authority of the Indian Self-Determination Act. Approximately 20 percent of this amount, or \$240 million, represents contract support costs. I believe the contract support costs are critical to the promotion of strong, stable tribal governments and critical to the provision of quality health care.

Contract support costs have been certainly the subject of much discussion and debate over this last year. In the 1999 appropriations, the Congress appropriated an increase of \$35 million for a contract support cost to the Indian Health Service. The Congress directed that the increases be allocated in a manner to reduce the inequity in the distribution of the contract support cost in the Indian Health Service and instructed the Indian Health Service to continue to work with the tribes to develop a long-term solution to this inequity.

We, the tribes and the Indian Health Service have continued to a spend considerable amount of time and effort to carry out and strengthen the congressional instructions. Consultation with tribes have resulted in the agency adopting the distribution methodology agreed to by tribes, and that has raised the average of the contract support cost funding level in the agency to 80 percent. No tribe is funded below 70 percent of its contract support cost need.

We are presently working with the tribes in Alaska to determine an appropriate amount of contract support cost associated with the tribal takeover of the Alaskan Native Medical Center, the largest single assumption of an Indian Health Service program to date. We anticipate an allocation to Alaska and the distribution of the entire

\$35 million by the end of this month. I believe we have the appropriately responded to the direction of Congress, but the allocation has certainly not been without difficulty.

Shortly after our consultation with the tribes was complete, we were advised by legal counsel, that is the Office of General Counsel and the Department of Justice, that a new vision in our congressional appropriation Act prohibited the agency from using 1999 appropriations to pay non-recurring costs incurred prior to 1999, contrary to what the agency and I had intended to do. I have examined and continue to examine every possible way to pay these costs, including continuing discussion with tribal leadership, which amounts to approximately \$1.8 million, but it appears that I may be prohibited by law—that is congressional language—from doing so. I will make a decision on this this coming week.

As a result of the numerous consultation sessions with tribal leaders and representatives of the Indian Health Service, they have adopted a revised policy to allocate the contract support costs into fiscal year 2000. The policy distributes contract support cost increases by a pro-rata system designed to further reduce the contract support cost funding disparities among tribes within the Indian Health Service system. A key element to this joint tribal Indian Health Service policy, the tribe's support cost funding will not be reduced when that tribe is already underfunded in the first place. We also feel our efforts in this regard respond to the wishes of Congress.

Finally, I would like to commend both NCAI and the GAO on their recently completed studies of the contract support costs. We believe these studies accurately describe the importance of contract support costs to tribal governments and this country's policy of Indian self-determination. These studies have drawn many of the same conclusions that we in the Indian Health Service have arrived at.

In summary, I would like to emphasize that the Indian Health Service and I am committed to uphold, promote, and strengthen the principles of Indian self-determination, the empowerment of tribal governments, and the government to government relationship that exists between Indian nations and this country. We continue to be committed to work closely and collaboratively with Indian tribal governments, national Indian organizations, and the Congress with regard to contract support cost issues and to advocate and to assure more appropriate and adequate funding to all tribes who contract or compact health care services from the Indian Health Service.

Thank you.

The CHAIRMAN. I thank you, Doctor, for your testimony.

[The prepared statement of Dr. Trujillo follows:]

#### STATEMENT OF DR. MICHAEL TRUJILLO, DIRECTOR, INDIAN HEALTH SERVICE

Mr. Chairman and Members of the Committee

Good morning. I am Dr. Michael Trujillo, the Director of the Indian Health Service (IHS). Today, I am accompanied by Mr. Michel E. Lincoln, Deputy Director, Indian Health Service; Mr. Douglas Black, Director, Office of Tribal Programs; Mr. Ron Demaray, Director, Self Determination Services; and Mr. Carl Fitzpatrick, Director, Division of Financial Management. We again welcome the opportunity to testify on the issue of contract support costs in the Indian Health Service. As we indicated in our testimony presented to the Committee on February 24, we believe that

contract support cost funding is critical to the provision of quality health care by Indian tribal governments and other tribal organizations contracting and compacting under the Indian Self-Determination and Education Assistance Act, Public Law 93-638 (ISDEA, P.L. 93-638). Since the February 24, 1999 testimony on contract support cost, we have continued to work with the authorizing and appropriations committees and Tribes to address the ever-growing contract support cost funding challenge, discussed later in this testimony. In addressing this challenge, we will collectively ensure that funding for contract support cost will not adversely affect funding for other IHS programs, including critical services delivered to non-contracting and non-compacting Tribes.

Congress appropriated an increase of \$35 million for contract support costs in the Fiscal Year 1999 Interior Appropriations with accompanying committee report language instructing the IHS that the increase should be "used to address the inequity in the distribution of contract support cost funding in fiscal year 1999." Further, the Congress directed the IHS, in cooperation with the tribes, to develop a solution to the contract support cost distribution inequity without the large infusion of additional funding for contract support costs. We believe we are close to accomplishing both objectives.

#### **Allocation of \$35 million**

Based on the Congressional guidance and results of extensive agency consultation with Indian tribal governments, the Indian Health Service has adopted an allocation methodology for the current distribution of the \$35 million in the most equitable manner given the total amount of the final negotiated CSC requests and availability of new funds. For example, the new allocation method addresses all those CSC requests submitted by tribes that have entered into Public Law 93-638 contract or compacts despite not receiving any contract support cost funding for those assumptions. Under the new method, those tribes that have the greatest overall contract support cost need for all programs administered through self-determination contracts and compacts will receive the greatest proportion of new CSC funding. We believe that this allocation methodology is responsive to concerns expressed by the Congress that the Agency address the inequity in contract support funding levels of tribes in the IHS system. To date, we have allocated over half of the \$35 million increase and we are able to fund, on average, 80 percent of the total contract support cost need associated with IHS contracts and compacts. No tribe is being funded at less than 70 percent of their overall contract support cost need.

At present, the IHS is engaged in negotiations with representatives of the Alaska Tribal Consortium and the Southcentral Foundation over the amount of contract support costs that will be allocated to these two organizations for their assumption of the Alaska Native Medical Center (ANMC), which is the largest single takeover of an IHS program in history. Any additional funding from the \$35 million increase not allocated for the assumption of the ANMC will be distributed in a manner that further reduces the disparity in contract support costs funding levels.

#### **Revision of IHS Contract Support Cost Policy**

Since 1992 the IHS has had an established, written contract support cost (CSC) policy that was developed and implemented, in consultation with tribes and tribal organizations. This policy addresses many of the issues surrounding the determination of CSC needs authorized under the ISDEA and the allocation of CSC funds appropriated by the Congress. The first policy adopted in 1992 was subsequently revised in response to the 1994 amendments to the ISDEA.

As a part of the 1999 appropriations process the Congress expressed their concerns over the inequity caused by existing IHS CSC distribution methodologies and directed the Agency to propose a permanent acceptable solution to the CSC distribution inequity as a part of the FY 2000 budget process. Within days of receiving this instruction from the Congress, the IHS began the process to develop solutions to these CSC challenges. The fact that the tribes, Congress and other stakeholders have differing views as to what constitutes "equity" was immediately apparent at the start of our work. Consequently, the tribal and Agency representatives devoted significant time, energy, and resources toward addressing the fundamental issues of equity and developing solutions within the context of the different perspectives of all the key stakeholders. With a strong commitment to be as responsive as possible to the concerns expressed by tribes, the courts, and the Congress, the IHS incorporated the results of the tribal-Federal work into a major third revision of the current CSC policy. As an example, the new allocation method being utilized to distribute the new FY 1999 CSC funds is reflected in the Agency's proposed new draft CSC policy.

The IHS continues to consult and work closely with tribes, tribal organizations, and their representatives in the further refinement of the proposed revised CSC policy. This is consistent with the Administration and Congressional policy to support Indian self determination through active consultation to ensure that all major policies, like the IHS CSC policy, are based on the corner stone of the Indian Self-Determination Act. The IHS and the Department are both firmly committed to providing meaningful consultation on this issue. For example, we have made strides with Tribes to include authorizing language in the Tribal Self Determination Amendments to the Indian Self Determination and Education Assistance Act (P.L. 93-638) to explicitly state that contract support funding is subject to appropriations and that funds are not to be reduced to other IHS programs and activities.

The IHS has now nearly completed the development of a revised CSC policy that we believe addresses the expectation of Congress as stated in the fiscal year 1999 appropriation committee report. The proposed policy abandons the historic approach to the Indian Self-Determination (ISD) Fund and the maintenance of a queue system in favor of a pro-rata system whereby each eligible tribe with an ISD request receives a share of any additional CSC funding proportionate to its overall CSC needs. Those with the greatest unfunded CSC needs will receive largest share of any increase in available CSC funding. Basic to this policy however, is the premise that a tribe's CSC funding will not be reduced when that tribe is already receiving less than its identified CSC need. This is consistent with the statutory provisions of Section 106 (b) of the ISDEA. We are also committed to address contract support cost administratively, through the revision of our agency CSC policy, which includes a provision to better reflect and reduce duplications in contract support cost and tribal shares.

The new policy is much more comprehensive in addressing many of the more subtle facets of CSC than prior policy issuances. This can be seen in our approach to improved projections of CSC needs, a specific concern of the Congress; the tracking of CSC shortfalls; and the integration of this information into the IHS budget formulation process. We firmly believe that the proposed CSC policy takes advantage of all of the tools available under the ISDEA to manage CSC in a responsible manner. The policy has been drafted in such a way as to avoid any future litigation over CSC but this cannot be guaranteed. This policy has not been adopted and codified as a Departmental regulation in the Federal Register because both the IHS and BIA currently may not issue new CSC regulations. However, Tribes have from time to time raised the possibility of developing joint BIA/IHS regulations for CSC. The Agency needs to give serious consideration to whether it is time to pursue congressional authorization of a negotiated rulemaking process to adopt a final rule concerning CSC. The IHS would welcome the opportunity to join with tribes, the BIA, and the OIG in such a process, if authorized by the Congress.

#### **Other Contract Support Cost Efforts.**

Recently, the General Accounting Office (GAO) and the National Congress of American Indians (NCAI) each completed an extensive study of CSC that have been forwarded to the Congress. The IHS cooperated fully in the completion of both of these studies which we believe accurately describe the importance of CSC to tribal governments. These independent studies have drawn many of the same conclusions that have been reached by the IHS in the course of implementing the ISDEA provisions governing CSC. We believe that both of these studies provide thoughtful insight into CSC issues. In our view, the revised IHS CSC policy is consistent with most of the findings and recommendations contained in these reports and we welcome the opportunity to work with tribes, the BIA, and the Congress in reaching greater agreement amongst all of the varied concerns and views.

Thank you once again for the opportunity to discuss contract support costs in the IHS. We are now pleased to answer any questions that you may have.

The CHAIRMAN. I understand that Mr. Fitzpatrick, Mr. Black and Mr. Demaray are accompanying you to help answer any questions that we may ask?

Dr. TRUJILLO. That is correct.

The CHAIRMAN. I am a little bit concerned. I listened to all three of you, and in my opening statement I made the comment that this seems to be a battle about financing and not about health care. Financing doesn't guarantee health care.

I have a unique problem in Alaska, as you are well aware, Doctor, that we have—because of your great BIA—declared about 227

tribes in the State of Alaska. If 227 tribes were to apply for a pro-rata funding for health care, what type of health care do you think there would be for my Alaskan aid people in Alaska?

Dr. TRUJILLO. In regards to the numbers of tribes, you also have to take into consideration the remote geographic problems in regard to the villages and the programs that are there; and the cost of that health care and access to health care is extremely difficult as well as increasing day by day, as you well know. The costs and the population certainly increases. I had hoped that as the tribes and the consortiums worked together with the corporations that we would be able to have increasing access to health care with the tribes and the corporations.

The CHAIRMAN. Again, with SEARHC in southeast and, of course, with the Bethel Corporation, they are providing excellent health care now. If their base was diluted, what would be the result for the health care for the people?

Dr. TRUJILLO. If funding were to be decreased to any particular program, not only to Alaska but those in the lower 48, there would be difficulty to access.

The CHAIRMAN. So if we had the funding as it is today for those two larger—with the hospital in Anchorage, SEARHC in southeast and the Bethel hospital, if that retained its present status of funding, then it would mean that we need to have more money if other tribes would apply for the health care capability. Is that correct?

Dr. TRUJILLO. The areas for Indian Health Service has always been a difficulty of insufficient allocation of fiscal resources. I believe the tribes who have managed to administer and contract for their programs and now administer direct and preventive programs have done an excellent quality job. The difficulty has come with insufficient funding not only for the program aspects but also for the direct and indirect costs which would enable them to do a better job than they are doing right now. That is one of the aspects that I hope that we can come to some sort of conclusion or direction as to how we will cover this increasingly important area of cost for those tribes who wish to undertake the management—

The CHAIRMAN. In your testimony, you say IHS has made strides with tribes—it sort of rhymes—to implicitly state the contract support funding was subject to appropriations. But isn't it true, Doctor, that tribes do not agree with that position, that they view full contract support funding as a legal obligation and that the courts have consistently agreed with the tribes?

Dr. TRUJILLO. It is my understanding that we would certainly—I certainly agree that contract support costs should and other costs should be fully funded at 100 percent. The difficulty has been now that those costs can be covered by appropriate resources that are dedicated for those particular areas. Taking program funds from other tribes to pay contract support costs from other tribes only dilutes and compounds the problems for all American Indians, Alaskan natives throughout the Nation, including Alaska.

The CHAIRMAN. Mr. Gover, the one thing in your testimony, you state there are a number of programs that BIA funds with contract support costs that are, in effect, not self-determination contract programs which are, therefore, ineligible for such costs. You then ask the Committee to amend the Indian Self-Determination Act to

discontinue this practice. If the Bureau wishes to discontinue paying contract support costs beyond the requirements of the statute, why doesn't the Bureau simply take the appropriate action after thoroughly reviewing the matter of the Indian country?

Mr. GOVER. That is a good question, Mr. Chairman. We well may do that. I think that we would prefer to proceed with some congressional sanction of the approach, but if I have the authority to do that, then I certainly will consider that, doing that unilaterally.

The CHAIRMAN. My concern is, very frankly, to reopen this Indian Self-Determination Act today would not be a very, I believe, healthy thing to do, especially with outside forces concentrating on the success of certain activities of Indian tribes. I think it would probably open them up for some very strict scrutiny which would not necessarily be good for the tribes and probably be wrong.

I can't control all of that. I am very reluctant as chairman of this Committee to open that Self-Determination Act. So I think maybe you and I ought to talk to see what we can do without having to open that Act.

I have other questions I would like to ask, but my time is up. The gentleman from—Mr. Udall.

Mr. UDALL OF NEW MEXICO. Thank you, Mr. Chairman.

I guess this question is for Assistant Secretary Gover, but others if they have comments on it. Much has been said about the inconsistency of agencies to pay contract support costs. Who is responsible for coordinating agency policy within the administration?

Mr. GOVER. Ideally, Congressman Udall, that would be the Office of Management and Budget that coordinates the executive branch policy on these issues. To this point, however, we have received no guidance from OMB that would tell us, again, not only how to resolve the differences on how BIA and IHS administer these costs but, equally importantly, how all of the other Federal agencies and departments who do business with the tribes pay those costs. The fact is, most of them don't pay the costs right now, and they should.

These lawsuits look to the BIA and the IHS to pay the costs in times when, as the chairman points out, IHS doesn't have the money to do what we ought to be doing in health care, and BIA certainly doesn't have the money to do the many things that it is being charged to do.

Mr. UDALL OF NEW MEXICO. So OMB hasn't really done anything in terms of trying to ensure that all agencies pay contract support costs?

Mr. GOVER. Well, they reviewed our testimony.

Mr. TOM UDALL. I am sure they did.

Mr. GOVER. They have not yet taken any aggressive steps in that regard.

I will say that I spoke with Elgie Holstein just last week about this issue, and he has offered to coordinate a meeting among all of the agencies. That meeting is going to go like this. BIA says, you agencies ought to pay your own indirect costs; and they are going to say, no, we don't want to; and that will be the meeting. Somebody has got to make a decision, and I am afraid that happens above my pay grade.

Mr. UDALL OF NEW MEXICO. Thank you.

Let me also just thank you, Assistant Secretary Goyer, for your service.

Mr. Chairman, you should know he is a New Mexican, and he gave up a good-paying job to come back here and serve the public, and I think he is doing a very good job at it.

Dr. Trujillo, when can the Committee expect to see your new IHS proposed contract support cost policy that you referred to in your testimony?

Dr. TRUJILLO. Yes. In regards to the policy that has been put in the Federal Register, we are awaiting final comments from the public and tribes and even leadership on the policy. We will then have another concluding meeting with tribes and tribal leadership on those recommendations and statements that have come from the public. We hope to publish the tribal and Indian Health Service work on policy by the beginning of the fiscal year 2000.

Mr. UDALL OF NEW MEXICO. Thank you.

I yield back, Mr. Chairman.

The CHAIRMAN. I thank the gentleman.

The gentleman from Arizona, the biggest western union Congressman we have.

Mr. HAYWORTH. Well, I thank you. From the chairman of this Committee and the Congressman for all Alaska, that is high praise indeed. It is good to see my neighbor from New Mexico here and my other neighbor from New Mexico, who has come back to help us with the BIA.

I would like to thank all of the witnesses, but let me turn to Dr. Trujillo.

Dr. Trujillo, we are especially pleased that you could join us today. It is my understanding that you made a policy decision this year not to pay any start-up costs incurred by tribes in prior years, costs that were incurred with the full knowledge and approval of the IHS in which tribes were assured they would be placed on the IHS priority list and would be paid. The question is fairly obvious. Why are you violating the ISDA, the tribal contract commitments, in your own internal circulars by now refusing to use the fiscal year 1999 funds appropriated by Congress for this purpose?

Dr. TRUJILLO. That is an excellent question.

In my opening statement I refer to that dilemma that we have come across in regards to what I had intended to do and looked at. Also, the agency, in its discussions with tribes and tribal leadership, said that we were intending to pay prior years' start-up costs. However, we were advised at the last minute prior to our allocating the money within the agency to tribes by the Office of General Counsel, the Department of Justice, that this decision was prohibited by congressional language and that we could not pay non-recurring start-up costs that had occurred prior to 1999.

We have continued our discussion with tribal leadership, General Counsel, the Department of Justice, staffers from the Appropriations Committee who had written that language; and they all advised us that that was not the intent of the language, to pay prior start-up costs. So now I am caught up in the dilemma of wishing to have done this, but the interpretation of the Office of General Counsel and the Department of Justice and the staff from the Appropriations Committee was not to do that.

The CHAIRMAN. If the gentleman would yield, I am concerned. What the hell does the staff of the Appropriations Committee have to do with this? You are operating in authorization language.

Now, I would suggest—I have had this fight with the Appropriations Committee before. I heard Mr. Gover say it, too. I want the names of those people that instigated this, and we will have what we will call a come to Jesus meeting with the appropriations committee. They are not running this damn Congress. So I want those names. If they instigated this—because we did appropriate the money. They are going beyond the role of any one committee—they are not authorizers. So you will give me those names, will you not?

Dr. TRUJILLO. We will forward our discussions with also the interpretation from the Office of General Counsel and Department of Justice.

The CHAIRMAN. I want the whole transcript of how they arrived at this decision. I am not beating you on the head. I am beating them on the head.

Mr. HAYWORTH. I thank the chairman.

I would reiterate, Dr. Trujillo, we would appreciate your cooperation. If you don't have the information today, again just to state for the record, it is very important to this Committee that those answers be supplied in writing as quickly as possible because, as the chairman outlines, we have some very serious policy questions confronting not only this Congress but the several Indian tribes. And so we would appreciate that.

Dr. TRUJILLO. Before concluding, what we had intended to do in our discussion with tribal leadership and also the interpretation from General Counsel and the Department of Justice—

Mr. HAYWORTH. How quickly can we expect that response from you, Dr. Trujillo?

Dr. TRUJILLO. I would imagine by the end of this week.

Mr. HAYWORTH. So we can expect this on Friday? Would that be fine with the chairman?

Dr. TRUJILLO. I am sure there will be other questions, but in this particular issue we can get that to you.

Mr. HAYWORTH. Whomever's interpretation of section 314 of last year's appropriations Act, you have gone through that. Again, for the record, let me ask you your interpretation. Isn't it true that section 314 simply instructs the agency on what it can and cannot do with its older appropriations accounts?

Dr. TRUJILLO. The reading when we had first reviewed the language was simply that, and it also would have allowed us to possibly pay those prior start-up costs. That was our intent, certainly my intent. Further interpretations and discussions and we were then informed of that information, as I had related to you earlier, that we were prohibited for not paying prior start-up costs.

Mr. HAYWORTH. Isn't that what the Interior Board of Contract Appeals in the Federal court in Oregon just determined in separate rulings this past month?

Dr. TRUJILLO. Those are some particular issues surrounding some of the contract support cost issues. In this particular—of course, 314 were not part of that discussion.

Mr. HAYWORTH. Dr. Trujillo, isn't it true that by not reimbursing any start-up costs you will be severely damaging three tribes in



particular, notably the Gila River, Fort McDowell and Potawatomi tribes?

Dr. TRUJILLO. Their amounts for these particular start-up costs are significant. We had entered into discussions with them and also continued discussions with Gila River as to some other alternatives if this particular issue was not resolved.

Mr. HAYWORTH. Doctor, I thank you.

I thank you, Mr. Chairman. I see the red light.

The CHAIRMAN. We can always come back.

The gentlelady, do you have questions?

Mrs. NAPOLITANO. Thank you, Mr. Chairman.

I am sorry I was late. I didn't get to hear your introduction. But I am going to be a little concerned about the 1995 suit to IHS and the Court ruling that the Secretary should try to allocate as much funding as possible from lump sum appropriations each year and found that the legislative history show the intent to go up pro rata reduction in contract funding. How is that working out? This is 1995. Have you instituted that pro rata funding?

Dr. TRUJILLO. As I had mentioned earlier in my statement and the Congressman from New Mexico was talking about, the new policy that has been developed along with the tribes and tribal leadership that will be getting final comment on and hopefully publishing at the beginning of this coming fiscal year involves the allocation of contract support costs on a pro rata basis on new or incoming funding so that no tribes would have be having a detrimental impact upon their programs.

Mrs. NAPOLITANO. So, in other words, there will be less for the funds that are applying but nobody will be left out?

Dr. TRUJILLO. Correct. We will bring up, hopefully, all of the tribes who do need the money more in the particular policy level.

Mrs. NAPOLITANO. Okay. I am not quite sure what the answer is. Can you maybe elaborate on whether it is the funding that has not been there, the decrease in the funding? What is going to help reach the levels of adequate service?

Dr. TRUJILLO. You put a statement in your answer that I would like to just concur with. One is the insufficient funding in this particular category on direct and indirect costs. The other is the insufficient funding for program costs which we manage and administer ongoing programs, not only with the Indian Health Service but also the tribes, in urban programs. The tribes and urban leadership presented to the Department of Health and Human Services about two and a half months ago a needs-based budget of \$15 billion. At the present time, the Indian Health Service is requesting in its preliminary discussions with the Department and, of course, within the administration \$3.2 billion for its annual appropriations for the year 2001. The gap between \$3.2 and \$15 billion are indeed tremendous. In this overall cost also comes the cost within the direct and indirect cost to administer and manage programs.

Mrs. NAPOLITANO. Why the difference? Why the disparity?

Dr. TRUJILLO. Great disparity in funding and health care.

Mrs. NAPOLITANO. Have you asked why the disparity?

Dr. TRUJILLO. It has been funding over a period of time in regards to Indian programs.

Mrs. NAPOLITANO. You mean reduction of funding?

Dr. TRUJILLO. There has been reduction of funding, but there has been insufficient funding in some of the mandatory areas such as pay costs, inflation, population growth, that affect all of our programs nationwide, tribes and Indian Health Service.

Mrs. NAPOLITANO. But, legally, aren't those required?

Dr. TRUJILLO. They are not. This is a discretionary funding program.

Mrs. NAPOLITANO. What would your suggestion be then? I am sorry, I stopped you in the middle of your telling—

Dr. TRUJILLO. I hope that we would be able to—those of us, yourself included, this Committee and certainly appropriations in the Senate could fully discuss the appropriate needs across Indian country, not only in health care but economic development, housing and other areas that are in critical need in Indian country, Alaska included and the lower 48.

Mrs. NAPOLITANO. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Before I recognize the gentleman from Nevada, one of the things that I have listened to here, Mr. Gover and Dr. Trujillo have insufficient funds, but what were the amounts asked by the administration in this most recent budget?

Dr. TRUJILLO. In regards to the Indian Health Service, we were hoping for an increase of around about \$170 million over last year's appropriations. So far, with both the Senate and the House, we are seeing lesser amounts.

The CHAIRMAN. Lesser amounts. How much did that—that \$170 million, how much is that short of accomplishing your goals?

Dr. TRUJILLO. We had hoped that we would probably get at least to close to \$200 million.

The CHAIRMAN. You should ask for \$300 million. I know how this game is played.

Mr. Gover, how about the BIA?

Mr. GOVER. Basically the same story. We asked for an increase of about \$140 million, including the Office of the Special Trustee. The committees, each of them have offered less. In order to actually meet our programmatic objectives, according to both the study of tribal priority allocations that we just completed with the tribal work group and according to the National Academy of Public Administrators, we would need to triple our budget in order to actually meet the programmatic objectives that have been established for us by the Congress.

The CHAIRMAN. That is interesting to me because I am always a little concerned. We take the hit, you take the hit. But sometimes I think that you ought to come down with the numbers that you really need and forget what everybody else says and then let's figure it out. Because if you come down with a figure, you know they are saying you asked for too much. I think there is some real strong evidence here of what the needs are. I think that ought to be brought out so the public can talk about it.

Mr. Gibbons.

Mr. GIBBONS. Thank you, Mr. Chairman.

I just wanted to direct perhaps a production request to Mr. Sullivan, if I could. I have looked at your testimony here, and I have noticed some glaring absences, and I am reminded by the chairman

that much of your testimony fails to recognize—either that or you are unaware that your division, your own agency negotiates either direct—I mean, indirect rates for some of the largest tribal organizations, including my colleague from Alaska's Yukon-Kuskokwim—however he says it—Health Corporation, the Aleutian Pribilof Islands, Southeast Alaska Regional Health Corporation, and Tanana Chief's Conference in Alaska, just to name a few. Would you be willing and would you make a commitment to this Committee today to provide a list of all tribal organizations and nonprofit organizations for whom you negotiate indirect rates by the end of the week?

Mr. SULLIVAN. I was under the impression that the listing that I furnished today, the seven nonprofits and the seven organizations subject to A-87 of the State and Local Cost Principles, was the listing of the organizations that the DCA does set rates with.

Mr. GIBBONS. Would you go back to your agency and go back through the records and then provide for us a complete listing, as I have requested, of all of the tribal organizations and nonprofits organizations for whom you negotiate indirect rates and provide that list for us by the end of the week?

Mr. SULLIVAN. Yes, sir.

Mr. GIBBONS. Mr. Fitzpatrick, you are sitting there quietly. Perhaps I should direct a question to you. It would be only fair.

In this setting, when a tribe proposes a certain amount of contractual support costs and the parties ultimately end up negotiating and eventually the IHS, Indian Health Service, will make a decision on that cost, I would think that IHS would actually make a decision in writing and explain how or why it disagreed with the tribe and came up with a different number. I should think that IHS would provide also an appeal process in that regard. In fact, I thought this was also required by the Act.

So my question to you, Mr. Fitzpatrick, is if you agree that that would be a fair and right and legally required process, why has the IHS this year not furnished tribes with these simple pieces of information? Tribes have repeatedly said they have no idea why or where they stand and if they request, their requests have been knocked down and, if so, on what basis. What they have is nothing from which they can make an appeal, obviously.

So I would like you to address that issue and whether or not you feel that there is an obligation to a tribe to be straightforward, having a letter in writing or something, saying that why or what you paid to them and why you paid to them was fair, why it wasn't fair or why you paid them nothing. So you if you could address those issues and talk about the fairness aspect, I would appreciate that.

Mr. FITZPATRICK. Yes, sir. I think I can address—well, I will address.

First, we went through 225 applications. We went through them. We actually wrote down item by item what we approved or disapproved, sent them to the area offices, from which they actually came from the 12 area offices. We sent it back to them for them to actually take it down to the tribes to tell them what happened. So, yes, a document did go from my offices to the area directors explaining what was accepted, what wasn't accepted, what was needed, provided they weren't in agreement.

Mr. GIBBONS. Mr. Fitzpatrick, isn't it true that many of the tribes never received even the limited summary information that you provided them to the Office of Tribal Programs that was sent to area offices explaining your first round of payments from that \$35 million account because the areas were not instructed to advise the tribes or all of the tribes?

Mr. FITZPATRICK. No. I did not instruct them not to advise them. I passed it down hoping they would advise them. It gave them a detailed, itemized—

Mr. GIBBONS. But you didn't give them any direct instructions to advise all of the tribes on the rationale of your decision?

Mr. FITZPATRICK. I can't remember how the letter actually went, but I could submit the letter for the record that went to each area office.

Now, there is an appeal process in the 9604 that the tribes should be—if they appeal, there is a process for them to appeal.

Mr. GIBBONS. On page 11, subparagraph 4 of the IHS circular 9604, it states that, at the end of the second paragraph, once a tribe and its local area complete their contract support negotiations, only items remaining, quote, in dispute, end quote, go to your office for resolution.

Why this year has your office violated this policy by rejecting items that had been agreed at the area and tribal level and requiring tribes to renegotiate agreed contract support requirements?

Mr. FITZPATRICK. In reviews those ISD requests, many of them came in that showed actual duplication of costs, unallowable costs, so they went back to them to be explained why.

Mr. GIBBONS. Why has the Office of Financial Management been discriminatory against programs on IHSQ by applying them to a different rule regarding direct contract support costs than has been applied to all other programs?

Mr. FITZPATRICK. We just—we have actually followed 9604 and made sure that all tribes were treated equally in our reviews.

Mr. GIBBONS. Well, 9604 remains in place and it hasn't changed, has it?

Mr. FITZPATRICK. It is in place, yes, sir.

Mr. GIBBONS. So it should be applied as, according to that circular, consistently to all contracted programs, is that not true?

Mr. FITZPATRICK. Yes, sir.

Mr. GIBBONS. Mr. Chairman, I will wait for a second round.

The CHAIRMAN. The gentleman from Arizona, do you have any other questions?

I am going to—we have another hearing coming up in this room, and I do apologize, and I want to be able to listen to the next two panels. But we are going to forward to the administration additional questions with a deadline set for compliance. I say this because last time the Committee submitted questions to the administration they were 2 months late. And since this is our first hearing, I will allow that additional time. Should the administration not submit your answers in time, I will take formal action to ensure that you comply with our time limit.

We need to forward the contract support costs. We need to move forward on this. And this Congress, very frankly, I, especially, do not appreciate delays that results in the administration not re-

sponding to the questions that we will submit, because we do plan on solving this problem. The deadline for answering the questions I will submit to you is on September 3 of 1999, which gives you approximately one month. So I do appreciate that, if you would do so.

I thank the panel, and my door is open. My phone is available.

I would suggest to Mr. Gover, especially to Mr. Trujillo, that if there is a problem that we can't solve, let me know and I am going to communicate and see if we can't solve it. If I find that you are not adding to the solution to the problems, then I am going to be not too happy.

I do appreciate your work and support. My ultimate goal is to make sure that all American Indians have good health care. This is not about money. It is not about the administration. It is about health care.

I do believe that we are doing a good job in Alaska. We can do better if it's not meddled with, I believe. So I do thank this panel.

Mr. Gibbons, do you have any other questions?

I do thank this panel, and you are excused.

And I do call up the second panel.

The second panel is Mr. W. Ron Allen, President, National Congress of American Indians, Washington, DC; the Honorable Mary V. Thomas, Governor of the Gila River Indian Community in Sacaton, Arizona; Mr. Orie Williams, Executive Vice President, Yukon-Kuskokwim Health Corporation, Bethel, Alaska, an outstanding Alaskan constituent. They actually made me chief when we were in Bethel, so I am very lenient towards Mr. Williams. He will be accompanied by Mr. Paul Manumik, Chairman of the YKHC, and Mr. Lloyd Benton Miller, Attorney.

We always have to have these attorneys available. I realize that.

We will have Mr. Ron Allen be the first one up. Ron.

#### **STATEMENT OF W. RON ALLEN, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS, WASHINGTON, DC**

Mr. ALLEN. Thank you, Mr. Chairman. It is always a pleasure to be able to come and testify before this Committee and address issues that affect the Indian nations across America.

Contract support, as you well know, is an issue that we have been wrestling with for the past 20 years. It is not a new issue, not a new struggle. This is an old matter that we have been trying to correct and cause the Congress and the administration to get on the same page with regard to what to do.

The Indian Self-Determination Act in 1975 had a very simple objective. That objective was—with regard to Federal programs that administers Indian programs—was to reduce those programs and transfer those functions out to the Indian people. It was intended to put Indian programs in the hands of Indian people. It also, interestingly enough, 20 years ago was about devolution. It was about empowerment of tribal governments and to cause them to be able to have greater capacity to serve their communities.

The National Congress of American Indians has been working with the tribal leadership across the United States in a contract support costs task force that we put together a little over a year ago. Over the last 13 months we had 11 national meetings and

countless smaller work sessions and gathered what we believe is the experts of the experts with regard to a subject matter that most people don't like. It is not a simple subject matter. It is not easy to understand. But its concept is very straightforward, in our opinion. It is a concept that is well accepted by the Federal Government. It is accepted by State governments. It is accepted by the private sector.

Contract support administrative overhead costs is something that is very common with regard to how you administer programs and services for a particular purpose. We have put a lot of hard work into correcting a whole lot of myths and misunderstandings that we believe has been advanced with regard to contract support.

One of the questions is, does the Congress and the administration want to pay for the implementation of the goals set out in an Act that was intended in 1975? Did they know what they were trying to achieve? And now that the price tag has come in, and to achieve that, to raise the welfare of our communities up to the same level of mainstream America, are they willing to make that payment?

We tried to work with everybody. We have brought in Interior, the Indian Health Service. We have tried to get the DHHS, the Division of Cost Allocation, but they refused to come into our sessions to work with us. We tried to get OMB. They did not participate a great deal with us. So, interestingly enough, quite a few of the folks in the Federal administration system worked with us, but many did not which was a little bit on the disappointing side.

In the findings of our report that we are submitting to you and the other Members of the Congress and to the administration with regard to our observations and findings and recommendations, we have come up with a number of them. One is the notion of contract support rate is out of control. It is not the rate. Rate has nothing to do with the issue that we are dealing with right now. The average rate that both IHS and BIA in their analysis and our analysis is averaging around 25 percent. That is half of what the Federal agencies charge each other with regard to the same kinds of costs. It is half of what a university pays. Universities used to be up in the 100 percent range.

It really is not the rate, and we have shown over the years that the rate nationally is very stable. That is not the problem whatsoever in that the system of negotiating the rate is very flexible and is consistent with the uniquenesses of the tribes.

Tribes across America, from Alaska to Florida, are not the same. The fact is, you do get some adjustment relative to their size and conditions and so forth. We believe that it has been very effective and very efficient in advancing that agenda.

We also believe that the actual cost that we are asking Congress to bear is not an overwhelming cost. You asked questions of the previous panel about what is it that is actually needed. Right now, on the IHS side, we think that we are about 100 to 110 million short in the filling of the full needs for providing full contract support for all of the contracts that are out there right now, whether they are in 638 contracts or the self-governance compact. On the BIA side, it is only about 65 million.

When Indian country listens to all of the stuff that goes on in the Congress, dealing with the veterans and dealing with airport needs and dealing with the current issue with the farmers, the problems that they have, and they see literally billions of dollars being pumped out of here and we hear the debate over the surplus moneys and so forth, we look at the numbers that we are asking for, and we say, where does the priority of Indians fit against that priority of the resources that America has, the most impoverished communities in America? And is there willingness by the Congress to make a commitment to our communities?

We believe that it is very reasonable. We think when we get down to our recommendations that—let me back up. We also believe that once we fully fund it, it becomes fairly stable. We have made our own projections about what the actual cost would be annually as you continue to transfer these functions and services out to Indian country from BIA and IHS. It is fairly stable, it is very consistent, and it is not an overwhelming number that baffles anyone or should be a big problem for the Appropriations Committees.

We believe that when we get right down to it there is only three choices. We have the first choice where Congress can fully fund it. Second, if the Congress doesn't fully fund it, you can underfund us, and we would be left to go to the courts and try to get the Courts to instruct the Congress to fully fund it based on the law, the legal right that we have. Three, the third option is an arraignment case. This is an entitlement, that Congress owes the tribes for these funds, and they shouldn't be subsidizing the Federal Government for these functions or it shouldn't be undermining existing programs.

So the issue is, should it be part of an entitlement? Should the whole contract support with all of these contracts and compacts be moved over to an entitlement section? It is not an overwhelming number relative to those functions that are in the entitlement section. We urge you to take a serious look at that.

We also suggest that you look at instructing OMB to establish a separate circular dealing with tribes. If you look at the circular as OMB establishes, they regularly try to make the governments all the same, State governments, local governments and tribal governments. We argue that we are all governments, but we can tell you that the resources of the State and local governments are not the same as tribal government. The resources available for tribal governments are very limited. It is as a general option. There are only a few anomalies sitting out there, and we believe that an OMB circular should recognize that uniqueness of the tribal governments.

Third, we believe that there should be some more work with regard to benchmarking to create some consistencies with regard to how you are going to negotiate these rates with regard to the indirect cost rates, the direct contract support costs, and the start-up costs. There is some consistency. There is a little bit of inconsistency that some people create as problematic, and we believe that can be addressed.

Four, we believe that there is a whole lot of stability in the tribes right now. Over the last 5 or 10 years a great deal of stability has been moving forward. We have been advancing the concept that

you can take these resources and move them into the base budgets of tribes and tribes will move forward with that if they are fully funded and leave it to their ingenuity and creativity to become more efficient with those resources, a concept that we believe has a great deal of merit.

Five, we believe that BIA should be instructed to deal with direct contract support, just like IHS does, and recognize those two costs so there a consistency.

The sixth issue is similar to the previous one in that there needs to be consistency on the policies and principles of contract support with regard to BIA and IHS.

And, finally, we add into the other Federal agencies that was discussed in the earlier panel. We point out that there are some serious problems, but we believe that they can be addressed. We believe that if we enter into the next millennium we can solve this problem if we work together in this matter. We do have answers, and it really is not that great a price tag.

Thank you.

The CHAIRMAN. Thank you, Mr. Allen. I want to suggest that I am pleased with what you are saying and the recommendations that you have because we are going to try, in conjunction with the Senators and other Congressmen, try to solve some of these problems through legislation, so we welcome your suggestions.

[The prepared statement of Mr. Allen follows:]

#### STATEMENT OF W. RON ALLEN, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS

Good morning Chairman Young and distinguished members of the House Resources Committee. My name is W. Ron Allen. I am President of the National Congress of American Indians (NCAI) and Chairman of the Jamestown S'Klallam Tribe located in Washington State. On behalf of NCAI, the oldest, largest and most representative Indian organization in the nation, I would like to thank you for the opportunity to testify this morning on contract support costs. NCAI was organized in 1944 in response to termination and assimilation policies and legislation promulgated by the Federal Government which proved to be devastating to Indian Nations and Indian people throughout the country. NCAI remains dedicated to the exercise of tribal sovereignty and the continued viability of tribal governments. NCAI also remains committed to advocating aggressively on behalf of the interests of our 250 member tribes on a myriad of issues including the development of contract support costs solutions and funding options in the Bureau of Indian Affairs and the Indian Health Service.

### I. INTRODUCTION

The Indian Self-Determination and Education Assistance Act (ISDEAA) authorizes tribes to contract to operate Bureau of Indian Affairs (BIA) and Indian Health Services (IHS) government programs serving the Indian recipients of those programs. The point, as you well know, is multi-faceted: (1) to reduce the Federal bureaucracy; (2) to place Indian programs in the hands of the Indian people being served; and (3) to enhance and empower local tribal governments and institutions.

However, the shortfall in contract support costs due under the Act has impeded the achievement of those goals, and has, in fact, penalized our tribal people—the real and ultimate victims of the shortfall. Given the severity of those shortfalls, the impact on the programs themselves, and the growing drumbeat of litigation, last year NCAI took the initiative to form a National Policy Workgroup on Contract Support Costs.

### II. NCAI NATIONAL WORKGROUP ON CONTRACT SUPPORT COSTS FINAL REPORT

The purpose of our workgroup was to come to a thorough understanding of the contract support cost system as it has evolved over the years, to identify the problems that have developed and to explore solutions. After thirteen months of work, eleven national meetings, countless smaller working sessions and thousands of



hours of volunteered time, we are proud to present to you our Workgroup's Final Report. It is important to underscore the fact that our Report and recommendations is the result of a great deal of hard work and diligence on the part of Tribal leaders, and technical and legal representatives who are experts in this specialized topic.

In preparing this Final Report, it was our intent and desire to be as inclusive as possible. All relevant agencies were invited to participate, including the BIA, IHS, the Office of Inspector General of the Department of the Interior, the Department of Health and Human Services Division of Cost Allocation, and the Office of Management and Budget. Indeed, we even had hopes early on that our report would be a joint tribal-Federal report, although eventually that was not possible. While Federal representatives actively participated in our Workgroup meetings and discussions, this effort and final report was initiated by the tribes.

Our work went forward both energetically and productively, though not without disappointment. For instance, early on the DHHS Division of Cost Allocation simply refused to show up, and they refused to share their historic data either directly or through IHS. Then, one month ago, the BIA released a separate contract support cost policy which was developed without our knowledge or involvement. Despite these problems and disappointments, our work went forward, resulting in 31 key findings, 8 guiding principles and 16 major recommendations, some of which I will mention here.

### III. NCAI FINAL REPORT—FINDINGS

In the findings section, our work confirmed the integrity of the indirect cost negotiation system as carried out by the Department of the Interior Office of Inspector General. We found it to be free of collusion, over-reaching or abuse, a finding echoed in the General Accounting Office report.

Second, we found that this indirect cost negotiation system has proven to be appropriately flexible to differing tribal conditions. Tribes, like states, counties and cities, are all different. They not only use different accounting systems, practices and materials, but they face vastly different circumstances. Workers' compensation systems may in one part of Indian Country cost many times what the cost is somewhere else. Salaries vary—just as do utilities, rent and the like. Climate alone can play a large role, as can the extent of isolation, and we found the indirect-cost system to be uniquely sensitive to all these factors.

Many in the Administration and Congress have been led by the perception that indirect cost rates have been out of control leading to radically escalating contract support costs. Interestingly, just like the BIA and IHS, we found that indirect rates had in the aggregate remained surprisingly stable—even flat—at under twenty-five percent. This finding directly answered the concern by some that indirect costs were out of control and abused by tribes who saw the sky as the limit on indirect costs. That myth is now firmly dispelled.

Our report reveals that the increase in contract support costs is directly related to the success of the implementation of the ISDEAA. Tribal contracting and compacting activities accelerated to their peak in the mid-1990s in response to the 1994 ISDEAA Amendments and extension of the self-governance initiative to IHS. The trend in the transfer of Federal Indian programs to tribal operation under the ISDEAA has leveled off from the peak experienced in the mid-1990s, and with a few notable exceptions should remain constant in the years ahead.

We also found that this static, aggregate, twenty-five-percent rate was less than one-half the indirect rate of DHHS itself, as well as various other Federal agencies, universities, state agency service providers and most private foundations.

oWe found that the contract support cost shortfall is projected to be relatively small in fiscal year 2000 compared to the overall agency budgets and the magnitude of tribal contracting and compacting. At IHS, it is about \$100 million, including a small inflation factor (estimated at 3.5 percent). At BIA, it is approximately \$65 million, including adjustment for inflation and factors related to the Ramah case (estimated at \$21 million). These numbers are actually smaller than what we expected to find.

Finally, we found that contract support costs are for the most part expected to rise slowly in the years ahead. For the BIA, whose total estimated contract support costs requirements are roughly \$180 million (which includes adjustment related to the Ramah case), the expected annual increase is less than \$12 million a year, or about 7 percent. For the IHS, whose total estimated contract support cost requirements are roughly \$310 million, the expected long-range increase is \$10 million a year, or about 3 percent. These are modest increases indeed.

#### IV. NCAI FINAL REPORT—RECOMMENDATIONS

In light of these and other findings, we made several recommendations, including the following:

**First**, we concluded that contract support costs can and must be fully funded. They are an obligation of the Federal Government, both legally and contractually. This payment is also morally right—consistent with the devolution movement and local empowerment, tribal governments should not be required to permanently reduce funding for their programs and services. Although not specifically addressed in our report, there are really only three choices to address contract support cost funding issues:

- The appropriations committees can appropriate the full amount required—which under today's caps is difficult, at best;
- The appropriations committees can appropriate less, and leave tribes to sue to recover the rest; or
- Appropriate measures can be enacted to make contract support costs a true entitlement in terms of its funding mechanism in Congress.

Given the genuine pressures facing the appropriators, I suggest this Committee give this third option very serious consideration. Cost-wise, the impact is infinitesimal relative to the non-discretionary Federal budget. In terms of American Indian and Alaska Native governmental, social and health care programs, however, the impact would be clear, immediate and substantial.

**Second**, we recommend that the OMB issue a new cost circular specifically devoted to tribes and the unique laws that affect tribes. OMB continues to aggregate tribes in circulars with state and local governments, although Congress regularly recognizes that tribal governments do not have the same available resources to accommodate such circular conditions. Such a proposal was included in the 1994 amendments to the ISDEAA, but was deleted at the last moment at OMB's request. Particularly since Congress, in the ISDEAA has enacted special cost accounting principles applicable only to tribes, an OMB circular specific to tribes will eliminate the current confusion that exists between those statutory provisions and the existing general circular.

**Third**, we recommend that Congress authorize one to two years for the development and field testing of a potential "bench-marking" idea that would help bring greater consistency among similarly situated tribes. The idea here is to develop ways of bench-marking particular contract support cost components, so that tribes and government negotiators would have signposts to guide their negotiations, without actually dictating the outcome. If successful, such a proposal could help even out the highs and lows among tribes, thus achieving greater equity between all. Unfortunately, coming up with the precise benchmarks is a fairly technical undertaking that was beyond what we could do in the first year of our work.

**Fourth**, we believe IHS and BIA should be encouraged to work jointly together in the development of a contract support cost "base budget" approach such as is already under development, and as also described in alternative four to the General Accounting Office report. The agencies should be asked to inform Congress whether any further authorization is necessary to proceed with this efficiency innovation.

**Fifth**, we recommend that the BIA immediately come into compliance with the law and with the applicable regulations by recognizing and paying direct contract support costs such as workers' compensation and unemployment insurance. Not only must the BIA come into conformity with the law, but it must aggressively go forward and inform each and every tribal contractor that the Bureau will now begin complying with the ISDEAA in this critical respect.

**Sixth**, we recommend that BIA payment policies more closely mirror IHS policies by promoting first, and foremost, financial stability. As judges have held, neither tribes nor the ultimate Indian beneficiaries are well-served by a system under which the BIA holds back substantial contract support funding until the end of the fiscal year. Rather (and unless overpayments would result) tribes should receive at least the same amount of funding they received in the prior year, and such funds should be paid at the beginning of the fiscal year, not at the end.

**Finally**, we recommend that the so-called "other Federal agency" finally be tackled head-on by Congress. Currently, we operate under a system where a government-wide OMB circular establishes the rules for determining tribal indirect-cost needs, but not all Federal agencies feel bound by the circular. As a result, tribes are once again squeezed in the middle. As a first step here, we recommend that Congress call upon the GAO to study the source of each Federal agency's restriction on the recovery of indirect costs. Once the source of those restrictions is known, Congress can consider appropriate legislation to overcome the barriers that currently pose such difficult problems for tribes.

## V. CONCLUSION

In closing, we strongly recommend that all members of the Committee take the time to review our executive summary. I would like to close my remarks by quoting two short paragraphs from our report which I believe put the issue well:

No single policy in the history of American Indian affairs has more forcefully and effectively permitted tribes to empower their tribal institutions and their people. No single policy has more effectively served to break the cycle of dependency and paternalism. No single policy has better served the philosophy of devolution—moving Federal resources and decision making to that level of local government that is closest to the people. And, no single initiative has contributed more to the improvement in the conditions facing American Indian people.

As the Nation enters the new millennium, it is essential that the American people recommit fully and keep faith with the Self-Determination Policy and empowerment of tribal governments consistent with the devolution movement. Only through the continuation of that policy can America both respect the fundamental government-to-government relationship that exists between tribes and the United States, and fulfill the Federal Government's trust responsibility to protect the interests of Native American tribes.

Thank you, Mr. Chairman, for the honor to testify today on this most critical issue. NCAI, Tribal leaders as well as our legal and technical representatives, look forward to continuing to work with you on the development of contract support costs solutions and funding options.

The CHAIRMAN. Governor Mary Thomas.

### STATEMENT OF HON. MARY V. THOMAS, GOVERNOR, GILA RIVER INDIAN COMMUNITY, SACATON, ARIZONA

Governor THOMAS. Thank you and good morning, Mr. Chairman and members of the Committee, and especially to my representative, Congressman J. D. Hayworth. It is a pleasure to be here.

My name is Mary Thomas, Governor of the Gila River Indian Community. I am here to present the Community's views on the proposed solution for funding contract support costs for health care and community service programs in Indian country.

On Gila River, we have 372,000 acres located in central Arizona. We have 19,000 members, and 13,000 actually live within the boundaries of the reservation. We have a very young and growing population with a lot of needs. Our Community provides our own health and primary care services through the Department of Public Health and the Gila River Health Care Corporation.

Since 1995, the Community has been operating almost all of its health service programs under the ISDEA contracts with IHS. Our contracts are model illustrations for what is good and what is bad about self-determination contracts for health care services. Our experience helps us to advance our health care services to those people who really need it. But we also face a serious risk that exists that is due to underfunding of contract support costs that limits us.

According to national statistics and our own experience, contract support costs comprise about 25 percent of our total program costs. The Health Care Corporation, which is in its fourth year of operation, very young, has received only 56 percent of 1 year's contract support costs and no payment at all for its contract support costs during the first 3 years of operation. We would have been funded at 100 percent of our contract support costs in fiscal year 1999 if they didn't change the rules on us. We were up there in the Queue list, right near the top, and that was wiped out when the Queue rules were changed.

Because of this temporary legislative solution last year, our Community expects to receive about 70 percent of its contract support

costs for fiscal year 1999, but this still leaves the corporation with unreimbursed contract support costs for fiscal year 1996 to 1998 of over \$10 million. We know that \$35 million was appropriated, and it was made clear that the committee believed that the Queque system was inequitable and tried to find a sustainable solution for addressing the contract support cost needs of all tribes.

But there are some main points that I want to highlight. There are seven of them.

First, the contract support costs—and everybody probably says the same thing—is to fund at 100 percent level. When that is not done, in my particular case, in order to enhance services like 24-hour emergency service coverage with further cuts or not more funding in contract support costs, we may have to shut down and limit it to 8 hours a day, which was the case before, but our people really objected because there was a need. We are in a remote area.

Also, we established a podiatry clinic because, as you know, we have high instances of diabetes on my reservation. Over 51 percent of our adult population has or will become diabetics. It is estimated that it will go to 80 percent for males in the future and over 90 percent for our females in our future. We have people as young as under 18 who are diagnosed with diabetes as we currently speak.

Secondly, Congressman Hayworth has alluded to the bureaucratic misinterpretation of congressional intent. That was addressed before, so I will not go into that.

But by reducing fiscal year 1999 contract support costs, we expect that we will only receive \$790,000. We don't accept that premise in the proposed revised circular that contract support costs would continue to be underfunded in future years. I think that is wrong.

We believe that \$35 million in new contract support costs in fiscal year 1999 and 2000 is a good step forward, and we thank Congress for the increased funding and should take the necessary steps to fully fund IHS-approved contract support costs.

We support the GAO reports and recommend options 1 and 4. Full funding is one, and the other one is to incorporate the cost to contract program budgets.

Sixth, we understand there is a discussion in Congress concerning the possibility of establishing a pilot program. As I said before, we know both the good and bad of trying to run our health programs under contracts. So we would be interested. If it is coming to fruition, we would like to take part.

Finally, about the GAO report, there must be a single and consistent Federal policy dealing with contract support costs that applies to any and all self-determination/self-governance contracting by tribes, whether within the BIA or IHS.

In conclusion, I brought something with me that I would like to share with you.

I have been a diabetic for 37 years. This is my life right in this box. It is my syringes that I use for inoculating myself morning and night with my insulin. These are the pills that I must take every day in regard to associated problems with it—high blood pressure, infections, and controlling the sugar content within my body. This is why I have lasted for 37 years. It is because I have followed this

regimen very close and tried to take care of myself as best as possible.

The average cost for a diabetic on Gila River is about \$5,000 per year and we have 26,000 out of 35,000 registered. So you figure that out on a yearly basis it costs about \$13 million to pay for our diabetics necessary care. That does not include everything, though. Just part.

I have had laser surgery on my eyes. I have had operations. I have had kidney infections, urinary tract infections. Luckily, I have not had to go through any amputations. It takes long for me to heal out of surgery, and my teeth are affected as well. I hope that you will take this into some thought, that it does take a lot of money to run our programs, but we are trying our best at the local levels.

Thank you.

The CHAIRMAN. Thank you, Mary.

And, just for your information, this is one of my projects, is diabetes. It is not only in your area. It is one of the more rapidly rising diseases, most disabling diseases that we have, especially amongst the young. Contrary to what many people—we had two young people in my office the other day. One was 8 and one was 7. Like you said, it is a very expensive thing. We are trying to get enough money into research so that our future generations don't have to go through what you are going through. We are doing everything we possibly can.

[The prepared statement of Governor Thomas follows:]

STATEMENT OF HON. MARY V. THOMAS, GOVERNOR, GILA RIVER INDIAN COMMUNITY

## INTRODUCTION

Good morning, Mr. Chairman and Members of the Committee. My name is Mary Thomas and I am the Governor of the Gila River Indian Community. I am honored to have the opportunity to represent the Gila River Indian Community before the Committee today to discuss Federal funding for contract support costs associated with health care and other community service programs in Indian Country ("Contract Support Costs").

The Gila River Indian Community (the "Community") is located on 372,000 acres in south central Arizona. Our Community is composed of approximately 19,000 tribal members, 13,000 of whom live within the boundaries of the Reservation. The Community provides preventive health and primary care services through its Department of Public Health ("DPH") and the Gila River Health Care Corporation ("GRHCC" or "Corporation"). With minimal exceptions, the Community has operated all health service programs on the Reservation under Indian Self-Determination contracts with the Indian Health Service ("IHS") since fiscal year 1996. We also provide law enforcement, social services, irrigation system construction and rehabilitation, and other community services under self-determination contracts and self-governance agreements with the Bureau of Indian Affairs ("BIA") and the Bureau of Reclamation ("BOR").

We strive to operate well-managed and effective community service programs responsive to our Community's specific needs. With respect to health status, we have a relatively young and rapidly growing population, which suffers tremendously disproportionate rates of debilitating chronic diseases such as diabetes and alcoholism. In fact, the World Health Organization has found that our population has the highest incidence of type 2 diabetes mellitus in the world. It will take working through at least one generation to move from the IHS model of treating acute health conditions to a Tribally-based health prevention and maintenance model. We believe this change can only be made through the continued efforts of our Community-managed Department of Public Health and Health Care Corporation under adequately funded self-determination contracts with the IHS. With respect to our BIA and BOR programs, we similarly believe meaningful improvements can best be made by continuing to operate these programs ourselves through our contracts and compacts with the BIA and BOR.

It is appropriate that the Committee has asked the Community to testify today concerning contract support funding. According to national statistics and our own experience, our Contract Support Costs can be expected to comprise approximately 25 percent of our total program costs (see accompanying graph). In the area of health care, however, as of today, our Health Care Corporation, in its fourth year of operation, has received *56 percent of one year's* Contract Support Costs, and *no payment* for its Contract Support Costs for its first three years. With respect to the Community's ongoing self-determination and self-governance agreements with BIA, we receive less than 100 percent funding for indirect costs and far less in Contract Support Cost funding. The Community's experience speaks for itself in illustrating the shortcomings in the past Federal Contract Support Cost policy implementation and the unfortunate consequences of being in exactly the wrong place at the wrong time as that policy changed at the IHS. We focus today on our experience with contracting with the IHS as it illustrates the best and the worst of self-determination policy.

The DPH has operated community service programs such as Public Health Nursing and the Community Health Representatives program since as far back as 1985. In June of 1995, as the Community was preparing to contract with IHS to assume operation and management of the Community's Hospital and associated program and administrative functions, we submitted to IHS a contract support request of \$4 million. Because of the IHS practice of utilizing its first-come first-served waiting list or "queue" for new and expanded unfunded self-determination Contract Support Cost requests, our request was placed on the queue and we waited for funding. Under this system, the Corporation operated for three years with no contract support funding—waiting to reach the top of the queue. If the system had continued without change and Congress appropriated \$7.5 million in FY99 as it had in recent years, the Corporation would have received 100 percent of its FY99 contract support need plus reimbursement for pre-award and start-up costs incurred in prior years. We estimate the Corporation's cumulative unreimbursed Contract Support Costs for FY96-98 at over \$10 million. Each year we did not receive funding, we continued to track our Contract Support Costs and refine our Contract Support Cost request. Eventually our request made it close to the top of the IHS's queue and we would have been funded at 100 percent in Fiscal Year 1999 if the queue system had continued as it was operated in the past.

However, due to an estimated backlog of requests totaling approximately \$60 million and litigation over contract support shortfalls, the contract support funding situation reached crisis proportions last year. The House Appropriations Committee vigorously supported allocating limited contract support appropriations on a pro rata basis among all tribes nationwide without regard to its effect on the underlying programs. Language attempting to retroactively impose a "cap" on the amount of funds available for Contract Support Costs for previous years was enacted as an appropriations rider, and a moratorium was imposed on any new contracting. After a massive effort by tribal leaders and supporters in Congress, \$35 million in new funding was included in the FY99 IHS appropriation to begin to address the shortfall. The language requiring pro rata distribution was eliminated but the cap, moratorium, and limitation on past contract support payments remained in place. The Committee Report which accompanied the appropriation made clear that the Committee believed the "queue" system was inequitable and directed the IHS to work with tribes to find a sustainable solution for addressing the perceived inequity and the contract support needs of all tribes contracting with IHS.

At the same time, the General Accounting Office ("GAO") and National Congress of American Indians ("NCAI") initiated independent efforts to examine the shortfalls in contract support funding at the IHS and BIA, and to propose recommendations or alternatives to the current funding systems.

### **Distribution of IHS Contract Support Funding in FY99**

Immediately following final action on the IHS's FY99 appropriation, the IHS and NCAI convened meetings to consult with tribes concerning how the contract support funding for FY99 should be distributed, and to discuss policy changes for the future. This process required the IHS to finalize all contract support requests on the queue, and in general to determine the status of all tribes' contract support shortfalls. We commend the Office of Tribal Activities at the IHS, and negotiators from the Office of Finance, for their efforts in gathering and substantiating a tremendous amount of information in very short time frames. Further, this consultation process required all participants to really think through the short and long-term effects of proposed changes in the contract support system. We were impressed at the level of expertise brought to this issue by those working in this area throughout Indian country.

For FY99, it is our understanding that the IHS has or will distribute FY99 contract support funding so as to bring all tribes' contract support funding up to a "floor" of approximately 71 percent of their total contract support need. Ongoing programs are funded based on the amount they have historically received out of a pool of funds identified for recurring contract support needs. Any shortfall is noted and may be paid out of a separate pool of funds made available by Congress or IHS for such recurring shortfall. The \$35 million increase is being used to fund contract support requests on the queue to the extent a tribe's total contract support need—taking into consideration ongoing contract support need and payments and new or expanded contract support need—is below the "floor" of approximately 71 percent.

The Corporation's Contract Support Cost request for FY99 was approved by the IHS at approximately \$3.7 million. Of this amount, \$790,000 is for previously incurred preaward and startup costs. The balance, approximately \$2.8 million, represents direct costs (including indirect-type costs) which will be recognized by the IHS on a recurring basis so long as the Corporation continues to incur these costs each year. Under the IHS' distribution methodology for FY99, the Corporation expected to receive approximately 70 percent of its approved request, or approximately \$2.52 million.

In March of 1999, however, we learned that the IHS was considering legal recommendations from its Office of General Counsel ("OGC") that it not pay preaward and startup costs incurred in prior fiscal years. The OGC opinion on this issue concludes that Section 314 of the FY99 Omnibus Appropriations Act prohibits use of any part of the \$35 million increase for prior years' preaward and startup costs. If the Corporation's preaward and startup costs are not reimbursed, the Corporation will lose an additional \$790,000. This is in addition to the \$1.2 million the Corporation will not receive in FY99 under IHS's new distribution system. It is important to keep in mind that the funds we are not receiving are funds we would only use to operate a Federal program serving Federal beneficiaries. It is only right that the Federal Government pay the reasonable and prudent costs of running Federal programs as the law requires. The history of our program funding, unfunded contract support need and contract support funding received is shown on the attached graph.

These preaward and startup costs were included in the shortfall amounts communicated to the Committees during the FY99 appropriations debates and in the calculations upon which the NCAI and IHS recommendations were based. It was clearly our (and other tribal representatives) expectation that 70 percent of all approved Contract Support Costs—including preaward and startup—would be paid in FY99. Congressman Hayworth sent a letter to IHS Director Dr. Trujillo clarifying that it was congressional intent to pay prior year preaward and startup costs included in the queue. And IHS reports that it did pay one prior year's startup costs—FY98—but is reluctant to pay other prior year costs. Despite correspondence and repeated inquiries, we have been unable to get IHS to make a decision or provide a written response on this issue. IHS's inaction on this issue is unacceptable and we seek the Committee's help in remedying this inequity.

In addition to the preaward and startup costs, IHS is refusing to reimburse to us our unreimbursed Contract Support Costs from FY96 through FY99 that total over \$10 million. While not directly involved, we are closely following the recently filed class action under which we may be able to recover these costs.

### **Proposed Distribution of IHS's FY2000 Contract Support Funds**

After working on distribution of the \$35 million increase in FY99 contract support funds, the IHS Contract Support Workgroup began consideration of policy changes in response to the events of the FY99 appropriations debate and directives concerning contract support. The workgroup deliberations have resulted in a proposed revised circular. At the outset it is important to note that the proposed new circular accepts less than full funding and then proceeds to explain how the agency will distribute limited funds. It is not acceptable to us that the agency presumes these costs will be permanently underfunded.

The circular divides contract support funding into three pools: (1) an ISD pool for new or expanded contracts ("Pool 1"); (2) a pool for the Contract Support Cost needs of ongoing programs ("Pool 2"); and (3) a pool comprised of any additional funds available for shortfall ("Pool 3"). Perhaps the most significant aspect of the proposed change in policy is that the IHS will now look at a tribe's total contract support need and funding whereas in the past the IHS has considered only the tribe's contract support need associated with its new or expanded contract. The ISD fund will be used to pay contract support needs associated with new or expanded contracts at a rate as close to full funding as possible. A tribe's *ongoing* shortfall will not be paid from ISD funds however. This method in essence seeks to bring tribes from the bottom up to as close to full funding as appropriations permit.

Other than IHS's refusal to pay our preaward and startup costs and with the threshold caveat that IHS can only do so much with less than full funding, we have not objected to most of IHS's proposed new contract support policy. Of the options discussed, and if one accepts contract support will not be fully funded, the new policy goes the farthest toward funding all tribes' Contract Support Cost needs and moving towards total equity while minimizing disruption to existing programs. We want to be assured, however, that once funded, our level of funding will not be reduced unless Congress fails to appropriate a recurring level of funds. Another absolutely critical aspect will be timely information gathering and inclusion of tribes' true future needs in IHS's budget requests. We do, however, object to annual redistribution within IHS Areas as we believe this favors some areas over others and would like to see IHS return to timely national redistribution of contract support funds.

The success of the new policy will be largely dependent on adequate annual appropriations to fund tribes' true contract support needs. Most fundamentally, we reject the underlying premise of the IHS circular—that it is acceptable to have a regime where a tribe contracts to operate Federal programs for the Federal Government serving Federal beneficiaries without the minimally necessary funding to administer those Federal programs. This point is especially important when compared to direct services provided by IHS that have full "Contract Support Cost" funding.

### **NCAI and GAO Reports**

Community representatives provided information to the GAO for its consideration in its report and followed closely the work of the NCAI Contract Support Workgroup. We believe each report makes a significant contribution to the ongoing debate and solution of contract support issues.

**NCAI Report.** The NCAI Report provides a very thorough and well-written documentation of the history and development of the current state of Federal Indian Self-Determination and contract support funding policy. We concur with its findings and wish to emphasize our support for the following points.

The report emphasizes in several places the need for full funding of tribes' Contract Support Costs. The report documents past failures on the part of the BIA to implement "grandfathering" or flat rates in large part because such changes were not accompanied by initial full funding. The report also recognizes that in projecting future need, annual inflationary increases must be added to the recurring amounts and that contract support requirements should be included with all program increases and new initiatives. NCAI's recommendation that the agencies continue to report fully to Congress tribes' contract support needs is crucial to obtaining and maintaining full funding.

The report confirms that the indirect cost rate negotiation system has proved the most workable in light of providing some uniformity for determining diverse tribal needs. The report further confirms the increases in contract support need are due to increased contracting and the associated increase in contract support needs. We urge that the Administration and Congress further acknowledge that these increases are legitimate and necessary costs of the Federal policy of tribal self-determination. And it has been our experience that the benefits—in terms of increased access, improved services and improved health status that come with the devolution of Federal authority to local tribal governments—more than compensate for any marginal increase in total program cost. This fact should be recognized to put in context the House Appropriations Committee's concern that increases in contract support are at the expense of program increases. To the contrary, it is the *underfunding* of Contract Support Costs that comes at the expense of programs, as tribes are compelled to divert program resources to cover the government's contract support debt. As noted in the NCAI report, we believe that further development of the idea of "benchmarking" should be made and that through such benchmarking, we may be able to achieve greater consistency while preserving sufficient discretion to allow for tribes' diverse needs and accounting systems.

**GAO Report.** We believe the ultimate value in the GAO report is that it confirms that the contract support dilemma for tribes is *real*, that is, the failure to fully fund Contract Support Costs adversely affects our local programs and our ability to efficiently administer them. The report recognizes that this is a result the authorizing Committees have repeatedly sought to avoid and eliminate in amendments to the Indian Self-Determination Act, and is absolutely counter to successful implementation of self-determination policy. Also, importantly, the report validates the long-standing tribal position that increases in Contract Support Costs are attributable to increased contracting rather than uncontrollable increases in indirect cost pools and rates. In fact, the report concludes tribes' rates have remained relatively stable over the last ten years at approximately 25 percent. The report also clarifies some



of the common misperceptions about differing rates among tribes—an important point in dispelling the notion that some tribes manipulate their rates or operate inefficiently.

Contrary to the GAO report's reluctance to make predictions about future Contract Support Cost needs, however, we believe the stability in rates coupled with the agencies' hopefully improved data concerning tribes' contract support needs should enable the agencies to fairly accurately predict new contracts coming on line. In fact, we view it as a function of the agencies to know and guide tribes through the initial contracting processes—this should include working with tribes to include their future contract support needs in IHS's budget requests.

The GAO report further confirms the effect of shortfalls on tribal programs. The documentation in the report mirrors our experience. Our Health Care Corporation's transition from Federal to Tribal operation required extensive development of administrative—personnel, procurement, finance, information—systems and training. To function effectively and efficiently, change is still underway and more is necessary to upgrade antiquated medical records and information gathering systems which are absolutely critical in accessing information concerning the number of patient visits, reasons for patient visits, and the number of visits per diagnosis. The law requires and we were promised reimbursement for these items. After three, almost four, years of operating with from none to just over 50 percent of our IHS approved contract support need, the lack of contract support funding threatens the Corporation's financial stability. We are faced with options such as reductions in services and limitations on our ability to expand into other areas of health care delivery. The GAO report is useful in confirming the effects of shortfalls on tribes. This information now needs to be taken seriously and used to support the need for full funding to avoid these detrimental effects on our programs, and to recognize that some initial investment in our infrastructure is necessary to realize increased administrative efficiencies such as more effective patient referrals and maximizing billing of third party resources.

And last, the GAO offers four alternatives for funding tribes' contract support needs. Of these alternatives, we favor options one and four. The first option is to fully fund Contract Support Costs. We believe this option, coupled with several of the recommendations in the NCAI report, would meet both tribal and Federal interests on this issue. For instance, with the development of benchmarking and revisions to OMB circulars recognizing cost and audit issues unique to tribal operations, we believe a greater degree of consistency can be achieved so far as the allowable items included in tribes' indirect cost pools for operating similar programs. Inter-tribal collaboration, such as our arrangement with the nearby Ak-Chin Indian Community, should also be explored where feasible to reduce administrative costs and maximize economies of scale. Accompanying these tribal efforts toward consistency and economy, the Federal Government must recognize tribes' true costs of operating Federal programs. Toward this end, we encourage the BIA to revise policies that ignore or dilute its responsibility for known costs, such as BIA's failure to pay direct Contract Support Costs and dilution of its responsibilities for indirect costs attributable to BIA programs as in the *Ramah* case.

We also support further development of option 4, which is to incorporate contract support into tribes' program budgets—essentially consolidating, "grandfathering," or "base budgeting" contract support and program funding. We strongly believe, however, for this option to be successful, the amount of contract support consolidated in the first year must be full funding of contract support need. There also must be provision for annual increases in the consolidated amount tied to a nationally recognized inflationary index, and some provision for administrative increases tied to significant program increases. With these provisions, we believe option 4 offers considerable potential toward meeting tribal and Federal concerns. Our Health Care Corporation is an ideal candidate to demonstrate the potential success of Option 4, and we would be pleased to continue to work with the Committee on such a demonstration.

## SUMMARY

In summary, the following are the beliefs and recommendations of the Gila River Indian Community:

- Contract Support Costs for IHS and BIA programs need to be funded at the 100 percent level.
- Inadequate funding of Contract Support Costs results in funds being shifted from direct service provision to support.

- Past attempts by IHS and BIA to equitably distribute partial Contract Support Costs have not worked and have in fact caused harm to the Gila River Indian Community contracted programs.

- Current attempts by IHS and BIA to develop new, "fairer" policies for distributing less than full funding for Contract Support Costs are built on the wrong premise and represent just a band-aid solution; they do not solve the underlying problem.

- The GAO report on Contract Support Costs was an objective report with supportable recommendations. We support recommendations 1 and 4 full funding for Contract Support Costs, and incorporating these costs into contract program budgets.

- We would be willing to participate in a pilot program that implements a combination of GAO recommendations 1 and 4.

- There must be a single, consistent Federal policy dealing with Contract Support Costs that applies to any and all self-determination/self-governance contracting by tribes.

## CONCLUSION

In conclusion, the Gila River Indian Community believes strongly that full Contract Support Cost funding is necessary to continue paving the road to self-determination that the Congress outlined and that we have been traveling for almost 25 years now. In our health programs, we have directed the maximum amount of resources into direct patient care and specifically toward the worst health problems facing our Community. With our BOR program, we have made more progress toward a functioning water delivery system in the four years we have operated under a self-governance agreement than under past Federal operation. In law enforcement, we have a more stable and reliable police department than when we relied upon the BIA to operate it. We ask that you help us preserve and continue the success of our self-governance by committing to contract support policies that first acknowledge our contract support needs as legitimate and necessary and then fully fund these needs.

As our experience with the IHS shows, the past contract support policy has served to penalize us for contracting. We contracted with the hope of reversing the reductions in services we experienced in the early 1990s when the IHS budget failed to keep pace with inflation and other cost factors. After four years of minimal Federal Contract Support Costs, however, we are facing the harsh reality of imposing service reductions ourselves to cover necessary but unfunded administrative costs and infrastructure improvements. Full funding of Contract Support Costs will help Congress achieve its stated goal of "supporting and assisting Indian tribes in the development of strong and stable tribal governments," able to operate programs at a par with other Federal agencies. Tribes have repeatedly proven that the self-determination framework created by Congress can build tribal administrative capacity, reduce Federal bureaucracy, and, most importantly, improve the quality of life of tribal members.

As both the GAO and NCAI reports confirm, the current contract support system is sound in that the costs incurred are reasonable and legitimate, and necessary to prudently administer Federal programs at the local level. Now it is time to make the funding part of the system work by doing whatever is necessary in the appropriations system to assure these Federal obligations are fully paid each year. We can refine the system through benchmarking and other efforts aimed at consistency and economy.

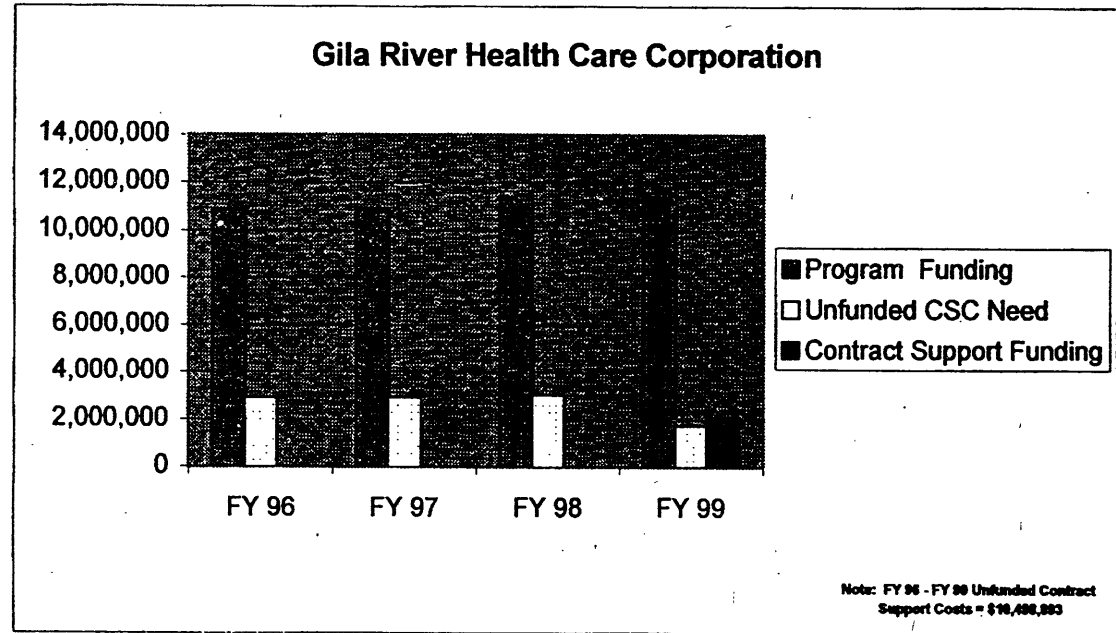
Our contracted programs have suffered from years of less-than-100 percent funding for the necessary Contract Support Costs. Gila River has been patient, hoping that with appropriate funding and guidance from the Congress and consistency of application by BIA and IHS, that the Contract Support Costs crisis could be resolved. As you are aware, other tribes, whose patience has run out, are moving beyond Congress and into the courts to seek remedies to this problem. If there is not a timely solution by Congress and the Administration in the area of Contract Support Costs, we may likewise be forced to seek judicial help.

In these times of significant budget surplus, we encourage the Federal Government, in fulfillment of its legal responsibility, to commit to fully funding and supporting Contract Support Costs.

Mr. Chairman and members of the Committee, thank you for the opportunity and honor of testifying today on this issue on which basic support for our community service programs depends. We thank you for your past support and look forward to continuing to work with the Committee as it deliberates over a sustainable solution to contract support issues.

Gila River Health Care Corporation

	Program Funding	Unfunded CSC Need	Contract Support Funding
FY 96	10,854,383	2,887,266	0
FY 97	10,891,730	2,897,200	0
FY 98	11,260,134	2,996,916	0
FY 99	11,576,260	1,717,511	2,067,573



The CHAIRMAN. Mr. Williams. Orie, you are up.

**STATEMENT OF ORIE WILLIAMS, EXECUTIVE VICE PRESIDENT, YUKON-KUSKOKWIM HEALTH CORPORATION, BETH-EL, ALASKA**

Mr. WILLIAMS. Good morning, Mr. Chairman, committee members, and Congressional staff.

Before I go on, Mr. Chairman, I would certainly like to thank you and Congressman Hayworth for allowing their staff to join the Indian Health Care Improvement Act. We were working out the differences and listening to the tribal concerns last week in health care improvement. Your staff did an excellent job, and I wanted to say that publicly before I start.

Mr. Chairman, thank you for the opportunity to testify once again before your Committee on what Congress in 1987 called "the single most serious problem with implementation of the Indian self-determination policy," namely the failure to fully fund contract support costs.

For the record, my name is Orie Williams, and I am the Executive Vice President of the Yukon-Kuskokwim Health Corporation. I am here this morning with our legal counsel and expert in this field, Lloyd Miller, who is well-known to this Committee. I am also happy to introduce to you Mr. Paul Manumik, on my left, the tribal elected member of the Yukon-Kuskokwim Health Corporation board of directors and the chairman of the hospital governing board. Mr. Manumik lives in his home in Sheldon's Point, Alaska, and has served his Yupik Eskimo tribal members for 15 years.

Our health care organization was created by and is controlled by 58 federally recognized Alaskan Native tribal governments, their members, and their village communities. In financial terms, we are the second largest privately operated Indian Health Service program in America, operating \$40.2 million in IHS government programs alone.

In my testimony last February, I reminded the Committee of the daunting conditions that we face in carrying out the task of delivering Indian Health Service government programs to the beneficiaries of those programs. Recall that we serve: a roadless area the size of South Dakota; 23,000 people scattered in 58 villages; a population where 54 percent are Medicaid eligible, including 90 percent of all pregnant women and children, and where 44 percent are unemployed—in some villages unemployment is over 80 percent; villages most of whose primary sewer system consists of one six-gallon bucket in each home; post neonatal mortality is more than double the average U.S. Rate, death by suicide is four times the national rate, fetal alcohol syndrome and fetal alcohol effect are rampant, and the lack of adequate sewer and water systems has left our communities victim to every known infectious disease and higher rates of tuberculosis, even as we enter the 21st century.

Rather than go further, I respectfully refer the Committee to my testimony submitted February 23, 1999, which I am submitting again today.

The point is that we are operating the government's programs, including a large government hospital, for the benefit of the Federal beneficiaries of those government programs. If independent

Department of Health and Human Services Division of Cost Allocation says it takes \$14.9 million to administer that program, then that is what we should be paid.

And yet, this year we are once again underfunded by \$2.3 million. Once again we cannot fill positions in our accounting department and in our administrations department and in support of our hospital. This is not just a crisis in 1999. It has been ongoing since 1992.

The GAO June, 1999, report is most welcome because it confirms what we have been saying all along. First, that contract support costs are legitimate and necessary and fairly determined; and, second, that without full payment of these costs our people are actually being penalized by the transfer of Federal health care programs down to the local level.

Mr. Chairman, we are trying to do our part to reduce the Federal bureaucracy and enhance local empowerment and economic development, but why, I ask, should this require such a heavy price in the reduction of direct services to our people?

Our tribal organization has remained intimately involved this past year both in the work of the National Congress of American Indians and the General Accounting Office study. Based upon that involvement, our experience over the years, and the analyses undertaken by our financial and legal advisors, we offer these following recommendations for addressing the many issues that involve the contract support system:

First, it is time for the appropriations process to finally catch up with the legal framework established by Congress 25 years ago. Since we are talking here about government contracts and legally binding obligations, and since the Indian Self-Determination Act already specifies that tribes are, quote, "entitled" to receive contract support to carry out these programs, the law should be changed as necessary to also make the payment of contract support an entitlement in the appropriations sense of that word. Once those amounts are set, whether it be by the Department of Health and Human Services Division of Cost Allocation or the Department of the Interior Office of Inspector General, the tribe as a contractor would know that it will be fully paid for performing that contract, no ifs, ands or buts about it.

The cost of doing this would be negligible in the national arena, although it would be critical to us—not just for tribes but to protect government program beneficiaries—over 1 million American Indian and Alaska Native people—from getting the short end of the stick as we dismantle the Federal Government and bring it down to the local level.

Second, if for whatever reason funding at the national level is insufficient, the first priority should be stability as recognized in the Indian Health Service system. Tribal organizations should at least receive the same amount they received the preceding year, and they should not be the victim of the peculiar BIA option that pays you an unknown amount in the 11th or 12th month of the year when all of your expenses have already been incurred. The BIA system is destabilizing, and therefore I especially praise your leadership, as well as Congressman Regula's regular sensitivity, to the fact that the simplified pro rata system in the end is not sensible.

If a health care system needs nothing else, it needs stability and predictability.

Third, we unequivocally oppose GAO's alternatives 2 and 3. Alternative 2 would gut the Act by making contract support entirely dependent on the highly political budget and appropriations process. And alternative 3 would ignore the enormous differences among tribal programs. Obviously, we are not all the same, and operating a 51-bed hospital and 47 clinics in a roadless area the size of South Dakota demands different administrative costs than operating a small community health program near major metropolitan areas.

Fourth, we recommend that the Committee consider authorizing a short demonstration project to see if the GAO's fourth recommendation for a stable, combined funding amount can work. Yes, there are details to be worked out, such as inflation adjustments and the like, but we agree that it holds real promise for accomplishing an unimpeachable goal: to encourage greater efficiencies in health care administration by actually rewarding those efficiencies.

Fifth, we agree with the NCAI that some standardization may be possible among some elements of contract support. It is true that all tribal organizations are different; and, like States and local governments, all have a right to design their systems to meet their unique needs. Even still, some standardization efforts that are sensitive to our differences could help moderate the highs and lows and reassure Congress that all tribes in the end are treated fairly, neither receiving less or more than necessary to prudently administer these government programs under local conditions. NCAI has proposed the so-called benchmarking idea, and we would like to see that idea funded, developed, and field tested over the next year or two by the two departments working jointly.

Finally, let me note that we obviously oppose any suggestion that Indian Health Service or BIA be delegated any legislative authority whatsoever in this area to write regulations, whether it is through negotiated rulemaking or otherwise. If the last 25 years have shown us anything, including all of the litigation over the past 5 years, it is that Congress wisely decided in 1994 to remove any agency discretion or authority in this very delicate area.

May I continue, Mr. Chairman?

The CHAIRMAN. Yes.

Mr. WILLIAMS. Yes, these agencies are committed to tribal self-determination, but there are also bureaucracies who have had time to seek to perpetuate their own existence. Granting these agencies broad regulatory authority over funding issues will, in our opinion, only serve to retard the process of downsizing and self-determination, and we therefore firmly oppose it.

On a related note before closing, I would like to add if the goal here is to improve Indian health care, then one additional means outside the technical contract support arena is to enact the many technical and mechanical improvements that are contained in the permanent self-government legislation that was recently marked up by this Committee, namely H.R. 1167. Although we do believe that the marked-up bill can be improved upon even further, and we would be pleased to share our recommendations with the chairman,

we also believe this is a measure whose time has come. We therefore respectfully ask that it about brought to the floor at the earliest opportunity.

Thank you, Mr. Chairman, for the honor of testifying today. While I am here, I would also like to acknowledge and thank the efforts of the chairman and Committee members who worked so hard over the years who helped alleviate many of the deplorable conditions facing our communities.

I would like to especially once again recognize Cynthia Ahwinona of Congressman Young's staff and Ms. Elizabeth Connell of Senator Stevens's staff for their assistance.

Mr. Chairman, if you would permit, I would like our hospital chairman, Mr. Manumik to add a comment or two, and then allow Mr. Miller to comment on one aspect of this proposal.

The CHAIRMAN. Without objection.

[The prepared statement of Mr. Williams follows:]

TESTIMONY OF  
 ORIE WILLIAMS, EXECUTIVE VICE-PRESIDENT  
 THE YUKON-KUSKOKWIM HEALTH CORPORATION  
 OVERSIGHT HEARING ON  
 CONTRACT SUPPORT COSTS  
 WITHIN THE  
 INDIAN HEALTH SERVICE  
 BEFORE THE  
 U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON RESOURCES  
 FEBRUARY 24, 1999

Mr. Chairman, thank you for the opportunity to testify before your Committee on what Congress ten years ago called "the single most serious problem with implementation of the Indian self-determination policy," namely the failure to fully fund contract support costs.

To begin, my name is Orie Williams, and I am the Executive Vice-President of the Yukon-Kuskokwim Health Corporation. Our health care organization is authorized by and represents 58 federally recognized Alaska Native Tribal Governments, their members and their village communities, and we are the second largest tribally-operated IHS program in America. We also believe we are the most successful tribal operation in the country, whether measured in terms of improved patient care, improved health status or increased tribal control over the health care delivery system.

Having said that, I must state that I truly believe it will take the next 10 to 20 years of sustained resources to build healthy families and communities in our service area and to totally transfer service from an IHS crisis care model to a health prevention model. This must -- and can only -- be accomplished under tribal management with the flexibility Congress has allowed in the amendments to the Indian Self-Determination and Education Assistance Act demonstration model. We applaud Congress' vision and the tribal vision that made this Act a reality.

We face daunting conditions. The 58 villages and 23,000 people we serve are spread across an enormous, roadless area the size of South Dakota. Only snowmachine and subsistence trails, rivers and air transport systems connect our communities. Transportation during the long harsh winters is unpredictable. The majority of our people live below the poverty line. We estimate at least 54% are eligible for Medicaid insurance coverage; overall, 44% are unemployed, although in many villages the unemployment rate exceeds 80%. Most of our village homes have 6 gallon plastic buckets for toilets. Post-neonatal mortality is more than double the U.S. rate. Death by suicide is four times the national rate. Fetal alcohol syndrome and fetal alcohol effect are extraordinarily high, as are all other alcohol-related diseases, accidents and deaths. Hepatitis, tuberculosis, infections caused by lack of adequate sewer and water systems, and sexually transmitted diseases all plague our young and growing population.



Attached to my testimony is a detailed profile of our health care organization and our region. As the profile reflects, we have succeeded in improving the health care delivery system since the days of IHS operation. But part of the reason we cannot do more today is that IHS has required us to neglect some programs and to divert resources to cover the fixed administrative overhead that necessarily comes along with operating a \$40,200,476 system comprising 1,003 employees, 47 village community health aid clinics, one mid-level subregional clinic, and a 51 bed hospital (including two new sub-regional mid-level clinics under construction).

Our contract support cost requirement -- what we need according to IHS policy, the DHHS Division of Cost Allocation and our certified annual audits -- is \$14,925,949. This is what we need to run our financial management systems, to operate our personnel, human resource and payroll systems, to support our facilities, to cover insurance, legal and audit costs, to operate our procurement system for drugs, equipment and supplies, to sustain our third-party billing operation, to support needed technology, to advance employee training, and to respond to new regulatory and legislative initiatives.

But for several years we have operated with a multi-million dollar deficit in contract support costs, a deficit this year of \$2,304,663 -- or fifteen percent (15%) below what we need (per Alaska Area CSC shortfall report 1/8/99). Keep in mind that this "need" has been determined by IHS and its sister agency the Division of Cost Allocation, not by us. Frankly, in our opinion it is artificially low. For instance, it understates greatly the need to at least match IHS's fringe benefit package when a tribal organization takes over the IHS system, especially for Commissioned Corps employees and Civil Service employees.

The continual backlog in unpaid contract support costs has had serious consequences. Our accounting department is \$212,050 short, including three unfilled positions. Our billing and admissions departments are \$321,375 short, including six unfilled positions. Technology support is short \$236,700, representing three positions that support the remote telecommunications system that is the central nervous system of our health care operation. Hospital maintenance and housekeeping staff and equipment are down \$477,430 to name just some of the areas where the shortage is causing reduced performance. We are unable to use IHS "tribal share" program funds for their intended purpose because much of the funds have been diverted to help close the contract support gap, funds which should be going to regional substance abuse services, mental health services, home health care and village clinic operations, and inhalant treatment, to name a few. In short, Mr. Chairman, the contract support cost shortfall for YKHC is very real, and it is causing very real damage to our ability to further improve the health status of our people.

With this overview, we would like to make these additional points directed at the issues raised in the Chairman's letter: how to improve upon the system itself within the framework of the Indian Self-Determination policy.

1. . . First, I cannot let this opportunity go without commenting on last year's proposal to reallocate all contract support costs on a simple flat pro rata basis.

The flat pro-rata approach would have been a disaster for many tribes, and tribal organizations, across the country that have worked hard over the years to justify and secure the contract support funding they have. For us, our existing shortfall would have only gotten worse, causing massive layoffs in a region of Alaska already plagued by a fisheries disaster and low employment. Other tribal organizations that depend on the stability of a known contract support cost amount each year would have been hurt even more.

If there is one thing I would hope to convey today, it is that last year Congress wisely rejected the proposal to redistribute all contract support on a flat pro rata basis. It is an approach that would have made Indian country shoulder the Federal Government's burden. It is an approach that was wrong despite its best intentions, and I hope the Chairman, and this distinguished Committee can assure all of us that it is an approach that will not be revisited.

It is true that this system seems to work reasonably well for the BIA. But that is only how it appears. The fact is, the BIA system is peculiar indeed. Under that system, the BIA supposedly pays a tribe its full indirect costs the first year, along with its full start-up costs. But in the second year the tribe's payment can drop to 80%, 70%, or some other level no one knows until the BIA actually calculates it the following summer, just before the fiscal year is about to end. The BIA payment goes up and down with no predictability, causing considerable uncertainty for the tribes. In fact, I understand that this is a large part of the reason why the Interior Board of Contract Appeals threw out the BIA system. It ruled that if a tribe's contract calls for contract support costs, and the tribe is dutifully performing, and most of the year is over, the tribe must be fully paid. There is only one thing I can say for the BIA system: It is administratively convenient.

The BIA system may help the BIA. But it does not help tribes. In contrast, the IHS system, although flawed by erratic appropriations, represents a genuine effort to maintain tribal stability by continuing to pay each tribal organization at least the same amount it received in the preceding year, again beginning with an effort to fully pay the tribe in the first year.

Yes, the IHS system can be improved upon, especially with better coordination between Congress and the Tribes; but it is clearly a better system -- assuming the goal is the stability of health programs serving needy Native Americans, and not administrative convenience.

2. Second, we believe the Committee's concern regarding accurate data from IHS has been largely addressed in the past year. We are extremely impressed with IHS's commitment and progress in this area over a few short months, thanks to a needed centralization of much of this work, improved training of IHS Area personnel, and greater oversight from the IHS Office of Tribal Affairs and the Division of Financial Management. Candidly, we were one of many who said that IHS would never be able to bring accuracy back into its system and to negotiate all the contract support requests it had before it. But our skepticism was misplaced, and we give credit for this especially to OTA Director Doug Black and Deputy Director Ron Demeray, as well as Carl Fitzpatrick, Dan Cesari and Dan Modrano of the IHS Division of Financial

## Management.

We do want to emphasize two points regarding the data issue. First, during last year's debate IHS furnished undistributed data to the Appropriations Committee staff. It was never publicized. Neither IHS nor anyone else shared that data with Indian country. It was finally provided to us by diligent Congressional staff during the heated debate; and, once it was received, we were able to show how terribly flawed the data was, and fortunately decisions based upon that poor data were abandoned. In the meantime, however, statements were made on the floor of the House and elsewhere that were plainly in error based on this false and misleading information.

The point is this: the IHS and the Congress need to trust us. They need to share such vital information with us in advance, and at their own initiative, not ours. If the data withstands the harsh scrutiny of daylight, it can be the basis for informed decisions. Otherwise, Congress should step back and hesitate to act on an uncertain record that has not been tested.

Indeed, even with all the good work IHS has done over the past few months, we continue to probe, to ask questions, to find flaws, to point out inaccuracies, and to prompt IHS to improve its data further. Tribal health care providers are now in partnership with IHS in this endeavor, and I have no doubt that IHS will readily acknowledge the value of our contribution. After all, we have a vested interest: if the data is called into question, the whole system may be called into question. And none of us can afford that outcome, least of all the thousands of Alaska Native people in the 58 villages we serve.

3. Third, we share the Committee's interest in learning more about the issue of agency downsizing. While we at YKHC are not in a position to assess IHS's downsizing nationally, we do know that it has happened in the Alaska Area and in our own Y-K Delta Service Unit in Bethel.

At the service unit level, there is no longer any IHS presence. Everything that was part of IHS has long been taken over by YKHC through our Compact with Congress. Of course, that does not mean IHS does not exist, for the hospital facility we operate is owned by IHS, and many of the professional staff we use are IHS employees detailed to us under the Intergovernmental Personnel Act and other applicable law. We do this because for many positions we simply cannot match the compensation benefit packages available to IHS for attracting qualified medical personnel, especially when it comes to Commissioned Corps personnel. So we leave those positions with IHS and we enter into agreements detailing those positions to YKHC. To that extent, then, IHS still has a vital local presence in the Yukon-Kuskokwim Delta.

At the Area level, in 1994 we helped set into place a three year process for transitioning most of the Area Office operations to the Area's several tribal organizations and individual tribes. The process has worked well, and has been coordinated with the Alaska Native Tribal Health Consortium's and the SouthCentral Foundation's take over this year of the Alaska

Native Medical Center. As a result of all these carefully planned efforts, the Area and ANMC staff working under the direction of IHS has shrunk from over 1,350 in 1994 to about 40 today. We believe this example -- the first experiment of its kind in the Nation under the Self-Determination Demonstration Act, involving the tribal administration of an entire Area and all its constituent service units -- certainly demonstrates that IHS operations shrink as Congress permits tribes to step into IHS's shoes.

On a national basis, the reduction of the IHS bureaucracy may be more difficult to see. For one thing, tribes have not been as consistently aggressive in the other IHS Service Areas in exercising their rights under the Indian Self-Determination Act in part due to the fact that they are not willing (or perhaps, more accurately, able) to take on services without adequate contract support appropriations, including start-up funds. Moreover, even where Self-Determination transfers have occurred, the reductions in the IHS system have often been balanced out by expansions in the overall system, thanks to desperately needed congressional attention to the terrible shortfalls in health care funding facing Indian country. For instance, in assessing IHS's reductions, it must be noted that Congress has increased the IHS service budget from \$226 million in FY 1975, to over \$1.84 billion in FY 1999. So, although 40% of IHS may now be under tribal operation, the remaining 60% is many times larger today than was the entire agency in 1975. In short, it may well be that far more analysis is needed to determine whether IHS is in fact a much smaller agency than it would otherwise be in the absence of the Indian Self-Determination Act.

Nonetheless, one thing remains clear. In 1988 this Committee and the Senate Indian Affairs Committee observed that the IHS service bureaucracy had been gradually replaced with an oppressive contract monitoring bureaucracy. Since then, especially with the advent of the 1994 amendments, we have seen a real reduction at our Area level, and a corresponding transfer of functions to the tribal providers. But we still believe more can be done at the Headquarters level in this regard, and that Headquarters can and must also do a better job of freeing up all available Headquarters resources that support the system, including assessments paid to other agencies.

As for other Area Offices outside our own, it is clear to us that IHS is indeed holding on to its empire in some quarters, and that it is often reluctant to turn over its operations to tribal control. This has been particularly evident in the Phoenix, California and Oklahoma Areas, and it is fair to say that IHS Headquarters has failed to bring necessary leadership and consistency to the various Area and Headquarters determinations regarding appropriate levels of noncontractible, so-called "residual," "inherently federal" functions. Adding to this particular problem, IHS continues in some Areas to also withhold from tribal operation so-called "transitional" operations (this is so in the Portland and Oklahoma Areas, among others), despite the ruling of at least one federal court that such actions are indefensible and contrary to the Self-Determination Act. This type of paternalistic approach has helped foster an "us versus them" attitude and an attempt by some to divide Indian country and pit one region of the United States against another.

In sum, we recognize that IHS has substantially downsized in response to the Self-Determination Policy, but agree that more along these lines can and must be done.

4. Fourth, the Committee is correct that more can be done to accelerate the transfer of additional functions from IHS to the tribes. Under an IHS plan adopted two years ago, IHS now takes up to three years to transfer functions from federal operation to tribal operation. This never used to be the case, and functions were always transferred within a matter of months. That's the way it was with the transfer of our Y-K Delta Regional Hospital. But this new plan, adopted at IHS insistence over the objection of many tribes, represents a serious retrenchment clearly intended to protect the Area and Headquarters offices. It is also directly contrary to the Act, which mandates that all IHS functions be paid to a contracting tribe as soon as the contract goes into effect.

5. Fifth, we share the Committee's interest in learning more about how much the federal government really spends to support an IHS-operated clinic and hospital. However, we are skeptical this information can be reliably developed in the short term. After all, innumerable federal agencies confer some benefit on IHS in one way or another, be it the Department of Justice (in prosecuting collection litigation, defending cases and other matters), the General Service Administration, the Office of Personnel Management, the Department of Treasury, the Veterans Administration (as in negotiating pharmaceutical contracts), the Equal Employment Opportunity Commission, the Federal Labor Relations Board, the Government Ethics Office, the Merit Systems Protection Board, the Government Printing Office -- the list goes on and on.

We assume the goal of such an ambitious study, perhaps better undertaken by the General Accounting Office than IHS, would be to provide some meaningful comparison between the true federal costs of IHS administered care, and the total costs of tribally administered care, including contract support costs.

Although the results of such a study would be enlightening, we respectfully suggest that such a study may ultimately be of limited use, particularly given its likely cost. For one thing, the Act and other federal laws impose upon tribes financial obligations which do not burden IHS or any other branch of the federal government.

For example, tribes undertake detailed annual audit reports on all their operations. IHS does not. Tribes carry costly property and vehicle insurance, casualty insurance, errors and omissions insurance and other insurance outside the scope of strict federal tort claims. IHS does not. Tribes bring in outside risk managers to help secure and maintain accreditation and to administer sound programs. IHS does not. Tribes bear the costs of their governing bodies which develop tribal health care policy in the same way that Congress controls policy for IHS. IHS does not. Tribes renegotiate their compacts and contracts every year. IHS does not. A study of the true cost of federal administration will miss these tribal-unique costs.

But even more importantly, the Indian Self-Determination Policy was never designed as a way to save the federal government money. It was built with the goal of promoting tribal responsibility and accountability. The Act directed that federal paternalism and oppression must end, and that Washington must stop dictating what is best for Indian country and what is best for the health care needs of Indian people. And to that extent the policy and its execution have been a resounding success. Having come so far from where we began, we must not now let ourselves be diverted from that success by a preoccupation with whose system costs less, especially given so many variables in program delivery and facility types.

Nonetheless, we concur in the Committee's interest in exploring how tribes and IHS can be encouraged to maximize their efficiency in all operations. One way to do this is to guarantee to a tribe a stable flow of funding for a period of years. After all, maximizing efficiency first requires predictability and stability. If a tribe had a multi-year budget that was, in fact, actually funded, a tribe would be free to trim further its administrative overhead as much as prudently indicated, for the reward would be for the tribe to retain any savings, to be plowed back into expanded health care. IHS is already experimenting with this approach, known as the "base budget" approach, with several tribes, and the proposed permanent Self-Governance legislation would clarify IHS's authority to do so within the Self-Governance program. The Committee may wish to encourage IHS to explore the same avenue for ordinary contracting tribes.

6. Sixth, the Committee has asked for comments on how tribes could further improve the availability of health care services within their existing budget limitations, and has particularly asked whether new authority or flexibility is needed to achieve this goal.

At YKHC we have experimented with a number of recent innovations, and we would be pleased to share these innovations in greater detail with the Committee and other tribes. For instance, we have invested in staff housing so that we can attract and maintain professional staff and reduce the turnover that plagues most health care operations in Indian country. We have changed the way we do business for the extensive travel required as part of our health care delivery system, to further reduce costs and conserve our resources. We have created our own emergency air medivac system, in lieu of expensive private carriers. We have worked with city governments and commercial lending institutions to finance long term facility infrastructure using municipal bonds, saving millions in financing and interest. We are working cooperatively with the State of Alaska Department of Health and Social Services to maximize program delivery of early child intervention and developmental health programs as well as State funded substance abuse and mental health services. The Self-Determination and Education Assistance Act has proven beyond a doubt that when adequately funded, Tribes are the best health care providers not only for their own Native people, but for all members of our communities.

These and other local innovations have helped us stretch our limited dollars far beyond IHS's ability. Our Tribes are proud and able to take the responsibility afforded them under our Compact with this Congress. All we ask is that Congress allow us the same resources you

would want in providing health care to your own families.

Substantial additional innovations will come with the enactment of the pending permanent Self-Governance legislation that I understand either has been or will be introduced this week. While the legislation is detailed, such detail is necessary if we are to overcome the barriers in federal law and policy that make doing business much more expensive for tribal health care providers than it needs to be. Given the extraordinary scrutiny this legislation was given last year in the form of H.R. 1833, we respectfully hope the Committee will be able to move the new legislation rapidly to a mark-up early in the Session.

Along similar lines, Title VI of the same proposed new Self-Governance legislation should eventually open the door to important new programs currently administered by the Department of Health and Human Services outside the authority of IHS. Title VI puts into place a study which hopefully will lead to additional legislation in the years ahead. While we would have preferred moving directly into a demonstration program with the Department, as originally proposed in H.R. 1833 as introduced last year, the Department has insisted that any demonstration program be preceded by careful study. Again, we hope this Committee will move swiftly on this important new bill.

Finally, we are confident that tribes can bring considerably more resources into their systems, and can do so more efficiently, once the Medicaid demonstration program established in the Indian Health Care Improvement Act is expanded to all tribal health care providers, as now proposed in S. 406.

7. We would like to close by commenting on the last topic identified by the Chairman, how to fund contract support costs today and in the coming years.

This Committee helped give birth to the Indian Self-Determination Policy a quarter of a century ago. What we need today as tribal health care providers, first and foremost, is a resounding and unequivocal recommitment of the Nation to that policy. In the area of contract support costs, we respectfully believe that that commitment means fully funding existing contract support cost needs.

It is important that the Committee understand fully the current situation. As things now stand, tribal health care providers are actually *punished* for operating IHS programs. If they want to operate an IHS program, if they want to take on responsibility for the program, if they want to realize improvements in the local health care delivery system, if they want to break the cycle of paternalism and dependency, there is a price: the tribes must finance their contract support cost shortfalls out of the program itself.

This would not be acceptable even under ordinary circumstances, and circumstances here are far from ordinary. Already IHS programs are funded at between 40% and 60% of need. Already, Indian health care is funded at less than half the national per capita expenditure on health care for other Americans. It is remarkable, to say the least, that under these

circumstances tribes in our part of the country living in "third-world conditions" should be required to further reduce their programs in order to realize the benefits of improved health care and local autonomy that come with the Indian Self-Determination Act. IHS has provided the Committee with an estimate of the increase needed to fully fund contract support through FY 2000 (including inflation adjustments for FY 1999 and FY 2000), and we respectfully urge the Committee to support a full increase in that amount in its communications with the Budget Committee and the Appropriations Committee.

For the future, there is every indication that the rate of increase in contracting activities has now come down substantially, and will likely carry a contract support cost of between \$10 million and \$15 million for the Indian Self-Determination Fund funding each year. Proportionately, this is consistent with the size of the ISD Fund in the mid-1990s, and we therefore believe it is reasonable for Congress to commit to continue funding new contracts at that level for many years to come.

Most importantly, we have been unable to identify any systemic problem either in the general Self-Determination process or in the specific contract support cost process. We therefore respectfully caution the Committee to reject recommendations that would revamp the Self-Determination Act in significant ways, such as by deferring new contract starts, deferring tribal entitlements to receive contract support, or otherwise weakening the Act's contract support cost provisions.

Improvements, however, can certainly be made in how the Act has been carried out. For instance, IHS and BIA can report to Congress on a more timely basis the contract support cost needs anticipated both for the current year and the upcoming new year, so that Congress can more easily make corresponding adjustments in the supplemental and ordinary appropriations processes. While there is no indication that the contract support shortfall has been caused by a lack of information regarding its extent—a shortfall that has been regularly reported to Congress, the Secretary and OMB, and that has long been well-known—certainly more accurate, detailed and earlier reporting will lead to correspondingly better decisions here. Given the progress IHS has made in its data collection this year, working with the National Congress of American Indians and Tribal technicians, consultants, and Tribal attorneys, this is not an ambitious request.

We also believe the agencies can do a better job of refining and standardizing the process for determining contract support cost needs. The National Congress of American Indians is already looking into this area, and we look forward to NCAI's recommendations later this year. YKHC certainly supports standardization that is sensitive to areas of commonality among tribes, as well as being sensitive to the unique differences among us. After all, no one would quarrel with the fact that our contract support cost needs are necessarily higher given where we are located than an identically-sized program within a casual drive outside Phoenix, Minneapolis or Seattle.



Finally, Mr. Chairman, we would ask that you and this Committee do everything possible to elevate the position of Director of Indian Health to the Assistant Secretary level -- a tribal request that is long overdue.

Mr. Chairman, we thank the Committee for the opportunity and honor of testifying today on an issue that is directly affecting the health and welfare of thousands of Alaska Native and non-native people back home, and of millions of Native American people across the country. We look forward to working closely with the Committee as it continues its examination into the Self-Determination contracting and compacting processes, and to exploring all avenues for continually strengthening both the Nation's Self-Determination policy, and the ultimate delivery of the highest quality health care services possible to our people at home.

**U. S. HOUSE OF REPRESENTATIVES  
COMMITTEE ON RESOURCES**

**OVERSIGHT HEARING ON CONTRACT SUPPORT COSTS**

**TESTIMONY OF  
ORIE WILLIAMS, EXECUTIVE VICE PRESIDENT OF  
THE YUKON-KUSKOKWIM HEALTH CORPORATION**

**AUGUST 3, 1999**

Mr. Chairman, thank you for the opportunity to testify once again before your Committee on what Congress in 1987 called "the single most serious problem with implementation of the Indian self-determination policy," namely the failure to fully fund contract support costs.

For the record, my name is Orie Williams, and I am the Executive Vice President of the Yukon-Kuskokwim Health Corporation. I am here this morning with our legal counsel and expert in this field, Lloyd Miller, who is well known to this Committee. I am also happy to introduce to you Mr. Paul Manumik, a tribally elected member of the Yukon-Kuskokwim Health Corporation Board of Directors and the chairman of the hospital governing board. Mr. Manumik lives at his home in Sheldon's Point, Alaska, and has served his Yupik Eskimo tribal members for 15 years.

Our health care organization was created by and is controlled by 58 federally recognized Alaska Native tribal governments, their members and their village communities, and in financial terms we are the second largest tribally-operated IHS program in America, operating \$40.2 million in IHS government programs alone.

In my testimony last February, I reminded the Committee of the daunting conditions we face in carrying out the task of delivering IHS government programs to the beneficiaries of those programs. Recall that we serve:

- a roadless area the size of South Dakota;
- 23,000 people scattered in 58 villages;
- a population where 54 percent are Medicaid eligible, --including 90% of all pregnant women and children -- and where 44 percent are unemployed (though in some villages unemployment is over eighty percent);
- villages most of whose primary sewer system consists of one six-

gallon bucket in each home;

- Post neonatal mortality is more than double the average U.S. rate, death by suicide is four times the national rate, fetal alcohol syndrome and fetal alcohol effect are rampant, and the lack of adequate sewer and water systems has left our communities victim to every known infectious disease and higher rate of tuberculosis, even as we enter the Twenty-First Century.

Rather than go further, I respectfully refer the Committee to my testimony submitted February 23, 1999 and which I am submitting again today.

The point is that we are operating the **government's** programs, including a large government hospital, for the benefit of the federal beneficiaries of those government programs. And if the independent DHHS Division of Cost Allocation says it takes \$14.9 million to administer that program, then that is what we should be paid.

And yet, this year we are once again underfunded by \$2.3 million. And once again, we cannot fill positions in our accounting department, in our admissions department, and in support of our hospital. This is not just a crisis in 1999 – it has been ongoing since 1992!

The GAO June 1999 report is most welcome, because it confirms what we have been saying all along: First, that contract support costs are legitimate and necessary and fairly determined; and second, that without full payment of these costs, our people are actually being **penalized** by the transfer of federal health care programs down to the local level. Mr. Chairman, we are trying to do our part to reduce the federal bureaucracy and enhance local empowerment and economic development, but why, I ask, should this require such a heavy price in the reduction of direct services going to our people?

Our tribal organization has remained intimately involved this past year both in the work of the National Congress of American Indians and in the General Accounting Office study. Based upon that involvement, our experience over the years, and the analyses undertaken by our financial and legal advisors, we offer these following recommendations for addressing the many issues that involve the contract support system:

1. **First**, it is time for the appropriations process to finally catch up with the legal framework established by Congress twenty-five years ago. Since we are talking here about government contracts and legally binding obligations—and since the Indian Self-Determination Act already specifies that tribes are, quote, "entitled" to receive contract support to carry out these programs – the law should be changed as necessary to also make the payment of contract support an "entitlement" in the

appropriations sense of that word. Once those amounts are set, whether it be by the DHHS Division of Cost Allocation or the Department of the Interior Office of Inspector General, the tribe as a government contractor would know that it will be fully paid for performing that contract, no "if's, and's or but's" about it.

The cost of doing this would be negligible in the national arena, although it will be critical to us -- not just for tribes, but to protect government program beneficiaries -- over one million American Indian and Alaska Native people -- from getting the short end of the stick as we dismantle the federal government and bring it down to the local level.

2. **Second**, if for whatever reason funding at the national level is insufficient, the first priority should be stability as recognized in the IHS system. Tribal organizations should at least receive the same amount they received the preceding year, and they should not be the victim of the peculiar BIA option that pays you an unknown amount in the eleventh or twelfth month of the year when all your expenses have already been incurred. The BIA system is destabilizing, and, therefore I specially praise your leadership, as well as Congressman Regula's sensitivity, to the fact that the simplified "pro rata" system in the end is not sensible. If a health-care system needs nothing else, it needs stability and predictability.

3. **Third**, we unequivocally oppose GAO's Alternatives 2 and 3. Alternative 2 would gut the Act by making contract support entirely dependent on the highly political budget and appropriations process. And, Alternative 3 would ignore the enormous differences among tribal programs. Obviously we are not all the same, and operating a 51-bed hospital and 47 clinics in a roadless area the size of South Dakota demands different administrative costs than operating a small community health program near major metropolitan areas.

4. **Fourth**, we recommend that the Committee consider authorizing a short demonstration project, to see if the GAO's fourth recommendation for a stable, combined funding amount can work. Yes, there are details to work out, such as inflation adjustments and the like, but we agree that it holds real promise for accomplishing an unimpeachable goal: to encourage greater efficiencies in health care administration by actually rewarding those efficiencies.

5. **Fifth**, we agree with NCAI that some standardization may be possible among some elements of contract support. Yes, it is true that all tribal organizations are different--and, like states and local governments, all have a right to design their systems to meet their unique needs. Even still, some standardization efforts that are sensitive to our differences could help moderate the highs and lows, and reassure Congress that all tribes in the end are treated fairly, neither receiving less or more than necessary to prudently administer these government programs under local conditions. NCAI has proposed the so-called "benchmarking" idea, and we would like to

see that idea funded, developed and field-tested over the next year or two by the two departments working jointly.

6. Finally, let me note that we absolutely oppose any suggestion that the IHS or BIA be delegated any legislative authority whatsoever in this area to write regulations, whether through negotiated rulemaking or otherwise. If the last twenty-five years has shown us anything, including all the litigation over the past five years, it is that Congress wisely decided in 1994 to remove any agency discretion or authority in this very delicate area. Yes, these agencies are committed to tribal self-determination, but they are also bureaucracies that at times seek to perpetuate their own existence. Granting these agencies broad regulatory authority over funding issues will, in our opinion, only serve to retard the process of downsizing and self-determination, and we therefore firmly oppose it.

On a related note before closing, I would like to add that if the goal here is to improve Indian health care, then one additional means outside the technical contract support arena is to enact the many technical and mechanical improvements that are contained in the permanent self-governance legislation that was recently marked-up by this Committee, namely HR 1167. Although we do believe the marked-up bill can be improved upon even further (and we would be pleased to share our recommendations with the Chairman), we also believe this is a measure whose time has come. We therefore respectfully ask that it be brought to the floor at the earliest opportunity.

Thank you Mr. Chairman for the honor of testifying today. While I am here I would also like to acknowledge and thank the efforts of the Chairman and Committee members who have worked so hard over the years to help alleviate many of the deplorable conditions facing our communities.

If the Chairman would permit, our Hospital Chairman Mr. Manumik would like to add a comment or two, and I would also like Mr. Miller to comment on one aspect of our proposal.

The CHAIRMAN. Go ahead.

**STATEMENT OF PAUL MANUMIK, CHAIRMAN, YKHC**

Mr. MANUMIK. Thank you, Mr. Chairman, and good morning and Qujana. My name is Paul Manumik, chairman of the Yukon-Kuskokwim Delta Regional Hospital, Bethel. I would like to say a few words in Yupik.

The CHAIRMAN. Without objection, although the reporter may have a difficult time of putting them down. So do it real slow and go ahead.

Mr. MANUMIK. Thank you, Mr. Chairman.

This will be given to the transcriber so that he can write the proper words in the proper translation.

[Speaking in Yupik.]

Language, bills, laws, this is where it all begins, right here in your hands.

Then we, the Native American Indian, Alaskan Natives, take it from your hands, revise it and amend the language to meet our needs and graciously hand it back to you for your greatly needed blessing so that we can administer the right health care services to our Native American Indian, Alaska Natives.

Qujana.

[End of translation.]

I would like to remind the Committee that the contract support cost crisis comes on top of a severe shortfall in our programs. According to the Indian Health Service Work Group on Level of Need Funded, the average funding for Native American people is a staggering 54 percent of what is in fact necessary to meet our people's needs.

Nationally, average Americans receive \$2,098 per capita. For veterans, including many in my own family, the average Federal expenditure for health care is higher. And, at that, many in Congress today are still calling for emergency spending increases to meet our veteran's needs. But in Indian country, Federal spending per capita is a mere \$1,310.

Mr. Chairman, this is a terrible situation, one that is far more severe in our villages, that cries out for attention. Helping us address the contract support shortfall will certainly help. But, as these statistics show, we still have a long way to go in meeting the Nation's commitment to the first Americans.

Thank you for your patience, and once again we invite the full Committee's and your spouses to come see firsthand our beautiful country, our wonderful people, and the severe challenges that we face today. Next April, we will mark 30 years of tribally administered health care in our region, and we invite you to join us for a celebration and tour of our villages.

Thank you.

The CHAIRMAN. Thank you very much.

[The prepared statement of Mr. Manumik follows:]

**STATEMENT OF PAUL MANUMIK, CHAIRMAN OF THE YUKON-KUSKOKWIM DELTA  
REGIONAL HOSPITAL**

Good morning, Mr. Chairman and Qujana. My name is Paul Manumik, Chairman of the Yukon-Kuskokwim Delta Regional Hospital.

Paul Manumit

8/3/99

Yupik

language, bills, laws,

this is where it all begins, right here in your hands,

Then, we the Native American Indian, Alaskan Natives, take it from your hands revise it, and amend the language to meet our needs, and graciously hand it back to you for your greatly needed blessing so that we can administer the right health care services to our Native American Indian, Alaska Natives.

Quyanah

I would just like to remind the Committee that the contract support cost crisis comes on top of a severe shortfall in our programs. According to the Indian Health Service Work Group on Level of Need Funded, average funding for Native American people is a staggering 54 percent of what is in fact necessary to meet our peoples needs.

Nationally, average Americans receive \$2,980 per capita. For veterans, including many in my own family, the average Federal expenditure for health care is higher—and at that, many in Congress today still call for emergency spending increases to meet our veterans needs. But, in Indian Country, Federal spending per capita is a mere \$1,310.

Mr. Chairman, this terrible situation—one that is far more severe in our home villages—cries out for attention. Helping us address the contract support shortfall will certainly help, but as these statistics show, we still have a long way to go in meeting the Nation's commitment to the First Americans.

Thank you for your patience, and we once again invite the full Committee and your spouses to come see first hand our beautiful country, our wonderful people, and the severe challenges we face. Next April we will mark 30 years of tribally administered health care in our region, and we invite you to join us for our celebration and a tour of our villages.

The CHAIRMAN. Mr. Miller.

#### STATEMENT OF LLOYD BENTON MILLER, ATTORNEY

Mr. LLOYD MILLER. Thank you, Mr. Chairman, Congressman Hayworth.

For the record, my name is Lloyd Miller. I am a lawyer with the law firm of Sonosky, Chambers, Sachse, Miller and Munson.

Today you have heard some calls for adjustments in the system so that the self-determination funding process is finally brought into conformity with the government's legal obligations to tribal contractors under the Indian Self-Determination Act. I have been asked to make a few remarks on this one legal issue.

In 1988, the Indian Self-Determination Act was massively overhauled precisely because the BIA and the Indian Health Service were not paying contract support costs required for tribal contractors to carry out these Federal programs. In an entire chapter, the Senate reported, devoted to this one issue, and no issue received greater attention in the Senate or House committee than this one issue. As the Senate committee noted, no other problem was more on Congress' mind than, quote, the consistent failure to fully fund tribal indirect costs.

Now, in the course of deliberations in 1988, I was reviewing these recently, and I came across a statement by the former chairman of that Committee, Senator Inouye, which I thought would be helpful to repeat here briefly. Senator Inouye said this in a 1988 hearing:

"a final word about contracts: I am a member of the Appropriations Committee, and there we deal with contracts all the time. Whenever the Department of Defense gets into a contract with General Electric or Boeing or any one of the other great organizations; that contract is carried out, even if it means supplemental appropriations. But strangely in this trust relationship with Indians they come to you maybe half way or three quarters through the fiscal year and say, quote, sorry, boys, we don't have the cash, so we're going to stop right here, after you put up all the money. At the same time you don't have the resources to sue the government. Obviously, equity is not on your side. We're going to change that, also."



That is what Senator Inouye said, and that is what he did. Congress did change the Act, by extensive amendments to the funding amendments of section 106, amendments to the shortfall reporting and supplemental appropriation reporting provisions of 106, the model contract in 108 that again guarantees funding, and the legal remedies in section 110.

Now, today the world is different. Although the agencies' shortcomings in the appropriations have not changed, thanks to these amendments the Courts have stepped in and come in to fill the void. They have consistently awarded damages against the agencies, just as Congress intended. So it is at the Interior Board of Contract Appeals, as the Congressman mentioned, that has expertise in this area, and that board has ruled under simple contract law, and this is a quote from the decision, that "the government's obligation to fund these indirect costs in accordance with the contract remains intact, despite the dollar ceiling in the applicable appropriations Act."

And a recent Federal court on July 22nd had this to say: "regardless of agency appropriations, nothing in the Act limits the agencies' obligation to fully fund self-determination contracts."

The Courts and the board have awarded damages, and additional damages may be assessed in additional litigation still pending against the IHS and the BIA.

This is the legal framework in which the tribal witnesses today come before this distinguished Committee and respectfully urge that perhaps the funding mechanism for contract support costs in Congress ought to be changed. After all, these are not discretionary activities. They are contracted Federal Government programs being carried out on behalf of the United States for the Federal beneficiaries of those Federal programs.

If tribal contractors are to accomplish that Federal mission, the least Congress can do is to assure payment promptly. Prompt payment should not be dependent on the politics of the budget process, the competing demands within the agencies and within OMB, or the fortitude of a few tribal contractors to take on the United States in litigation.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Lloyd Miller follows:]

STATEMENT OF LLOYD BENTON MILLER, SONOSKY, CHAMBERS, SACHSE, MILLER & MUNSON

Thank you Mr. Chairman. For the record, my name is Lloyd Miller and I am a partner with the law firm of Sonosky, Chambers, Sachse, Miller & Munson.

Today you have heard a call for adjustments so that the self-determination funding process is finally brought into conformity with the government's legal obligations to tribal contractors under the Indian Self-Determination Act. I have been asked to speak briefly to this particular legal issue.

In 1988 the Indian Self-Determination Act was massively overhauled—precisely because the BIA and IHS were not paying the contract support costs required for tribal contractors to carry out these Federal programs. As the Senate Committee noted, no other problem was more on Congress' mind than "the consistent failure to fully fund tribal indirect costs." S. Rep. No. 100-274 at 8.

In winding up his remarks at the hearings on the 1988 amendments, then Chairman Inouye of the Senate Indian Affairs Committee put the problem well:

A final word about contracts: I am a member of the Appropriations Committee, and there we deal with contracts all the time. Whenever the Department of Defense gets into a contract with General Electric or Boeing or any one of the

other great organizations, that contract is carried out, even if it means supplemental appropriations. But strangely in this trust relationship with Indians they come to you maybe halfway or three quarters through the fiscal year and say, "Sorry, boys, we don't have the cash, so we're going to stop right here" after you've put up all the money. At the same time you don't have the resources to sue the Government. Obviously, equity is not on your side. We're going to change that also.

*Hearing on S. 1703 Before the Senate Select Committee on Indian Affairs, 100th Cong., 1st Sess. 55 (Sept. 21, 1987).*

And, Congress did change that, by extensive amendments in 1988 and 1994 to the funding provisions of section 106 of the Act, the shortfall and supplemental appropriations reporting provisions of section 106, the model contract provisions of section 108, and the critical court remedies of section 110.

Today, the world is different. Although the agencies' shortcomings in the appropriations process have not changed, thanks to these amendments the courts have come in to fill the void. They have consistently awarded damages against the agencies, just as Congress intended. And so it is that the Interior Board of Contract Appeals (which has recognized expertise in this area) has ruled, under simple contract law, that "*the Government's obligation to fund these indirect costs in accordance with the [self-determination] contract remains intact, despite the dollar ceiling in the applicable appropriations act.*" *Appeals of Alamo Navajo School Board and Miccosukee Corp.*, 1997 WL 759411 Dec. 4, 1997 (slip op. at 45). Similarly, the Federal courts have ruled that "*regardless of agency appropriations, [nothing in the Act] limit[s] [the agencies] obligation to fully fund self-determination contracts.*" *Shoshone-Bannock Tribes v. Shalala*, No. CV 96-459-ST — F. Supp. —, 1999 WL — (July 22, 1999) (slip op. at 7). The courts and the Board have awarded damages, and additional damages are still awaiting assessment in class action suits now pending against both agencies.

This is the legal framework in which the tribal witnesses today come before this distinguished Committee and respectfully urge that the funding mechanism for contract support costs be changed. After all, these are not discretionary activities; they are Federal Government programs, being carried out on behalf of the United States for the Indian beneficiaries of those programs.

If tribal contractors are to accomplish that Federal mission, the least Congress can do is assure that payment for services rendered will be forthcoming. Prompt payment must not be dependent on the politics of the budget process, competing demands within the agencies and within OMB, or the fortitude of tribal contractors to take on the government in litigation.

Thank you Mr. Chairman. I am available to answer the Committee's questions.

The CHAIRMAN. I want to thank the panel on your very good testimony. I can assure the panel that we are going to be working closely with Senator Stevens and Senator Inouye and myself, J. D. Hayworth, et cetera, to try to see if we can't revive the 1988 Act and make it work. Sometimes we don't go as far as we should.

Orie, last year we had a year short—what this year in contract support—what would it cost? It has been estimated \$5 million for contract support?

Mr. WILLIAMS. For the Yukon-Kuskokwim Health Corporation, we are short \$2.3 million of what we have negotiated with the office of cost allocation.

The CHAIRMAN. What I am suggesting is, if you weren't operating this Yukon-Kuskokwim health association, the Federal Government by law has a responsibility, if they would actually have the \$5 million, to operate it; is that correct? That is what the estimated cost is, the contract costs, correct? What I am leading up to—you are supposed to answer this correctly. They are actually short-changing you. You are contracted with them, but if they were doing it, it would cost them about \$5 million.

Mr. WILLIAMS. I am afraid it would cost them more than that. They wouldn't have the system, number one. It would cost them at least that much.

The CHAIRMAN. There have been statements about the pro-rata formula. If that had been put in place last year, what would have it cost Yukon-Kuskokwim Health Corporation as far as money and jobs?

Mr. WILLIAMS. Money would have cost \$2.3 million at a minimum. Up to \$4.6 million depending on what appropriation or lack of appropriation would have happened. It would have cost a minimum of 80 jobs, most of those jobs being welfare to work mothers singly supporting their children without spouses.

The CHAIRMAN. What would be the effect on the health care itself?

Mr. WILLIAMS. We have suffered tremendously. It would be like going into battle and sending your people in the front line to provide health care and have no support. It would be like the Congressman and Congresslady sitting on this Committee without any staff support whatsoever.

The CHAIRMAN. Sometimes that might be a blessing, but I would not always say that.

How long has the Yukon-Kuskokwim health care been suffering with insufficient contract support? You have been in which is how long now?

Mr. WILLIAMS. We have been in contracting for 8 years September 30. We contracted the hospital in 1991 and took it over October 1, 1992. We have had claims in for start-up costs of about \$7.6 million since 1992.

The CHAIRMAN. We will revamp the Act. So you are short about \$7.5 million.

Mr. WILLIAMS. Plus the \$2.3 that would bring us to 100 percent of negotiations yet.

The CHAIRMAN. You filed a claim for Yukon-Kuskokwim contract costs. What happened to those claims?

Mr. WILLIAMS. They are still pending. We had several teleconferences on it, and they are still pending out in the contracts division of the—

The CHAIRMAN. When you file in court—Mr. Miller, has this gone to court?

Mr. LLOYD MILLER. No. The Yukon-Kuskokwim Corporation's claim, they haven't heard anything over a year. It was 3 years since it was filed. The law requires—

The CHAIRMAN. What is the delay in that? You will eventually have to take them to court?

Mr. LLOYD MILLER. The only way to recover the damages if they don't grant the claims is to take it to court.

The CHAIRMAN. Who is handling the claims? IHS?

Mr. LLOYD MILLER. Division of grants and contracts of the Indian Health Service, yes.

The CHAIRMAN. How do we expedite that?

Mr. LLOYD MILLER. I am not sure this Committee can. The Committee may want to direct some questions to the director of the Indian Health Service regarding the process for assessing those claims. By law, they are deemed denied by now, and YKC could go forward and file suit against the agency if they chose to. But litigation is expensive, a distraction, and they are hoping the claim would be granted.

The CHAIRMAN. You mean you wouldn't have the a little pro bono there, Mr. Miller?

Mr. LLOYD MILLER. I am sure that we can work something out.

The CHAIRMAN. I think we have to go back to the statement. Mr. Kildee made the same statement in the last hearing that we had about duplicating what Mr. Inouye said. This is one reason that we are having these hearings.

Dr. Trujillo and Mr. Gover, we can't reach what Congress is directed to do. Maybe we have to go to a different formula as far as the total funding. I happen to be one of those people that there is a contract, there is an obligation, there is an entitlement. Maybe we do have to make this a different way because it is a small amount of money.

Mr. Allen, you said that very well. It is one cruise missile. Think about that. We shot 200 cruise missiles in Bosnia, 200 in Kosovo. Just think about that money. It is going to cost us about—now estimated cost over \$200 billion if we get involved in the reconstruction. I think you hit the point when we talk about subsidy, which—I love my farmers and this and that and everything else, but, just think, what we spent in that conflict would solve this problem. And it is a legal right that should be taken care of.

My time is up.

Mr. Udall. Mr. Inslee. Who was here first? Mr. Udall.

Mr. UDALL OF NEW MEXICO. Thank you, Mr. Chairman.

I want to extend my appreciation to the panel as well for your testimony. I have learned a lot listening to you this morning.

It is nice to find that I am agreeing with the chairman today. I like to find ways to agree with my chairman.

I want to extend a question to Mr. Allen. One of the recommendations of the NCAI contract support cost working group is for the Congress to study similar tribes to come up with ways of benchmarking some of these components that we could then use in these future negotiations. What would you envision such a study would entail and who do you think ought to conduct it?

Mr. ALLEN. I think what we need to do is get the negotiators for the Department of the Interior and Department of HHS together with the tribal leaders and our experts to go over the principles that we use to negotiate the indirect cost rates and the direct contract support funds or functions and the start-up cost so there is a consistency.

Some have a perception there is an inconsistency about how they negotiate it. So the issue is that provides a little more certainty in terms of how they are going to negotiate those numbers. It makes it easier to project the actual expected cost in future years, and we think that a team of that kind of effort with the administration to work closely with the tribes would be good. We do believe firmly that tribes and our efforts need to be in the middle of this because we feel that we are the best experts on this matter to come up with those kinds of principles.

Mr. UDALL OF NEW MEXICO. I think you have already made a very good case along those lines. You all are working on this. Mr. Williams speaks to it very well, and it makes very good sense.

Mr. ALLEN. I would also point out something that I forgot to mention in my testimony.

Mr. Gover raised an issue with a proposal they had submitted just in the last month. It was something that sort of came out of left field on us, and we had not had any notion that it was even being developed. We absolutely object to this idea. In our opinion, it basically takes the Self-Determination Act and the transfer of those functions out to the tribe and it creates two different kinds of categories. That is not the direction of what the Self-Determination Act is all about. That is not a legitimate proposal.

Mr. UDALL OF NEW MEXICO. Governor Thomas or Mr. Williams, would either one of you care to comment on this proposal as well?

Mr. WILLIAMS. I am not prepared to comment at this time on it. I would be happy to submit comments on it.

Mr. UDALL OF NEW MEXICO. Mr. Allen, I will come back to you with another question.

You talked about the need for financial stability with tribes that are supplying these programs and relating this to when tribes receive these payments from the BIA and I think you also implied from the Indian Health Service. Please talk again about the benefits to the tribe when your fundings are received at the beginning of the fiscal year rather than, say, the end. Is this just merely a cash flow problem or are there other issues tied to this funding stream?

Mr. ALLEN. The problem is, if the departments or agencies hold the contract support funds until the end of the year, the tribes have to cover those costs. Those costs come from somewhere. So, as a general rule, the costs for the programs are being covered, but the costs for the contract support are not being covered, so the tribes simply have to use their own resources. They have to use whatever means they have, their own cash flows. Their hard cash flows are used for other purposes or they would have to go out and borrow money in order to cover those costs for them to be reimbursed at the end of the year. So, essentially, they are banking the Federal Government's responsibilities for the Federal Government.

Mr. UDALL OF NEW MEXICO. Mr. Williams, would you confirm that observation? Do you have anything to add to that?

Mr. WILLIAMS. Mr. Allen is 100 percent accurate. That has historically been the way that the tribes have funded their programs, out of program dollars that are supposed to provide health care to the people. They have had to always augment the contract support and admin costs out of programs.

Mr. UDALL OF NEW MEXICO. It would seem to strike me that, additionally, you find yourself getting further and further behind the curve. The best kinds of organizations, whether they are government, nonprofit, or for-profit, have some proactive component. You are planning for the next year. You are planning 2 or 3 years out. You know that you have got resources and you can invest those funds. It sounds like your hands are tied in many cases, and in the end you are also cost shifting and not providing the kind of care that the people ought to have and that they have been guaranteed.

Mr. ALLEN. If I might add one more point, Congressman, on the BIA side, because we don't know what the actual number is. Are they going to pass the 83 percent of the rate, of what is due to the tribe? Is it 85? Is it 79? It is a guessing game for the tribe. We have to make our best guess at what are shooting for and what they are

going to deliver to us at the end of September or the end of the fiscal year.

Mr. UDALL OF NEW MEXICO. I see the light has changed. If I could just make one last comment.

It just seems like an immense waste to me that then we end up in litigation with lawsuits against all of these various governmental organizations and then additional money runs out the door for lawsuits instead of solving the problem that you presented to us today.

Thank you, Mr. Chairman.

Mr. HAYWORTH [presiding] I thank the gentleman from Colorado. I won't quote Shakespeare in his reference to juris doctors, although the J. D. comes after your name, and I have it before my name. I didn't go to law school, and I think that is an asset. But I do appreciate my friends from the legal profession who are here today. I appreciate the comments of all of the panelists, whether they are juris doctors or not, because they are on the front lines of this challenge that we face.

I will exercise both the prerogative of the chair and congressional prerogatives to address comments and questions to my dear friend from the Gila River Indian community, Governor Thomas. Governor Thomas, I want to thank you for offering what I will call the human equation. Because so often in our endeavors here we end up looking at a balance sheet and we talk about percentages of this and that and we quote different bureaucratic shorthand for different statutes that the Congress either follows or sadly chooses not to follow, thus the advent of the court cases that my friend from Colorado alluded to earlier. But you brought to us the evidence this morning that is not unique to your situation, that sadly for members of the Gila River Indian Community, more than any other place in the United States, according to those experts in public health, although we have seen the first Americans dealing with the challenges of diabetes and the concerns that grow out of that disease.

While we welcome the efforts of the Speaker and Chairman of the Republican Conference and the Minority Whip who, within a half hour's time, will talk about outreach on diabetes and we welcome that from across the aisle, you bring us physical evidence of just how dire the needs are in the Gila River Community, not only to you personally but to so many others as you offered those chilling and compelling numbers.

Governor Thomas, you also in your testimony observed that your Community is still awaiting disbursement of preaward and start-up costs incurred in connection with its takeover of hospital and clinic operations in 1995 which were appropriated with \$35 million in new contract support cost in the fiscal year 1999 omnibus appropriations bill. How much, Governor, is the Community still awaiting and what has been the explanation of the IHS for this delay?

Governor THOMAS. Thank you, Congressman Hayworth, my dear friend.

The Community hasn't been paid \$790,000 in pre-awarded start-up costs in March of 1999. Granted, IHS delay was based on IHS's consideration of legal recommendations. I guess lawyers have to make their money, so sometimes the pay-in can really hinder us,

and it takes a long time to climb out of that situation. The legal opinion was that none of the \$35 million should be used for prior preaward or start-up costs. We are in that dilemma right now.

Mr. HAYWORTH. And again we offer other apologies to our good friend, Mr. Miller, and others. We observe what goes on with the legal profession.

The overview, Governor Thomas, what in your opinion is the fundamental problem with contract support costs?

Governor THOMAS. The fundamental problem is the full funding, 100 percent. I don't know if you are going to have other hearings for the States, for universities and for others to come and say we are short-funded contract support costs. I don't know which committee hears those. But I am sure this is not as drastic as it is for the Indian people across this country.

We are patient. We do not bemoan anybody for that, but we are still waiting and we will wait until—we encourage you to take actions and also our people who are advocates for us, the BIA and IHS, to come forward and, as was stated earlier, to say how much it would actually cost and stick with it and not make them compromise because it affects all of us in Indian country, our health.

We talked about diabetes. Did you know, on Gila River, diabetes is only 50 years old, somewhere in that neighborhood? It occurred because of the change in our environment. When the settlers came out west we adopted their lifestyles, and it occurred at such a rapid pace and now diabetes is in epidemic proportions. Not only on Gila River, but I talked to my friend here from Alaska and he said the same thing, it is growing. So it is because of the change in our environment. It is traumatic for us, and that is what we are discovering.

Mr. HAYWORTH. Governor, I thank for sharing your personal story and what you have seen firsthand in your role leading the Gila River Indian Community. Although we have been joking about the role of attorneys, that I would be remiss if I did not state in all sincerity to Mr. Miller, thank you, sir, for your points in going back to the record and pointing out the words of Senator Inouye. And again, this is an issue that transcends partisan lines. We are all very concerned, and we thank all of you.

Let me turn now to my good friend from Washington State for any comments or questions that he might have.

Mr. INSLEE. Thank you, Mr. Chairman.

Mr. Miller, what is the current status on claims? Is there attorneys fees provision in the law if, for instance, the Nations prevail in this regard?

Mr. LLOYD MILLER. Yes.

With regard to the first—the status of the claims, there are several claims pending in the Interior Board of Contract Appeals, claims pending in Federal district court in Oregon, a class action again the Indian Health Service pending in the Oklahoma Federal court, a class action against the Bureau of Indian affairs pending in Albuquerque, and two appeals, one pending in the Ninth Circuit and one pending in the Federal circuit here in Washington.

There is an attorney fee provision that was inserted by Congress in 1988 at the behest of Senator Inouye's committee at the time. Fees are awarded under the Equal Access to Justice Act if a court

finds that the government's position was not substantially justified. And in the Shoshone-Bannock litigation, the court awarded full attorneys fees, which is unusual, at the full rate—at an enhanced rate, excuse me, against the Indian Health Service because the court found that their defense in that case was not even substantially justified.

Mr. INSLEE. Are there things we could do procedurally, attorney fees or timing of claims or anything that we ought to be doing to impose a greater cost on the government if in fact it does not comply with its legal obligations?

Mr. LLOYD MILLER. Right now, the only penalty over and above the amount of the contract amount not paid would be interest. The Committee could look at the rate of interest and make its own judgment whether it thinks that the interest amount is sufficiently high. The Committee could look at penalties if the Committee feels that is an appropriate use of the taxpayers funds to further encourage the agencies to comply.

Right now, the agencies really don't have an incentive, surprisingly to me, to settle cases. I do a fair amount of litigation, much more than that appearing in this great comm. room. When you litigate against a private party everybody understands that there are risks all the way around. We assess our cases and try to find some accommodations. Sometimes you can't, but usually you do. Or you get to a range.

But I have found consistently over 20 years of practicing that the litigation against the Department is entirely different. They don't have a sense of the cost of litigation. That is handled by the Department of Justice. They don't have a sense of cost and the distraction of the agency, and they will take you to the moon to resist paying that claim.

We have claims where, as I say, where the Justice Department position was found not even to be sufficiently justified. That is bordering on frivolous. Yet the Department is going forward, taking appeals. We offered to settle those cases even though we want 100 cents on the dollar. The Department has not even graced that with a counteroffer.

Mr. INSLEE. We are going to do what we can to expedite these. I am going to work with the chair to see if there are ways to do that.

Chairman Allen, I notice in your testimony that as far as direct costs of Workers' Compensation—and unemployment insurance, there is a suggestion that that be paid and that BIA recognized a responsibility. What has BIA said, and I am sorry if I missed part of the testimony, why they would not honor that commitment?

Mr. ALLEN. It is a cost that they have not acknowledged historically. They have currently been reviewing it and discussing it with IHS, who have paid it historically. IHS has always recognized that those costs associated with those kinds of expenses and they are separate from the indirect cost rate. Whether or not they are seriously considered or not is still in question. Their current proposal, in my opinion, doesn't reflect that in a meaningful way.

But even if they would leave it in it, the proposal is taking programs and creating different kinds of programs out of the different operations and cutting our base in half. And saying, well, the half



that we think is appropriate we will pay you 100 percent and the half that we don't think is appropriate, you are not getting any more contract support for those types of functions and activities. So they say in that category where you pay 100 percent we would also address contract support, is misrepresenting a base that the tribes are working on or working towards.

It is an issue where they have need to move forward. We believe they need to adopt the practice that IHS has adopted and also move forward with the full funding request. We believe that the price tag is very reasonable.

It is very irritating for us to get back comments from OMB or the administration or from the appropriation committees that it is an unacceptable cost when we know that it is a very reasonable cost to fully fund these costs.

The Ramah factor, if I might add to this, with regard to the other Federal agency, at this point in time is not an overwhelming number. We calculated it to be right around the 20 to 25 million dollar range. That is not an overwhelming number relative to this other Federal agency.

Mr. Gover is correct. Fix it and address those OMB and those committees, those departments to pay that full funding, but it is not a cost that is going to break anybody's back. So it is very frustrating for us to hear that they can't afford to address the needs of the most impoverished communities in America.

Mr. INSLEE. This is very frustrating for many of us here, and we will be working with the chair and others to try to move ahead in this regard. We appreciate your help.

Mr. HAYWORTH. I thank my colleague from the State of Washington.

In closing, I want to thank the panel. Also just to say to President Allen, Mr. President, we will have a couple of questions. I listened with interest to your comment about the BIA proposals that in your words came out of left field. We have a couple of questions, and if you could respond in writing to those questions because we want to pursue that line of inquiry. But, given time limitations today, we won't go into it with a full airing here, but we would appreciate that response.

With that, thanks to all of our panel members here and especially my dear friend, Governor Thomas, and we thank you for that.

And we will welcome our third panel. And our last panel of witnesses includes Mr. Jim Wells, Director of Resources, Community and Economic Development Division of the GAO. That, for anybody in our audience that might not know the nomenclature or the acronym, stands for the General Accounting Office here in Washington, DC. And he is accompanied by Mr. Jeffrey D. Malcolm, Senior Evaluator from here in Washington, DC.

So, with that, we will make the necessary changes in choreography and circumstances and logistics and welcome you front and center, Mr. Wells, for your statement. Once you get situated, we will be happy to recognize you and hear what it is that you have to say. It goes without saying, although we will reiterate, that we will be happy to take your complete testimony for the record and we know that you offer that, without objection. And so now, in the

time that we have, we would be happy to let you orally state the highlights of said testimony. Mr. Wells.

**STATEMENT OF JIM WELLS, DIRECTOR, ENERGY, RESOURCES AND SCIENCE ISSUES, RESOURCES, COMMUNITY AND ECONOMIC DEVELOPMENT DIVISION, GENERAL ACCOUNTING OFFICE, WASHINGTON, DC; ACCOMPANIED BY JEFFERY D. MALCOLM, SENIOR EVALUATOR**

Mr. WELLS. Before I begin, I would just want to again introduce my colleague. With me is Mr. Jeff Malcolm, who is responsible for leading all of our Indian work here on the Indian contract support cost.

My comments this afternoon will focus on the reasons for increasing the contract support shortfalls and the alternatives for funding them. Our June, 1999, report goes into a lot of detail about the calculation of contract support costs and the effects of the shortfalls on the tribes, which you have heard firsthand today. Shortfalls in contract support costs have been increasing each and every year in the last 5 years. Fiscal year 1998 the combined BIA and IHS shortfall was \$95 million.

At your earlier hearing this year, much was made of the uncertainty of what actually was the shortfall. In my 32 years of experience, getting what should be a quick answer is never easy. Our staff worked closely with the staff of the two agencies involved, and we are happy for small victories in that we have found some situations where we were able to communicate and help eliminate some of the inconsistencies with the way that the two agencies were operating and determining costs.

Contract support costs have increased mostly because of the tribes becoming more active and contracting more but also because the cost of administering these contracts has increased. The more you contract, the more it costs.

As we learned, about half of the BIA and IHS programs are currently now under contract, about \$2 billion of the \$4 billion program money that is out there. The contract tribe support costs are up to \$375 million. Shortfalls clearly have increased because appropriations have not kept pace with the tribe's costs.

Having sat through the two earlier panels and listening to your questions, it is clear that there is a great deal of frustration over this contract support cost issue and the self-determination obligations. Shortfalls, particularly in the last year 5 years, are occurring each year. While the exact amount of the future contract support cost is difficult to predict today but given the continuing success of the tribes wanting to contract more, we conclude that costs can go up.

Our report covers the facts, the figures, and the numbers because, quite frankly, that is what the General Accounting Office does best, as well covering and giving you information on the litigation issues and the moratoriums that the agencies have and what the tribes are dealing with. While we do not want to make recommendations on which alternatives are best, we do want to assist you, the Congress, in your deliberations on how to resolve this impasse.

In light of the continuing shortfalls, I would like to discuss four alternatives for funding contract support costs. These alternatives are presented in no particular order.

The first alternative is to fully fund contract support costs. The second alternative is to eliminate the full funding provisions currently in the Act and continue funding at the current level. The third alternative is to impose a limit or cap on tribal indirect costs. The fourth alternative is to consolidate program funding and contract support funding and allow the tribes to fully recover their indirect cost from this total amount.

Mr. Chairman, if the desired outcome is to reimburse all tribes for all of their contract support costs, then clearly alternative one, full funding, or alternative number four, consolidated amount, would work. If the desired outcome is to deal with limited appropriations, then alternatives two, three, and four could work. A disadvantage is the alternatives two, three, and four would require amending the Act.

I will stop here and just say that this program clearly has a legislative intent. It has estimated needs, but it does not have enough appropriated money. The challenge facing the Congress, and we in the General Accounting Office are trying to assist in your deliberations of this policy decision, is to find some common ground. I will stop there.

Mr. HAYWORTH. Mr. Wells, we thank you for your testimony. We look forward to utilizing the resources of the General Accounting Office, and we will have questions for you that we will submit in writing, and in turn we would ask for your responses in writing.

Mr. WELLS. Be glad to.

[The prepared statement of Mr. Wells follows:]

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**GAO****United States General Accounting Office****Testimony****Before the Committee on Resources, House of  
Representatives**

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For Release  
on Delivery  
Expected at  
11:00 a.m. EDT  
Tuesday  
August 3, 1999

**INDIAN  
SELF-DETERMINATION  
CONTRACTING****Shortfalls and Alternatives for  
Funding Contract Support Costs**

Statement of Jim Wells, Director,  
Energy, Resources, and Science Issues,  
Resources, Community, and Economic  
Development Division



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**GAO/T-RCED-99-271**

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Mr. Chairman and Members of the Committee:

Just a month ago, the President of the United States visited the Oglala Sioux Tribe in South Dakota, stressing Native Americans' need for economic empowerment. This historic visit is another step—the first of which was taken in 1975 with the passage of the Indian Self-Determination and Education Assistance Act (the act)—toward recognizing the potential for tribes' self-determination through economic development. The act, as amended, provides that tribes shall have the opportunity to assume the management of federal Indian programs, and that they shall receive contract support funds to cover their costs of contract management and administration.<sup>1</sup> Yet during our review of contract support costs for tribal self-determination contracts, many tribal officials told us that they have diverted funds from economic development opportunities to cover shortfalls in federal funding. For example, for fiscal year 1988, the Bureau of Indian Affairs (BIA) and Indian Health Service (IHS) calculated that they owed the Oglala Sioux an additional \$1.5 million in contract support funding that they were unable to provide because of limited appropriations. For all tribes with self-determination contracts, the shortfall in funding for allowable contract support costs totaled \$95 million in fiscal year 1988.<sup>2</sup> Contract support costs are intended to cover the expenses tribes incur—for financial management and accounting, some training, and program startup costs—in managing contracted programs such as social services, hospitals and clinics, road maintenance, law enforcement, and forestry.

Because of congressional concerns over ever-increasing contract support costs and shortfalls in funding these costs, the Subcommittee on Interior and Related Agencies, Senate Committee on Appropriations, and the Senate Committee on Indian Affairs asked us to review various aspects of these costs in our June 1989 report.<sup>3</sup> Our testimony today will focus on the

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<sup>1</sup>Throughout this testimony, the term "tribes" will refer to both tribes and tribal organizations eligible to contract for programs under the act. Also, the term "contracts" will refer to contracts, grants, self-governance agreements, cooperative agreements, or annual funding agreements that are entered into under the act, as amended, that receive contract support funds.

<sup>2</sup>Tribal contractors and IHS are currently engaged in litigation to determine whether, for Indian self-determination contracts, the funding for tribal contract support costs is limited to the amount appropriated.

<sup>3</sup>Indian Self-Determination Act Shortfalls in Indian Contract Support Costs Need to Be Addressed (GAO/IGED-88-160, June 30, 1989).

extent of, and reasons for, increases in contract support costs over the last several years and four alternatives for funding these costs.<sup>4</sup>

In summary, tribes' allowable contract support costs tripled from 1989 through 1998—increasing from about \$125 million to about \$375 million.<sup>5</sup> This increase occurred for two principal reasons. First, the total costs of tribally contracted programs—upon which contract support costs are based—have increased. Second, the total cost to tribes of administering their self-determination contracts has increased. Although the amounts appropriated for contract support costs have increased over the past decade, they have not increased at as great a rate as the support costs, resulting in funding shortfalls. For fiscal year 1998, for example, the shortfall between appropriations (almost \$280 million) and allowable contract support costs (about \$375 million) was about \$95 million. Projections of future contract support costs are difficult to calculate because the number of programs for which tribes will choose to contract in the future is uncertain, as is the amount of funding they will receive. However, the tribes' allowable contract support costs could double in the future if tribes were to contract for all the available programs from BIA and IHS.

The impasse over whether to provide full funding for contract support costs or limit these costs continues in the Congress. The fallout has included litigation relevant to the issue, as well as a 1-year moratorium for fiscal year 1999 on new contracting. Because of a lack of progress in resolving this issue during 1999, the Senate Committee on Appropriations has proposed extending the moratorium for another year. To assist the Congress in its deliberations over how to resolve the impasse over contract support costs, GAO presents four alternative funding approaches, each of which can be considered individually or combined with the others. These alternatives range from providing appropriations sufficient to fund the tribes' allowable contract support costs each year to amending the act to remove the provision for funding contract support costs separately from and in addition to a program's direct costs and instead provide a single, consolidated contract amount. Each of the alternatives has advantages and disadvantages. Three of the four alternatives have the advantage of controlling future increases in contract support costs. A disadvantage of

<sup>4</sup>The June 1999 report also addressed how the tribes have been affected by funding shortfalls for contract support costs, and whether the act's provisions for contract support costs have been implemented consistently. The report contained two recommendations to make BIA's and IHS' payment of contract support costs more consistent.

<sup>5</sup>Dollar figures used throughout this testimony have been adjusted to constant 1999 values.

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these same three alternatives is that they would require legislative changes to the funding provisions of the act.

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## Background

Before 1975, Native Americans and Alaska Natives depended on the federal government to provide them with such services as law enforcement, social services, natural resource management, hospital care, and other health services like dental and mental health care. This began to change in 1975 when the government announced a policy of self-determination for tribal governments. The federal government's self-determination policy allows tribes to take over the management and administration of programs previously managed by the government on their behalf. As part of the government's policy, tribes receive funding for the programs they contract to manage as well as funding to cover the costs of their contract management and administration. These latter costs, referred to as contract support costs, are the necessary and reasonable costs tribes incur in establishing and maintaining the support systems needed to administer their contracts.

Tribes enter into self-determination contracts with two agencies (1) BIA, which is the primary federal agency with responsibility for administering Indian policy and discharging the federal government's trust responsibility for American Indians and Native Alaskan villages, and (2) HHS, which is responsible for delivering health services to American Indians and Alaska Natives. If a tribe chooses not to contract for a BIA or HHS program, the agencies continue to provide the service to the tribes. In fiscal year 1997, tribes contracted for programs worth about \$546 million, excluding such programs as education and construction; BIA's budget that year totaled \$1.7 billion. Tribes contracted HHS programs worth \$719 million in fiscal year 1998, and HHS' total budget for that same year was over \$2 billion.

To identify allowable contract support costs, the agencies commonly refer to three cost categories: (1) indirect costs, (2) direct contract support costs, and (3) startup costs. Indirect costs are costs for a tribe's common support services, such as accounting. Direct contract support costs are costs for activities that are program-related but for which the tribe does not receive program funds, such as workers' compensation, and startup costs are costs for one-time expenses incurred in beginning a program, such as the costs of computer hardware and software.

Tribes' indirect cost rates are negotiated using guidance published by the Office of Management and Budget. This is the same guidance used by

other groups such as state and local governments and nonprofit agencies. The Department of the Interior's Office of Inspector General negotiates the majority of these rates. The Department of Health and Human Services' Division of Cost Allocation also negotiates some rates, predominately for tribal organizations. There have been a number of legal challenges dealing within the rate setting process and the funding for contract support costs. A 1997 court decision—*Ramah Navajo Chapter v. Lujan*—may require a change in the Inspector General's method of calculating indirect cost rates; we do not address this issue in our testimony because the settlement discussion is ongoing.<sup>6</sup>

### **Increases in Contract Support Costs Will Likely Continue in the Future**

As the tribes' funding for contracted programs has increased over the past decade, so has the funding for contract support costs. In the past decade, the total dollars that BIA and HHS have provided to tribes for self-determination contracts has more than doubled, from about \$800 million in fiscal year 1989 to about \$1.9 billion in fiscal year 1998.<sup>7</sup> Tribes' contract support costs have also increased for these programs; the amount of contract support funding for tribes' administrative and other management costs has increased from about \$125 million to about \$375 million. Although appropriations from the Congress and the payments from these two agencies for contract support have increased, they have not been sufficient to cover tribes' allowable costs identified by BIA and HHS. In fiscal year 1998, the Congress appropriated almost \$280 million to fund almost \$375 million in tribes' allowable contract support costs, resulting in a shortfall of about \$95 million.

There are two views about whether contract support costs should rise in proportion to overall contracting levels. The first view is that most contract support costs would be expected to increase as a tribe contracts for additional programs. With more contracted programs, more money is needed for contract management and administration. The second view is that contract support costs should not automatically increase when additional programs are contracted. For example, if a tribe has already developed an accounting system then it could, up to a point, contract for additional programs without spending additional resources on the accounting system.

<sup>6</sup>113 F. 3d 1455 (10<sup>th</sup> Cir. 1997).

<sup>7</sup>Because BIA could not provide us with fiscal year 1998 contracting data, this information is fiscal year 1997 contracting data expressed in constant 1998 dollars.

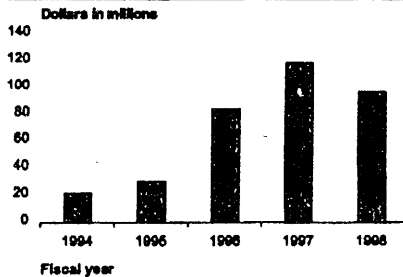


The exact amount of future contract support costs is difficult to predict, but will likely increase beyond the \$375 million for fiscal year 1998. The extent of future increases will depend on the (1) amount of future appropriations BIA and IHS receive for contracted programs, (2) extent to which tribes choose to contract for new programs in the future, and (3) future changes in tribes' costs of administering contracts. Currently, tribes receive funding through self-determination contracts equal to about half of BIA's and IHS' total appropriations; the other half is being used by BIA and IHS themselves to provide services to the tribes. If the half now being used by BIA and IHS were contracted by the tribes in the future and if indirect cost rates were to stay about the same, then contract support costs could double—from the fiscal year 1998 amount of about \$375 million to about \$750 million.

## Alternatives for Funding Contract Support Costs

Shortfalls in contract support funding have persisted for the past decade, with the most dramatic shortfalls occurring in the last 5 years. Figure 1 shows that funding shortfalls grew from about \$22 million in fiscal year 1994 to about \$95 million in fiscal year 1998, peaking at about \$120 million in fiscal year 1997.

Figure 1: Shortfalls in Contract Support Funding for BIA and IHS, Fiscal Years 1994-98



In response to the need for a permanent solution to the current funding impasse, we are presenting four alternatives for funding contract support

costs. We discuss the advantages, the disadvantages, and the cost implications of each. We do not consider all the possible alternatives for funding contract support costs. In discussing the costs of each alternative, we address costs starting in fiscal year 1998. However, we do not address the additional funding that would be necessary for prior years' shortfalls or if BIA and ISIS change their methods for determining direct contract support costs.<sup>6</sup> The cost estimates we provide are illustrative rather than actual because they involve two major assumptions. First, using the agencies' estimated funding level for new contracts for fiscal year 2000, we assume that \$17.5 million would be the annual cost of supporting new contracts. Second, using fiscal year 1998 appropriations of about \$280 million, plus the agencies' fiscal year 1998 shortfall estimate of about \$96 million for existing contracts, we assume that \$376 million would be the cost of fully funding the existing contracts the first year under an alternative funding method. Finally, we are not able to estimate the costs of changes to existing contract costs because of the ever-changing nature of tribes' indirect cost rates and direct cost bases.

### Alternative 1: Fully Fund Contract Support Costs

The first alternative for congressional consideration is to make appropriations sufficient to fully fund (i.e., at 100 percent of allowable costs) tribes' allowable contract support costs (this alternative assumes that BIA and ISIS would request the full amount of tribes' allowable costs). With this alternative, BIA and ISIS would continue to identify tribes' allowable costs as they do now, by using tribes' indirect cost rates, and would pay direct contract support costs in a consistent way. The agencies would identify and request the funds necessary to support new contracts.

### Advantages and Disadvantages

The first alternative has the advantage of fulfilling the provisions of the act that allow tribes to receive funding for their allowable contract support costs. By fully funding these costs, the Congress and the funding agencies would eliminate funding shortfalls as well as the potential for lawsuits stemming from such shortfalls. This alternative would be advantageous to tribes because it would help ensure that they receive the allowable support funds for the BIA and ISIS programs they contract. As tribes contract for more programs, they may need to build up their administrative systems to properly administer and manage their contracts.

<sup>6</sup>In 1996, the Congress included language in the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal year 1999 (P.L. 104-277, section 314, 112 Stat. 2681-588, Oct. 21, 1998) that limited the obligation to fund contract support costs to the amounts the Congress appropriated for that purpose in fiscal years 1994 through 1998. This provision is currently being challenged by tribal contractors.

The primary disadvantage of this alternative is that its implementation would require the Congress to fully fund all allowable contract support costs, which will likely continue to increase each year. It is difficult to predict future contract support costs for several reasons, including the difficulty of determining how many tribes will enter into new contracts during the year. As BIA and IHS transfer more and more programs to the tribes, the agencies' administrative costs should decrease, and some of this funding could become available to offset increases in contract support funding. Nevertheless, most of the funding for the increased allowable costs would have to be provided through federal appropriations.

Another disadvantage of this alternative, in terms of cost-efficiency, is that it does not provide tribes with incentives to limit the growth of contract support costs and, particularly, of indirect costs. Although tribes must justify their indirect cost rates through the standard rate negotiation process and, under the law, should not receive duplicate funding for the same task from program funding and contract support funding, the current method of funding indirect costs could encourage tribes to classify as many costs as possible as "indirect" to receive more funding.

#### Cost of the First Alternative

As the need for contract support funding will, in all probability, continue to increase each year, the "full funding" alternative will involve ever-increasing amounts of funding. The cost of this alternative would be about \$375 million the first year, including the fiscal year 1998 funding shortfall, and would increase by the amount paid for new and expanded contracts and an undetermined amount for changes to existing contracts due to changes in indirect cost rates or program funding.<sup>9</sup>

#### Alternative 2: Amend the Act to Eliminate the Provision for Full Funding of Contract Support Costs

A second alternative is for the Congress to amend the act to eliminate the provision for fully funding allowable contract support costs and, instead, provide funding strictly on the basis of annual appropriations.<sup>10</sup> With this alternative, BIA and IHS would continue to identify tribes' allowable costs, using their indirect cost rates, in the agencies' budget requests.

<sup>9</sup>In the second year of contracting under this alternative, we assume that the funding for existing contracts would increase by \$17.5 million and another \$17.5 million would fund additional new and expanded contracts.

<sup>10</sup>This alternative may not be necessary if federal courts determine that the requirement for contract support funding under the act is limited to the amount actually appropriated. Cases presently before the Court of Appeals for the Federal Circuit are considering this issue.

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### Advantages and Disadvantages

This alternative has the advantage of limiting the growth of contract support funding; funding amounts would be established by the amount the Congress appropriates each year. At the same time, this alternative would allow the Congress to fund contract support costs at whatever level it deems appropriate. The Congress has appropriated increased amounts for contract support; in fiscal year 1989, it provided about \$100 million; in fiscal year 1998, it provided about \$280 million. If adopted, this alternative would eliminate the expectation, created by the 1988 and 1994 amendments to the law, that full contract support funding will be available, when, in fact, appropriations and funding have been limited and have caused shortfalls.

A disadvantage of this alternative is that it may discourage tribes from entering into new self-determination contracts. The current policy fosters self-determination by encouraging tribes to assume managerial responsibility for federal programs that the government previously managed on their behalf. Yet, as the Senate authorizing committee has explicitly stated, assuming responsibility for these programs was not intended to diminish the tribes' program resources.<sup>11</sup>

Another disadvantage of this alternative for tribes is that funding for their contract support costs would be subject to the uncertainties of the appropriations cycle. Unless the Congress decides to appropriate amounts sufficient to fully fund tribes' contract support costs every year, this alternative would produce shortfalls between the amounts provided and those identified as allowed for contract support. Appropriations could fluctuate from year to year, and this could negatively affect tribes' ability to plan and budget for administering their programs.

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### Cost of the Second Alternative

The cost of this alternative would depend on the annual appropriations provided by the Congress for contract support, which was \$280 million in fiscal year 1998.

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### Alternative 3: Amend the Act to Impose Limits on Indirect Cost Rates

A third alternative would be to amend the act to limit the amount of funding tribes could receive for contract support by limiting the amount of indirect costs they can receive. For example, one way to limit funding would be to establish one indirect cost rate—such as the current aggregate rate of 25 percent—as a flat rate that would apply to all tribes.

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<sup>11</sup> S. Rep. No. 108-374 at 9 (1994).

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### Advantages and Disadvantages

Like the second alternative, this one has the advantage of imposing limitations on the growth of contract support funding and of eliminating the expectation created by the law's current language that full contract support funding will be available.<sup>12</sup> An advantage of this alternative for tribes is that their contract support costs would be funded on a consistent basis and they could better anticipate their annual contract support funding. All tribes would receive funding, and they would receive it at the same rate.

However, the disadvantage of this alternative to tribes is that it ignores differences among individual tribes' actual indirect costs, which make up the majority of contract support costs and vary widely among tribes. By ignoring these differences, this alternative could provide a windfall for tribes that have low indirect cost rates while placing those with high rates at a disadvantage, depending on the specific rate limitation that would be applied. Currently, if the Congress were to impose a flat 25-percent rate based on total direct costs, more tribes would receive reduced funding than increased funding for indirect costs. For example, if a tribe had a 30-percent rate before this fixed rate was set, it would receive 5 percent less for indirect costs each year. On the other hand, a tribe that had a 15-percent rate before the establishment of a fixed 25-percent rate would receive 10 percent more each year than it would have done otherwise. While this alternative would provide an incentive for tribes with high indirect cost rates to lower their indirect costs, BIA and IHS would have to redistribute funding among tribes, which could cause financial and administrative disruption for those that would lose funding.

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### Cost of the Third Alternative

The cost of this alternative would depend on the type of rate limit established. If, for example, the Congress chose a flat rate of 25 percent, this alternative would cost about the same as the current method costs, about \$375 million, for the first year. This amount would be higher or lower depending on the rate chosen by the Congress.

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<sup>12</sup>The idea of imposing a cap on indirect cost rates is similar to the approach used to limit the growth of indirect costs at colleges and universities. Beginning in fiscal year 1992, a 50-percent cap was imposed on federal reimbursements to universities for certain indirect costs associated with the performance of federally funded research, as we reported in a previous review of such costs. University Research: Effect of Indirect Cost Revisions and Options for Future Changes (GAO/RCED-86-74, Mar. 6, 1986).

#### **Alternative 4: Amend the Act to Replace the Current Funding Mechanism With a Consolidated Contract Amount**

A fourth alternative would be to amend the act to eliminate the current funding mechanism, which provides contract support funding over and above direct funding for the program, and replace it with one that would combine the current categories of contract costs into one contract amount from which both direct and indirect costs would be recovered. The revised contract amount would consist of the sum of (1) a program's dollars; (2) the allowable indirect costs; and (3) any allowable direct contract support costs. Upon consolidation into a single contract amount, these cost categories would lose their individual identities and would thereafter simply make up the contract total. This method has been tried before, but failed because of funding shortfalls. BIA tried to create a single contract amount in the mid-1980s.

#### **Advantages and Disadvantages**

The advantage of this alternative for both the government and tribes is that it provides for the full recovery of indirect costs, although the amount of funding provided may not increase. At the same time, this alternative removes any incentive for tribes to increase their indirect costs to receive more funding each year. Funding would no longer be provided over and above a program's direct funding, so once the consolidated contract amount has been set, any increases in indirect costs would leave less money for a program's expenditures. This would create an incentive for tribes to reduce their indirect costs as much as possible, to make more money available for direct program expenditures. In keeping with the purpose of the act, tribes would make decisions about how much funding to spend on program costs and how much to spend on administrative, or indirect, activities. With this alternative, the spotlight would no longer be on the sufficiency of contract support funding, but on the sufficiency of direct program funding. That is, funding debates would center on whether the funds provided for a particular program would be sufficient to achieve its intended purpose.

A disadvantage of this alternative for tribes is that if their indirect cost rates increased over the years, the contract amounts would not automatically increase. Changes in indirect cost rates—whether upward or downward—would no longer affect the amount of funding a tribe would receive, because contract support would no longer be funded separately from the program amounts. Thus, tribes would bear the responsibility for managing indirect costs prudently, to retain as much funding as possible for program services.

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**Cost of the Fourth  
Alternative**

The Congress could fund this alternative in one of two ways. First, when the existing contract funding is consolidated, the funding could be combined at the current funding level, which would perpetuate the current funding shortfall. This option would cost \$280 million annually for existing contracts, but would not differ from the previous failed attempt by SIA. Or, second, the contract funding could be consolidated at the level identified by SIA and IRS as the amount of tribes' allowable contract support costs. Using fiscal year 1998 funding, the consolidated amount would be about \$376 million. As with the other alternatives, contract support costs would continue to be needed for new contracts. But under this alternative, future increases in contract support costs would be slowed, because the funding mechanism would no longer provide contract support funding over and above the direct program amounts for existing contracts. Thus, if the Congress decided to increase funding for a particular program, this decision would not create a corollary obligation for increased contract support funding.

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Mr. Chairman, this concludes my statement. I will be pleased to respond to any questions that you or other members of the Committee may have at this time.

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**Contact and  
Acknowledgments**

For information about this testimony, please contact Chet Janik at (202) 512-6508. Individuals making key contributions to this testimony included Susan Iott and Jeff Malcolm.

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Mr. HAYWORTH. Again, I want to thank everyone who has joined us here today. We would note for the record that while we welcome so many who have stayed for the duration, we especially welcome Dr. Trujillo and thank him for staying to hear what has been said. We thank him for his testimony.

Let me reiterate something that Chairman Young said earlier. Since the Committee is scheduled to hold another hearing at 2 p.m. which will be televised, we will forward the Committee's additional questions to the administration again with a deadline set for compliance.

Last time this Committee submitted questions to the administration those representing the administration were 2 months late in replying. However, since it was the first hearing, our chairman generally allowed the additional time.

This time, Chairman Young asked me to reiterate should the administration not submit its answers on time, Chairman Young solemnly promises that he will take formal action to ensure that everyone complies with the time limit.

We need to move forward with contract support costs. This Congress does not appreciate the administration's continued delays with responses to our concerns. Officially, the deadline for submitting the administration's answers to our questions will be September three, 1999.

I would note, both for my time in the chair and the questions I addressed to Dr. Trujillo, to the extent that answers can be submitted by the end of this business week by Friday, they will be greatly appreciated.

With that, thanks again to all who joined us.

The Committee is adjourned.

[Whereupon, at 1:17 p.m., the Committee was adjourned.]

[Additional material submitted for the record follows.]

## RESPONSE BY JIM WELLS TO QUESTIONS FROM THE COMMITTEE

UNITED STATES GENERAL ACCOUNTING OFFICE  
WASHINGTON, DC 20548

September 2, 1999

The Honorable DON YOUNG  
Chairman,  
Committee on Resources,  
U.S. House of Representatives.

Dear Chairman Young:

Following your August 3 hearing on Indian contract support costs, at which we testified on our recently issued report *Indian Self-Determination Act Increases in Indian Contract Support Costs Need to Be Addressed* (GAO/RCED-99-150), we received additional questions from the Committee and were asked to provide our responses for the record.

Those questions, and our responses, are enclosed. Please contact Chet Janik at (202) 512-6508 or Jeff Malcolm at (303) 572-7374, if there is any other information on contract support costs that we might be able to provide.

Sincerely yours,

JIM WELLS,  
Director, Energy, Resources  
and Science Issues

GAO'S RESPONSES TO COMMITTEE QUESTIONS ON INDIAN SELF-DETERMINATION  
CONTRACT SUPPORT COSTS

**1. Your report shows that the growth in new contracting activities with the Bureau of Indian Affairs (BIA) has held steady at less than \$5 million per year. The Indian Health Service (IHS) projects long-term growth of about \$10 million for new contracting. Based on this experience and agency assessment, isn't it true that Congress can generally expect only a modest growth in contract support costs, and not the doubling hinted at in your report?**

On the basis of the growth of contract support costs over the last 10 years, there should be modest growth each year in the future. However, in any given year, a decision by a tribe such as the Navajo or the Cherokee to contract a large program would have a substantial impact on contract support costs. Furthermore, even without large contracts, years of modest growth accumulate over time to substantial growth. In our report, we did not project an amount of growth in contract support costs for each year. The point we make is that only half of all programs are currently being contracted and if the other half are eventually contracted, costs will double if indirect rates stay the same.

**2. Tribes have experienced severe problems when other Federal agencies ignore the Office of Management and Budget (OMB) Circular-dictated indirect rate set by the Department of the Interior Office of Inspector General. Would the GAO be willing to investigate the legal basis upon which these other agencies can ignore a rate that is set under a government-wide OMB circular, and recommend corrective action?**

The requirements of the Indian Self-Determination Act with respect to the reimbursement of contract support costs apply only to Self-Determination Act contracts, which are administered by the BIA and the IHS. Other agencies administer their grants and contracts under other statutory authority, and the funding for these programs is based on the individual program's statutory authorization. For example, the Job Training Partnership Act limits the amount of funds that can be spent on administrative functions to 20 percent and the Head Start program limits the amount of funds that can be spent on administrative functions to 15 percent.

The cost principles in OMB Circular A-87 are intended to set standards for cost allocation, not for determining how programs will be financed. Specifically, Circular A-87 states that the principles in the circular are "for the purpose of cost determination and are not intended to identify the circumstances or dictate the extent of Federal or governmental unit participation in the financing of a particular program or project." Each indirect rate agreement also contains a specific limitation: "Use of the rates contained in this agreement is subject to any applicable statutory limitations."

For these reasons, we believe there is no need for an investigation of this matter. Tribes consider this a longstanding problem, and the BIA and the National Congress of American Indians have recommended that other agencies should be required to allow tribes to fully recover their indirect costs.

**3. Why did you not study the issue of how IHS' calculation of direct contract support costs meets the intent of the law? Could you furnish a supplemental report after reviewing the matter with IHS and tribal financial experts?**

As part of our study, we did review IHS' policy for payment of direct contract support costs. The term appears to be derived from two provisions of the legislation authorizing contract support costs. It refers to (1) the reasonable costs of tribal contractor activities to assure contract compliance and management, which are not carried on by the respective Secretary in his direct operation of the program; and (2) direct program expenses for the operation of the contracted Federal program (25 U.S.C. 450j-1 (a) (2) (A) and (3) (A) (i)). In both cases, the burden falls on the agencies to determine what these costs entail. The statute does not specify how direct contract support costs should be determined. IHS is currently redrafting its policy, and from our work, we believe that IHS, which has responsibility for implementing these provisions under the statute, is appropriate in refining its system of paying direct contract support costs to tribes. For this reason, and because the policy is still in draft form, we do not believe further review or a supplemental report is necessary at this time.

**4. Your report suggests the appearance of a conflict of interest in the setting of tribal indirect cost needs by the same agency within the Interior Department that also audits how tribes spend their Federal funds. Without going into that particular issue, would you agree that there is a similar appearance of conflict within IHS when direct contract support cost needs are set by the same office (Division of Financial Management) that is also responsible for managing IHS' money? If so, would it be better for tribal contract support cost needs to be handled by a different branch of IHS or by the Area Offices? Is this a matter you could look into further?**

No, the Division of Financial Management does not appear to have the same type of conflict of interest that Interior's Office of Inspector General (OIG) appears to have for two reasons. First, the OIG was established as an independent audit agency and the Division was not. As a result, the OIG has to follow audit standards and guidelines, such as maintaining its independence, and the Division does not. Second, direct contract support costs are direct costs and under the Self-Determination Act, the BIA and IHS are responsible for managing and distributing direct program funds.

Currently, several offices within the IHS establish direct contract support cost needs. The Area Offices assist tribes in developing their contract proposals and developing their contract support cost needs; these proposals are developed under the policy guidance and assistance of the Office of Tribal Programs, Self-Determination Services. The Division of Financial Management and the Office of Tribal Programs staff work together to review the cost proposals developed by the tribes for the purposes of passing out funding. The division is also responsible for maintaining data on the funding allocations and shortfalls for each of the tribes and is involved in the estimation of funding available to transfer from the agency to the tribes.

Because we do not see a conflict of interest in the role of the Office of Financial Management in determining tribes' contract support cost needs, we do not believe there is a need for us to review this matter further.

**5. If future costs are predictable and modest, and if the proper incentives and controls are already in place to promote efficiency, why isn't Option #1 the preferred alternative?**

We express no opinion on which alternative, or combination of alternatives, should be implemented. That is a policy question that is up to the Congress as a whole to decide. Our main purpose in presenting various alternatives is to provide the Congress with some insights on the advantages, disadvantages, and cost implications of the various alternatives for funding contract support costs as the Congress deliberates on a permanent solution for funding these costs.

**6. Under Option #4, how do you suggest we deal with (a) inflation; (b) new contracts; and (c) ongoing contracts?**

(a) Spending for Indian programs is classified as discretionary spending. The level of spending for these programs is determined annually by the Congress and does not include mandatory adjustments for inflation. Under our fourth alternative, which would amend the Indian Self-Determination Act to eliminate the current funding mechanism and would replace it with a consolidated contract amount, contract support funding would continue to be classified as discretionary spending and issues such as inflationary increases would be handled annually through the appropriations process.

(b) Under our fourth alternative, new and expanded contracts would be handled exactly as they are now for the first year. After the first year or some other agreed

upon time frame when stability in the tribe's costs has been achieved, the program funding and contract support funding would be combined into a consolidated amount. For example, a tribe wishing to contract a program with a direct base of \$100,000 and an indirect cost rate of 25 percent would receive an additional \$25,000 (over and above their program base of \$100,000) to cover their indirect costs for the first year or some agreed upon time. Tribes contracting new programs in the future would be treated the same as tribes that are already contracting.

(c) With ongoing contracts, if Congress increased the funding for a program, the fourth alternative would limit the increase in funding to the amount provided—no additional contract support costs would be provided, as they are now. The increase in funding would be split into direct and indirect costs. To continue the example above, assume a number of years have passed and the tribe's indirect cost rate has stabilized with a direct program base of \$100,000 combined with the indirect costs of \$25,000 to form a consolidated funding amount of \$125,000. Next, assume that the program receives a \$25,000 funding increase. Under the fourth alternative, this increase would be added to the existing \$125,000 to form a new consolidated funding amount of \$150,000. Of that total amount, 25 percent or \$30,000, would be the tribe's indirect cost and the remaining \$120,000 would be available for direct program costs.

In comparison, again assume that there is a tribe with \$100,000 in direct program base funds with an indirect cost rate of 25 percent, and therefore the tribe receives \$25,000 for indirect costs. Under the existing funding mechanism required by the Indian Self-Determination Act, if that tribe receives a direct program increase of \$25,000, then the tribe's base would increase to \$125,000 and its indirect costs would increase to \$31,250. The total funding under the current system would be \$156,250 compared to \$150,000 under Alternative #4.

**7. Would you agree that the current shortfall system ends up penalizing tribal self-determination by forcing curtailments that would obviously never occur if IHS and BIA continued to operate the programs themselves?**

While it would be easy to say yes, the issue is more complex than that. Tribes have experienced shortfalls. They stated that they have had to either cut back on their administrative costs or provided funds to pay for these shortfalls. However, BIA's and IHS' funding for administrative functions are also subject to annual appropriations just as the funding for contract support costs are. While we did not examine what steps BIA or IHS may take in the event that their annual appropriations were insufficient to fund their administrative functions, the agencies have to handle any shortfalls in their budgets.

**8. Why didn't you examine the Division of Cost Allocation's (DCA) indirect cost data and processes? Do you have any sense of the proportion that the DCA negotiated indirect costs bear to all indirect cost requirements associated with all IHS and BIA contracts and compacts?**

We did examine the DCA's rate negotiation process—this is discussed in appendix H of our report. DCA reviews cost proposals from about 50 rates with tribal organizations and a few tribes. The negotiators determine the allowability and reasonableness of the proposed indirect and direct costs and negotiate differences with the tribal organization or tribe. After a rate is negotiated, the DCA issues a rate notice to the tribe. This is the rate that is applied by the BIA and IHS to the tribe's self-determination contracts.

We also examined the DCA's cost data, but did not include this information in the data in Chapter 2 because we did not combine the DCA data with data from the Department of the Interior's OIG. The effect of excluding this data from the data in chapter 2 is minimal because the DCA only negotiates about 50 rates, mostly with tribal organizations, and the aggregate indirect cost rate is about the same percent as the rates negotiated by the OIG—25 percent. The main difference between the rates negotiated by DCA and the OIG is that all the rates negotiated by DCA are provisional-final type rates while the rates negotiated by the OIG are predominantly fixed-with-carryforward rates.

**9. Can you tell us what the impact would be if Congress required all tribes to use the same method for determining their direct-cost base, and if all tribes used the fixed-with-carryforward method for calculating their rates? Is there any reason why this would not be fair and reasonable?**

The impact on tribes' costs would be zero if the same method was used to calculate indirect cost rates because tribes are reimbursed according to their costs, and it doesn't matter how these costs are expressed. Regardless of whether a fixed-with-carryforward rate or a provisional-final rate is used, a tribe should receive a rate that will allow it to recover their full costs. While mandating a single method would have no effect on cost, it prohibits tribes from choosing the rate most appropriate for their circumstances and accounting systems.

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## DEPARTMENT OF HEALTH &amp; HUMAN SERVICES

Public Health Service

Indian Health Service  
Rockville MD 20867

SEP 01 1988

The Honorable Don Young  
House of Representatives  
Washington, D.C. 20515


Dear Mr. Young:

I am responding to your August 6 letter in followup to the Committee on Resources hearing of August 3 on Contract Support Costs.

Enclosed are the answers to the questions submitted to the Indian Health Service by the Committee.

I trust this information is helpful.

Sincerely yours,

  
Michael H. Fry, M.D., M.P.H., M.S.  
Assistant Surgeon General  
Director

Enclosure

## HOUSE RESOURCES COMMITTEE QUESTIONS

## AUGUST 3, 1999 CONTRACT SUPPORT COST HEARING

## Dr. Trujillo Questions

- **Prior-year Start-up Costs.** Dr. Trujillo, I am informed you have made a policy decision this year not to pay any start-up costs incurred by tribes in prior years – costs that were incurred with the full knowledge and approval of the IHS, and which tribes were assured would be placed on the IHS priority list and would be paid.

Question:

Why are you violating the ISDA, tribal contract commitments and your own internal circulars by now refusing to use the fiscal year 1999 funds appropriated by Congress for this purpose?

Answer:

The Office of General Counsel (OGC) of the Department of Health and Human Services (HHS) and the Department of Justice (DOJ) advised me that paying prior year CSC costs would be in violation of Section 314 of the Omnibus Appropriations Act, P.L. 105-277. Accordingly, I will not be able to pay prior year start-up costs from the \$35 million increase appropriated for CSC as contemplated. According to the attached OGC legal opinion, Section 314 supercedes any other provision of law and precludes use of fiscal year 1999 appropriations or the permanent judgement fund appropriation to pay additional CSC including start up costs for fiscal years 1994-1998 contracts.

- I am informed your reason for not paying any prior year start-up costs is based on your reading of Section 314 of last year's Appropriations Act.

Question:

Isn't it true that "Section 314" simply instructs the agency on what it can and cannot do with its older appropriation accounts? Isn't that what the Interior Board of Contract Appeals and the federal court in Oregon just determined in separate rulings this past month?

Answer:

Section 314 has a much broader scope than simply telling the IHS what it can and cannot do with

its older appropriations.

Section 314 establishes "notwithstanding any other provision of law" that the amounts appropriated to or earmarked in committee reports for fiscal years 1994-1998 are the "total amounts available" to pay contract support costs for contracts funded by the listed appropriation acts for those fiscal years. By establishing the total amounts available for the IHS to pay contract support costs for those past year contracts, section 314 precludes use of fiscal year 1999 appropriations or the permanent judgment fund appropriation to pay contract support costs (including start up costs) for those past year contracts. This is consistent with federal appropriation law which precludes use of current fiscal year funds to meet prior year needs. We believe that the holdings in the above mentioned cases are incorrect and they are on appeal.

Question:

Isn't it true that by not reimbursing any start-up costs you will be severely damaging three tribes in particular, notably the Gila River, Fort McDowell and Potawatomi tribes?

Answer:

The total amount of CSC (i.e., prior year start-up costs) that the IHS will not be able to pay tribes from the \$35 million increase is approximately \$1.8 million which would have been distributed to over 40 tribes. Prior year costs associated with the Gila River Indian Community, the Ft. McDowell Tribe and the Potawatomi of Oklahoma total approximately \$1 million of this amount. Approximately 80.4 % of these tribes' overall CSC estimate, not including prior year start up costs, will be funded out of the \$35 million increase.

Question:

Isn't it true that despite your current position, IHS earlier took a different view of section 314, and went ahead and paid out over \$300,000 in FY 1999 funds to cover start-up costs incurred in FY 1998?

How can you reconcile what you are saying now with what you actually did, reportedly also on the advice of counsel, only three months ago?

Answer:

Initially, the IHS did allocate funding from the FY 1999 CSC increase to Area offices to pay start up costs that were incurred in FY 1998. This was inadvertent and clearly a mistake. It will be corrected. Section 314 prohibits the payment of any prior year start-up costs from fiscal years 1994-1998.

**Question:**

Why did you pay some FY 1998 start-up costs but neglect to pay other FY 1998 start-up costs, such as those incurred by the Ketchikan Tribe of Alaska – costs that have been repeatedly approved at the local Area level?

**Answer:**

Initially, the IHS did allocate funding from the FY 1999 CSC increase to Area offices to pay start up costs that were incurred in FY 1998. This was inadvertent and clearly a mistake. It will be corrected. Start-up costs incurred in FY 1998 by the Ketchikan Tribe of Alaska have not been paid by the IHS. Section 314 prohibits the payment of any prior year start-up costs from fiscal years 1994-1998.

- We understand that IHS projects a need in indirect requirements for fiscal year 2000, including new contract initiatives, of roughly \$100 million over the current \$204 million appropriations.

**Question:**

Why does the President's budget only include \$35 million to close this gap?

**Answer:**

The request of \$35 million for CSC in the FY 2000 President's Budget is a 17% increase over FY 1999 CSC funding, more than double the 8% increase proposed for IHS as a whole. This increase reflects the importance that the Administration attaches to contract support costs and the promotion of Indian self-determination contracting and compacting. While the President's Budget does not fully fund CSC, there are a number of other important areas (e.g., dental health, mental health) where need exists. IHS has recently testified that its overall level of needed funded is, on average, only about 60%. Our commitment to those tribes who will continue to receive their health services directly from IHS can be no less than our commitment to contracting and compacting tribes.

**Question:**

Do you really think it is appropriate for tribes to continue suffering the severe impacts of not fully funding contract support costs, as described by the GAO?

**Answer:**

The IHS does not believe tribes should continue to be underfunded for the costs of providing



basic health care services to its members and has testified to Congress many times concerning the adverse impact that the shortfall in contract support costs funding is having on tribally administered health programs. We've also testified to Congress on many occasions as well that funding for CSC must not adversely affect funding for other IHS programs, including critical health care services delivered to non-contracting and non-compacting tribes.

- Recently the General Accounting Office criticized the Department of Interior's Office of Inspector General for the appearance of a conflict of interest when the same office that conducts the audits also negotiates tribal contract support cost needs.

**Question:**

Don't you agree that a similar appearance of a conflict is present when the same office that is responsible for managing IHS's funds is also negotiating tribal contract support cost needs?

**Answer:**

We do not believe there is a conflict of interest. The primary responsibility for negotiating tribal contract support cost requests is delegated to the IHS Area Directors or his/her designee. The area recommendations are forwarded to IHS Headquarters, Division of Financial Management (DFM). Area negotiated CSC requests are submitted to the Division of Financial Management (DFM), IHS Headquarters where they are reviewed for consistency and compliance with CSC policy and statute.

**Question:**

Isn't it fair that tribes would have the perception, as we do too, that despite the Division of Financial Management's best efforts, it sees its job as being to pay out as little as possible, rather than to objectively negotiate tribal contract support cost needs on a consistent basis regardless of the size of the final bill?

**Answer:**

It is not the position of the Division of Financial Management (DFM) nor the IHS to "pay out as little as possible" in tribal CSC. The standards against which CSC is determined are based in statute and are developed in IHS policy with the active participation and consultation of tribes. It is the responsibility of the DFM to assure the negotiation of final tribal CSC pursuant to statute and IHS policy is done in a fair, consistent, and equitable manner.

**Question:**

In fact, wasn't the negotiation of contract support cost needs at one time handled by the Office of Tribal Programs?

Answer:

The Office of Tribal Program had responsibility for the CSC policy development and oversight of area CSC negotiation from 1991 until 1996 when the oversight function was transferred to Division of Financial Management (DFM) as a part of the headquarters restructuring. The primary responsibility for negotiating tribal contract support cost requests has always been carried out by the Area Directors or his/her designee. Area negotiated CSC requests are submitted to the DFM where they are reviewed for consistency and compliance with CSC policy and statute.

- On the need for full contract support cost

Question:

Isn't it true that in the ten years studied by the General Accounting Office, your agency has never, even once, included in the President's budget for full funding for contract support costs?

Answer:

Domestic spending limits under which the President's budget request is proposed does not allow the Administration to request full funding for all the critical needs faced by all IHS funded programs, including CSC. Administration fully supports the tribal contracting and compacting under the Indian Self Determination Act (ISDEA) and recognizes the importance of contract support cost in achieving self determination. The IHS and the Department of Health & Human Services work closely with tribes to establish annual budget priorities which balance all the health care priorities with the necessary costs of providing basic health care services. During this process, the CSC program budget, which is less than a tenth of the overall IHS budget, receives priority consideration in the allocation of the proposed increase. The FY 2000 President's Budget requested a 17% increase over FY 1999 for CSC, more than double the 8% increase proposed for IHS as a whole. This increase reflects the importance that the Administration attaches to contract support costs and the promotion of Indian self-determination contracting and compacting. In addition, the IHS always advises the Congress of the full CSC requirement through the appropriations committee hearing process pursuant to Section 106 (c), P.L. 93-638, as amended.

Question:

Isn't it true that if, as you state, IHS programs themselves are terribly underfunded, you only make matters worse for tribes by shorting them on contract support costs, since the GAO tells us the result is that tribes must chop down those underfunded programs even further to make up for the contract support cost shortfall?

Answer:

We are aware of what the GAO Report says about the adverse impact tribes bear as a result of

CSC shortfalls. The GAO findings are consistent with the testimony tribes and the IHS have provided to the Congress in the past. As evidence of this, pages 5 and 6 of the IHS "Report to Congress on Contract Support Cost Funding in Indian Self Determination Contracts and Compacts", May 1997, discuss "The Impact of Not Funding CSC Shortfall".

**Question:**

Why is it IHS policy to penalize tribes in this way – tribes are trying to help IHS's mission by taking over the operation of these programs themselves?

**Answer:**

The fact that IHS has not been able to fully fund the CSC estimates is the not the result of a policy to penalize tribes; it is the consequence of operating in the tightly constrained federal fiscal environment. As a result, the agency has only been able to fund part of the identified priorities (like medical inflation, pay costs, contract health services & CSC) associated with the provision of basic health care services by IHS and Indian tribes based on the available annual appropriation.

- In your testimony you say that IHS has "made strides with Tribes" "to explicitly state that contract support cost funding is subject to appropriations".

**Question:**

But isn't it true Dr. Trujillo that tribes do not agree with that position, that they view full contract support cost funding as a legal obligation, and that the courts have consistently agreed with the tribes?

**Answer:**

The IHS has consistently stated that contract support cost funding is subject to appropriations. It is true that there are various interpretations by tribes as to what this means. For example, we are working with tribal representatives to include authorizing language in S. 979, the Tribal Self-Governance Amendments of 1999, to explicitly state that contract support funding is subject to appropriations and that funds are not to be reduced to other IHS programs and activities to pay contract support costs. The IHS recognizes that individual tribes may continue to believe contract full support cost funding is a legal obligation despite the "subject to appropriations" proviso.

## DIVISION OF FINANCIAL MANAGEMENT QUESTIONS

(Carl Fitzpatrick)

- Basic fairness in this setting suggests to me that when a tribe proposes a certain amount of contract support costs, the parties will negotiate and eventually IHS will make a decision. I should think IHS would actually make a decision in writing, explaining how and why it disagreed with the tribe and came up with a different number. I should think IHS would also provide an appeal. In fact, I thought all this was required by the Act.

Question:

So my question is this: If you agree that this is fair and right and legally required, why has IHS this year not furnished tribes with these simple pieces of information?

Answer:

The Agency agrees that the tribes should receive an explanation of why and how their CSC allocation was arrived at by Headquarters. The Division of Financial Management (DFM) and Office of Tribal Programs (OTP) have worked closely with the tribes through the Indian Health Service Area Offices during the entire contract support cost review and approval process for FY 1999. The Area Offices have been communicating with the tribal organizations within their respective Areas to assure that the tribes are aware of adjustments to their requests throughout the entire review process. Due to the complexity of some negotiations and policy decisions being considered by the Agency, the FY 1999 allocation was made in 2 payments. The initial allocation was made on April 16, 1999 at which time the attached memo was sent to the area directors with instructions "to consult with each tribe with information which is consistent with the amounts contained" in the advice of allotment transmitted by the memo. Upon completion of the final allocation, the Area offices will provide individual tribal worksheets that will indicate the adjustment(s) and the reason for the adjustment along with a reiteration of the appeal process as identified in the IHS Circular 96-04.

Question:

Tribes tell me that they don't know where they stand, if their requests have been knocked down, and if so on what basis, and that they have nothing from which they can take an appeal. Don't you owe each tribe a straightforward letter saying why you paid them nothing?

Answer:

As stated above, each tribe will receive a letter from their respective Area Director advising them of the outcome of the distribution of the entire \$35M. This letter will also contain a full explanation of the allocation and the method used to determine each of their amounts. This will be in addition to the information provided in the attached April 16, 1999 memo when the first distribution occurred.

Question:

Isn't it true that many tribes never received even the limited summary information the Office of Tribal Programs sent to the Area Offices explaining your first round of payments from the \$35 million account because the Areas were not instructed to advise all tribes?

Answer:

The summary information explaining the allocation of the initial CSC distribution was provided to IHS Area Offices for dissemination to tribes under the attached April, 16, 1999 memo which instructed the areas to "take immediate action to amend the Annual Funding Agreements and consult with each tribe with the information which is consistent with the amounts" reflected in the Advice of Allotment which was attached to the memo. This same information was concurrently provided directly to tribes in Area and National meetings. The fact that many tribes contacted headquarters to ask numerous follow up questions concerning the content of the allocation information also confirms receipt of this information by tribes.

- On page 11, subparagraph (iv) of IHS Circular 96-04, it states that at the end of the second paragraph that once a Tribe and its local Area Office complete their contract support negotiations, only items remaining in "dispute" go to your office for resolution

Question:

Why this year has your office violated this policy by rejected items that had been agreed at the Area and Tribal level, and requiring Tribes to renegotiate agreed contract support requirements?

Answer:

This is the third year that the Division of Financial Management (DFM) has had the responsibility to review ISD requests. The review of ISD requests is not a unilateral prerogative of the Area Offices. The Area cannot commit or obligate funds to a Tribe for which they have never received a CSC allocation. The allocation of CSC to an Area Office does not occur until such time as the

ISD request is approved by Headquarters. This process was deliberately established to assure that CSC is allocated equitably, consistently, and within the funding established by the IHS Services Appropriation and Congressional Directives and earmarks. To allow funding decisions to be made on a decentralized basis would jeopardize the integrity of the appropriation as well as equity and consistency of the IHS contract support cost policy.

- **Question:** Why has the Office of Financial Management been discriminatory against programs on the IHS "queue," by applying to them a different rule regarding direct contract support costs than has been applied to all other programs?

**Answer:**

The Division of Financial Management has not discriminated against any program on the IHS queue. All funds for CSC are allocated to tribal organizations operating under Title I and III of the Indian Self Determination Act, as amended. The review of the Indian Self Determination (ISD) requests by Headquarters staff is conducted using the CSC policy contained in Circular 96-04, April 12, 1996. The review is made to assure that equitable funding of the ISD request is accorded all tribes and that the eventual funding of the ISD request is in accordance with the CSC provisions contained in Section 106, P.L. 93-638, as amended. In summary, each ISD request is reviewed to determine that:

- (1) requested start-up costs and pre-award costs are eligible for funding under the statute;
- (2) direct contract support cost requests are not duplicative of program funds provided under Section 106(a)(1);
- (3) the indirect cost calculation is applied to the proper base using the rate established by the Office of Inspector General, Department of Interior;
- (4) consideration has been applied for the transfer of tribal shares that represent duplicative administrative costs.

We understand that some tribal organizations might feel that their costs are all legitimate and should be eligible for total funding as reflected in their ISD request. Disallowance of expenses not in conformance with Section 106(a)(2) and (3) or the CSC policy that was developed in consultation with the tribes should not be interpreted as discriminatory. IHS has reviewed approximately 225 ISD requests in FY 1999. If some ineligible cost was inadvertently funded, however, this would be unintentional and when discovered, action would be taken to disallow the amount. Likewise, if a claimed cost was denied during the review cycle, and a tribe found with substantiating documentation that the IHS was in error and requested a reconsideration, an adjustment would be made in the allocation to correct the initial IHS determination.

**Question:**

Isn't it true that IHS Circular 96-04 remains in place and hasn't been changed or repealed?

**Answer:**

The IHS Circular 96-04 remains in place and is being adhered to for the determination of CSC requirements. The allocation process described in the Circular has been replaced in favor of a process recommended by the tribes as a result of consultation and Congressional guidance over allocation of the FY 1999 CSC increase of \$35 million.

**Question:**

If so, shouldn't it be applied consistently to all contracted programs?

**Answer:**

The Division of Financial Management has applied the policy consistently to all ISD requests that were reviewed in FY 1999.



## Miccosukee Tribe of Indians of Florida

Business Council Members  
Billy Cypress, Chairman

Jasper Nelson, Ass't. Chairman  
Max Billie, Treasurer

Andrew Best Sr., Secretary  
Jerry Cypress, Lawmaker

Statement of Billy Cypress, Chairman  
Miccosukee Tribe of Indians of Florida  
at the House Resources Committee Hearing on  
Indian Tribal Self-Determination and Contract Support

August 3, 1999

Mr. Chairman, my name is Billy Cypress. I am Chairman of the Miccosukee Tribe of Indians of Florida. Our Tribe has been in the vanguard of the federal policy of tribal self-determination for over a generation. In 1971, we negotiated a contract to operate all the programs of the BIA Miccosukee Indian Agency. Our contract was one of the models for the Indian Self-Determination Act, and we have operated all our BIA and Indian Health Service programs since 1976. We have been actively involved in each of the major amendments to the Act, including especially the 1988 and 1994 amendments and in the negotiated rulemaking under the 1994 amendments.

While we consider the tribal self-determination policy as the most successful Indian policy ever adopted by the United States, the lack of full federal compliance with section 106 (a) (2) of the Act continues to be a problem. As we discuss below, we are currently encountering (for the first time) problems in completing negotiations of our indirect cost rate with the Interior Inspector General. Even more disturbing is the failure of the Senate Appropriations Committee to approve the \$35,000,000 increase in Indian Health Services contract support funding for FY 2000 recommended by the President and the House, the imposition of a moratorium on new self-determination contracts this year, and the Senate Appropriations Committee's proposal to continue the moratorium next year.

The FY 2000 appropriation bill approved by the Senate Appropriation Committee proposes to bar for another year the further transfer of programs from federal to local tribal control. This moratorium is justified by its supporters as necessary to halt the growth in the need for contract support funding.

It is certainly true that the need for contract support funding has grown significantly in recent years. However, this growth is not an indication of a problem with the policy of self-determination. Rather, it is a sign that self-determination is working. As found by the GAO in its recent study, more contract support is required because tribes are taking control of more federal programs - just as Congress intended.

P.O. Box 440021, Tamiami Station, Miami, Florida 33144, (305) 223-8380, fax (305) 223-1011  
Constitution Approved by the Secretary of the Interior, January 11, 1962



The Micoosukee Tribe firmly believes that the Congress should encourage tribes to take control of programs that would otherwise be operated by federal bureaucrats in Washington. The best way to encourage this devolution of power to the local level is to fully fund the contract support costs necessary for tribes to assume responsibility for these programs without being forced to divert limited program funds to administrative costs which self-determination requires but which the government would not incur in its direct operation of the program.

We understand that there may be budgetary reasons that hinder the ability of Congress to fully fund contract support as quickly as tribes would like to take control of additional federal programs. Even so, it is simply not acceptable to respond to this situation by bringing the policy of Indian self-determination to a halt, as was done this year, and is proposed to be done next year. There are far less draconian methods available:

For example, attached to this statement is a proposal to temporarily require tribes to provide the IHS and BIA with notice of their anticipated contract support requirements two years in advance of payment (instead of the current 90-day notice period). Tribes would have the option to contract before the end of the two-year notice period, but they would do so without any right or claim to contract support during that period.

This two-year notice period would have several major benefits:

- (1) It would allow the process of self-determination to move forward, since additional contracting would be permitted.
- (2) The two-year notice period would coincide with the budget formulation period, allowing both the agencies and Congress to better plan for funding these costs.
- (3) Since very little additional contract support funding would be required until FY 2002, Congress would have two years to clean up the existing contract support shortfalls before new requirements are added.
- (4) It would allow time for a negotiated rulemaking committee (language for which is also attached) to examine the present system and develop long-term improvements in the system if they are necessary to assure fairness and to eliminate obstacles to the achievement of the goals of the Act. Such regulations would provide consistent standards for both IHS and Interior and would be designed to ensure both equity and reliability.

We believe this proposal addresses Congress' concerns about funding the current system, while preserving the overall policy of Indian Self-Determination. We have had a good experience under Title I of P.L. 93-638, and we support the right of other tribes to exercise the same rights which we have under the Act to administer federally funded programs for their people. We also object to the moratorium because it bars our plans to expand our self-determination programs or to exercise rights under the Act to contract with agencies in the Interior Department other than the BIA.

We think the present system is fair except for the failure of Congress to fund contract support requirements in full. However, if, as we understand, key Congressional figures feel that

the present system needs correction, we are not afraid to sit down with federal and tribal representatives in a disciplined procedure under the Negotiated Rulemaking Act to thoroughly explore the system and correct whatever needs to be corrected.

Our support for this approach is strengthened by the recent proposal of the Assistant Secretary, Indian Affairs, of a plan to "reform" contract support by making many BIA programs which in the past have been contracted under the Act, not eligible for 638 contracts, thus denying contract support funding for such programs. We strongly oppose this latest BIA proposal, which was developed without consultation with tribes or even with the BIA staff most involved in this matter, and which the BIA's own contract support study, dated June 1999, totally failed to mention.

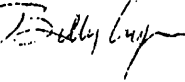
We also suggest a negotiated rulemaking because our recent experience in indirect cost negotiations with the Inspector General indicates that there are aspects of indirect cost procedures which require clarification to assure conformity with the Act and an efficient negotiating process. We have been negotiating for many months with the Interior Inspector General to finalize an indirect cost rate for the 1998 contract year (which ended September 30, 1998). The delay is partly due to the fact that the Inspector General put a moratorium on all negotiations early in 1998. Then the Inspector General took a position that legal fees in maintaining our position before the board of Contract Appeals were not allowable costs. Our lawyers explained that they are allowed under a specific provision of the Indian Self-Determination Act (section 106 (k)), and the Inspector General has withdrawn its objection on this ground.

Nevertheless, the Inspector General now takes the position that this appeal only benefited the BIA-funded programs operated by the Tribe and that, therefore, they cannot be charged to an indirect cost pool that is funded by contracts other than self-determination contracts. This position is directly in conflict with the facts since the underfunding of our indirect cost budget has a negative effect on all programs supported by that budget, not just on the BIA programs. The Inspector General has told us that these costs are allowable but must be treated as "direct costs" of the BIA programs, or must be funded from a separate indirect cost pool for BIA contracts. However, BIA has a longstanding policy of not providing contract support funds to pay direct costs, even those which, like legal fees, clearly qualify for contract support funding. We are placed in a catch 22. These costs cannot be charged to the existing single indirect pool (according to the Inspector General) and cannot qualify as direct (according to the BIA).

We are still negotiating with the Inspector General and it has made a proposal that we are studying. That proposal would permit reimbursement for these costs under a multiple indirect cost rate system in which they would all be charged to the BIA. We also note that in his February 24, 1999, testimony before your Committee, Assistant Secretary Gover indicated that he is re-examining the BIA policy of not paying direct costs from contract support funds. He further stated that he does not know the reason that policy was adopted. While we may be willing to resolve this matter as proposed by the Inspector General, we view multiple rates as an unnecessary complication in the process made necessary by the Inspector General's erroneous insistence that our legal efforts to obtain all of the funds from BIA for indirect costs did not contribute to the non-BIA programs which we administer which are supported by our indirect costs pool. We recognize that this is a highly technical issue and our attorneys Bobo Dean or Mike Roy would be glad to respond to any questions which you or your staff may have about it.

Finally, we note that we have participated through our legal counsel in the development of the NCAI-sponsored Tribal Contract Support Report, which has been provided to your Committee. We support the recommendations in that report that no further moratorium should be imposed on the exercise of tribal rights under the Act, and that Congress should appropriate sufficient funds to pay in full the negotiated indirect costs and the direct "contract support" costs of all tribes and tribal organizations operating self-determination programs under P.L. 93-638, as amended.

We appreciated the opportunity of presenting the views of the Miccosukee Tribe and your attention and that of your Committee, and urge that you work with others in the Congress to address this remaining obstacle to full implementation of the federal policy of tribal self-determination.

A handwritten signature in dark ink, appearing to read "Billy Long", with a stylized flourish at the end.

## NOTICE PROVISION

Notwithstanding any other provisions of law, including but not limited to section 106 of the Indian Self-Determination and Education Assistance Act (Pub. L. 93-638), during FY 2000 - FY 2002, neither the Secretary of the Interior nor the Secretary of Health and Human Services shall pay or obligate the United States to pay contract support funds for any new or expanded contract or compact based upon a request submitted after July 1, 1999, except under the following terms and conditions:

(1) the Indian tribe or tribal organization must provide the Secretary of the Interior or the Secretary of Health and Human Services with notice of its anticipated contract support requirement two years in advance of payment for such costs;

(2) although an Indian tribe or tribal organization is entitled to begin contracting or compacting after the existing 90 day notice period, the Indian tribe or tribal organization shall have no right, entitlement or claim to any contract support funding for the new or expanded contract or compact during the two year notice period;

(3) within six months after an Indian tribe or tribal organization notifies the Secretary of the Interior or the Secretary of Health and Human Services of its anticipated contract support requirement, the appropriate Secretary shall conduct an initial negotiation with the Indian tribe or tribal organization to determine the estimated amount that the Indian tribe or tribal organization is eligible to receive for contract support costs;

(4) a final negotiation of the request will take place within two years after the date of the initial notice by the Indian tribe or tribal organization;

(5) the Secretary of the Interior and the Secretary of Health and Human Services shall report updated estimates of contract support requirements for the next two fiscal years to the applicable authorizing and appropriations committees of Congress on each April 1 and October 1 after October 1, 1999; and

(6) all funds available for contract support in FY 2000, FY 2001 and FY 2002 shall be utilized by the Secretary of the Interior and the Secretary of Health and Human Services to address the shortfall in contract support for programs contracted or compacted, or requested to be contracted or compacted, on or before July 1, 1999;

Provided, nothing herein shall diminish the right of an Indian tribe or tribal organization to receive its full share of funds other than contract support funds as otherwise provided in the Indian Self-Determination and Education Assistance Act.

NEGOTIATING RULEMAKING PROVISION

Section 107 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450k) is amended by adding a new subsection (f):

(f) (1) Notwithstanding any other provisions of law, including but not limited to subsection (a), paragraph (1), the Secretary of the Interior and the Secretary of Health and Human Services are authorized and directed to promulgate regulations to govern the manner in which contract support costs shall be calculated in accordance with the requirements of section 106(a)(2) and 106(a)(5) and the manner in which funds for the payment of such costs shall be distributed to tribes and tribal organizations.

(2) (A) Not later than 60 days after the date of enactment of this Section, the Secretary of the Interior and Secretary of Health and Human Services shall establish a negotiated rulemaking committee pursuant to section 565 of Title 5, to promulgate such regulations as are necessary to carry out this part.

(B) The Secretary shall adapt the negotiated rulemaking procedures to the unique context of Self-Governance and Self-Determination and the government-to-government relationship between the United States and the Indian tribes to ensure that the rulemaking committee represents the interest of diverse small, medium and large tribes, large and small contractors, and tribes operating under Title I, III and IV of this Act.

(C) A negotiated rulemaking committee established pursuant to section 565 of Title 5, to carry out this section shall have as its members only Federal representatives of the Office of Management and Budget, the Department of the Interior Office of Inspector General and Office of the Secretary and DHHS Division of Cost Allocation and tribal government representatives. The rulemaking committee shall comply with the requirements of the Federal Advisory Committee Act, P.L. 92-463, as amended; provided, however, that the committee shall not be required to file its charter with the Administrator of General Services before meeting or taking any action.

(D) The negotiations referred to in paragraph (a) shall be conducted in a timely manner. Proposed regulations to implement this part shall be published in the Federal Register not later than 180 days after enactment of this Act and final regulations shall be published in the Federal Register on or before January 1, 2001.

(3) The regulations promulgated under this subsection shall be promulgated--

(A) in conformance with sections 552 and 553 of Title 5, United States Code, and subsections (c) and (e) of this section; and

(B) as a single set of regulations in Title 25 of the Code of Federal Regulations.

(4) The regulations so promulgated shall be designed to:

(A) provide for uniform rules and standards for the Secretary of the Interior and the Secretary of Health and Human Services concerning the determination and distribution of contract support funds;

(B) provide for simplicity in both application and interpretation;

(C) be fair and equitable to all tribal contractors, with due consideration for such differences as size and geographic location;

(D) permit prompt payment of contract support funding without unreasonable delay beyond the date that performance commences; and

(E) avoid unreasonable disruptions to existing tribal programs based upon past practices and funding levels.

(5) Notwithstanding any other provision of law (including any regulation), the Secretary of the Interior and the Secretary of Health and Human Services are authorized to jointly establish and fund such interagency committees or other interagency bodies, including advisory bodies comprised of tribal representatives, as may be necessary or appropriate to carry out the provisions of this subsection.

(6) The regulations promulgated under this subsection shall govern notwithstanding any other federal regulation, circular or guideline.

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## DEPARTMENT OF HEALTH &amp; HUMAN SERVICES

Office of the Assistant Secretary  
for Legislation

Washington, D.C. 20201

August 6, 1999

The Honorable Don Young  
Chairman, Committee on Resources  
House of Representatives  
Washington, D.C. 20857

Dear Chairman Young,

This is in follow-up to the House Committee on Resources August 3, 1999 hearing on contract support cost funding for Native Americans and Alaskan Natives. Thank you again for allowing the Department of Health and Human Services to testify on this important matter.

During the hearing, Rep. Gibbons requested that the Department provide a full listing of those tribes and tribal organizations with which HHS sets contract support cost rates. The testimony of Mr. Richard Sullivan, Branch Chief, Cost Allocation Division, provided a partial list of these tribal entities. Please find attached a more comprehensive list of those entities, and please note that the Red Lake Band of Chippewa Indians rate setting, which was included in Mr. Sullivan's testimony, is no longer administered by HHS. We plan to correct this inadvertent error and to include the comprehensive list when we receive the draft transcript from the Committee asking for corrections to the Department's testimony.

We are forwarding the same response directly to Mr. Gibbons.

Sincerely,

A handwritten signature in dark ink, appearing to read "R. J. Tarplin", written over the typed name.

Richard J. Tarplin

**REVISED LISTING OF ENTITIES CURRENTLY SUBJECT TO DCA RATE SETTING****Subject to OMB Cost Principles for State & local Governments**

Kenaitze Indian Tribe	AK
Mount Sanford Tribal Consortium	AK
Ninilchik Village Tribal Council	AK
Seldovia Village Tribe	AK
Tanana IRA Native Council	AK
Native Village of Eyak Tribal Council	AK

**Subject to OMB Cost Principles for Nonprofit Organizations**

North American Indian Center of Boston, Inc	MA
American Indian Community House, Inc	NY
Eight Northern Indian Pueblos Council	NM
Five Sandoval Indian Pueblos	NM
Inter-Tribal Council, Inc	OK
Indian Board of Minneapolis, Inc	MN
National Indian Youth Leadership Project	NM
Association of American Indian Physicians	OK
Milwaukee Indian Health Board, Inc	WI
Eastern Aleutian-Tribes, Inc	AK
Valdez Native Tribe	AK
Alaska Native Health Board	AK
Alaska Village Initiatives	AK
Arctic Slope Native Association, Limited	AK
Council of Athabascan Tribal Government	AK
Nome Community Center, Inc	AK
Norton Sound Health Corporation	AK
Yukon-Kuskokwim Health Corporation	AK
Aleutian-Pribiloff Island Association, Inc	AK
Bristol Bay Area Health Corporation	AK
Chugachmut	AK
Copper River Native Association	AK
Kodiak Area Native Association	AK
Manililaq Association	AK



Southeast Alaska Regional Health Consortium	AK
Tanana Chiefs Conference	AK
Valdez Native Tribe	AK
Indian Rehabilitation, Inc	AZ
Inter-Tribal Council of Arizona, Inc	AZ
Native American Community Health Center, Inc	AZ
Native Americans for Community Action	AZ
Pima Prevention Partnership	AZ
Pima Youth Partnership	AZ
Berry Creek/Mooretown Tribal Health Organizati	CA
Consolidated Tribal Health Project, Inc	CA
Inter-Tribal Council of California, Inc	CA
National Native American Aids Prevention Cente	CA
Riverside-San Bernadino County Indian Health, I	CA
Sacramento Urban Indian Health Project	CA
San Diego American Indian Health Center	CA
Southern Indian Health Council, Inc	CA
Council of Energy Resources Tribes	CO
Inter-Tribal Council of Nevada, Inc	NV
Native American Rehab Association of the NW	OR
Northwest Portland Area Indian Health Board	OR
Puyallup Tribal Health Authority	WA
Seattle Indian Health Board	WA
Small Tribes Organization of Western Washingto	WA
South Puget Intertribal Planning Agency	WA
United Indians of All Tribes Foundation	WA
Healing Lodge of the Seven Nations	WA

**TESTIMONY OF  
MARY V. THOMAS, GOVERNOR  
GILA RIVER INDIAN COMMUNITY  
BEFORE THE HOUSE COMMITTEE ON RESOURCES**

Washington, D.C.  
August 3, 1999

**INTRODUCTION**

Good morning, Mr. Chairman and Members of the Committee. My name is Mary Thomas and I am the Governor of the Gila River Indian Community. I am honored to have the opportunity to represent the Gila River Indian Community before the Committee today to discuss federal funding for contract support costs associated with health care and other community service programs in Indian Country ("Contract Support Costs").

The Gila River Indian Community (the "Community") is located on 372,000 acres in south central Arizona. Our Community is composed of approximately 23,000 tribal members, 13,000 of whom live within the boundaries of the Reservation. We have a young and rapidly growing population that presents us with a variety of health care challenges, now and in the future.

The Community provides preventive health and primary care services through its Department of Public Health ("DPH") and the Gila River Health Care Corporation ("GRHCC" or "Corporation"). With minimal exceptions, the Community has operated all health service programs on the Reservation under Indian Self-Determination contracts with the Indian Health Service ("IHS") since fiscal year 1996. We also provide law enforcement, social services, irrigation system construction and rehabilitation, and other community services under self-determination contracts and self-governance agreements with the Bureau of Indian Affairs ("BIA") and the Bureau of Reclamation ("BOR").

We strive to operate well-managed and effective community service programs responsive to our Community's specific needs. With respect to health status, we have a relatively young and rapidly growing population, which suffers tremendously disproportionate rates of debilitating chronic diseases such as diabetes and alcoholism. In fact, the World Health Organization has found that our population has the highest incidence of type 2 diabetes mellitus in the world. It will take working through at least one generation to move from the IHS model of treating acute health conditions to a Tribally-based health prevention and maintenance model. We believe this change can only be made through the continued efforts of our Community-managed Department of Public Health and Health Care Corporation under adequately funded self-determination contracts with the IHS. With respect to our BIA and BOR programs, we similarly believe meaningful improvements can best be made by continuing to operate these programs ourselves through our contracts and compacts with the BIA and BOR.

It is appropriate that the Committee has asked the Community to testify today concerning contract support funding. According to national statistics and our own experience, Contract Support Costs can be expected to comprise approximately 25% of total program costs (see accompanying graph). In the area of health care, however, as of today, our Health Care Corporation, in its fourth year of operation, has received 56% of one year's Contract Support Costs, and no payment for its Contract Support Costs for its first three years. With respect to the Community's ongoing self-determination and self-governance agreements with BIA, we receive less than 100% funding for indirect costs and far less in Contract Support Cost funding. The Community's experience speaks for itself in illustrating the shortcomings in the past federal Contract Support Cost policy implementation and the unfortunate consequences of being in exactly the wrong place at the wrong time as that policy changed at the IHS. We focus today on our experience with contracting with the IHS as it illustrates the best and the worst of self-determination policy.

The DPH has operated community service programs such as Public Health Nursing and the Community Health Representatives program since as far back as 1985. In June of 1995, as the Community was preparing to contract with IHS to assume operation and management of the Community's Hospital and associated program and administrative functions, we submitted to IHS a contract support request of \$4 million. Because of the IHS practice of utilizing its first-come first-served waiting list or "queue" for new and expanded unfunded self-determination Contract Support Cost requests, our request was placed on the queue and we waited for funding. Under this system, the Corporation operated for three years with no contract support funding - waiting to reach the top of the queue. If the system had continued without change and Congress appropriated \$7.5 million in FY99 as it had in recent years, the Corporation would have received 100% of its FY99 contract support need plus reimbursement for pre-award and start-up costs incurred in prior years. We estimate the Corporation's cumulative unreimbursed Contract Support Costs for FY96-98 at over \$10 million. Each year we did not receive funding, we continued to track our Contract Support Costs and refine our Contract Support Cost request. Eventually our request made it close to the top of the IHS's queue and we would have been funded at 100% in Fiscal Year 1999 if the queue system had continued as it was operated in the past.

However, due to an estimated backlog of requests totaling approximately \$60 million and litigation over contract support shortfalls, the contract support funding situation reached crisis proportions last year. Certain Members of the House Appropriations Committee vigorously supported allocating limited contract support appropriations on a pro rata basis among all tribes nationwide without regard to its effect on the underlying programs. Language attempting to retroactively impose a "cap" on the amount of funds available for Contract Support Costs for previous years was enacted as an appropriations rider, and a moratorium was imposed on any new contracting. After a massive effort by tribal leaders and supporters in Congress, including the Chairman and Members of this Committee, \$35 million in new funding was included in the FY99 IHS appropriation to begin to address the shortfall. The language requiring pro rata distribution was eliminated but the cap, moratorium, and limitation on past contract support payments remained in place. The Committee Report which accompanied the appropriation made clear that the Committee believed the "queue" system was inequitable and directed the IHS to

work with tribes to find a sustainable solution for addressing the perceived inequity and the contract support needs of all tribes contracting with IHS.

At the same time, the General Accounting Office ("GAO") and National Congress of American Indians ("NCAI") initiated independent efforts to examine the shortfalls in contract support funding at the IHS and BIA, and to propose recommendations or alternatives to the current funding systems.

#### **Distribution of IHS Contract Support Funding in FY99**

Immediately following final action on the IHS's FY99 appropriation, the IHS and NCAI convened meetings to consult with tribes concerning how the contract support funding for FY99 should be distributed, and to discuss policy changes for the future. This process required the IHS to finalize all contract support requests on the queue, and in general to determine the status of all tribes' contract support shortfalls. We commend the Office of Tribal Activities at the IHS, and negotiators from the Office of Finance, for their efforts in gathering and substantiating a tremendous amount of information in very short time frames. Further, this consultation process required all participants to really think through the short and long-term effects of proposed changes in the contract support system. We were impressed at the level of expertise brought to this issue by those working in this area throughout Indian country.

For FY99, it is our understanding that the IHS has or will distribute FY99 contract support funding so as to bring all tribes' contract support funding up to a "floor" of approximately 71% of their total contract support need. Ongoing programs are funded based on the amount they have historically received out of a pool of funds identified for recurring contract support needs. Any shortfall is noted and may be paid out of a separate pool of funds made available by Congress or IHS for such recurring shortfall. The \$35 million increase is being used to fund contract support requests on the queue to the extent a tribe's total contract support need – taking into consideration ongoing contract support need and payments and new or expanded contract support need – is below the "floor" of approximately 71%.

The Corporation's Contract Support Cost request for FY99 was approved by the IHS at approximately \$3.7 million. Of this amount, \$790,000 is for previously incurred preaward and startup costs. The balance, approximately \$2.8 million, represents direct costs (including indirect-type costs) which will be recognized by the IHS on a recurring basis so long as the Corporation continues to incur these costs each year. Under the IHS' distribution methodology for FY99, the Corporation expected to receive approximately 70% of its approved request, or approximately \$2.52 million.

In March of 1999, however, we learned that the IHS was considering legal recommendations from its Office of General Counsel ("OGC") that it not pay preaward and startup costs incurred in prior fiscal years. The OGC opinion on this issue concludes that Section 314 of the FY99 Omnibus Appropriations Act prohibits use of any part of the \$35 million increase for prior years' preaward and startup costs. If the Corporation's preaward and startup costs are not reimbursed, the Corporation will lose an additional \$790,000. This is in addition to the \$1.2 million the Corporation will not receive in FY99 under IHS's new distribution system.

It is important to keep in mind that the funds we are not receiving are funds we would only use to operate a federal program serving federal beneficiaries. It is only right that the federal government pay the reasonable and prudent costs of running federal programs as the law requires. The history of our program funding, unfunded contract support need and contract support funding received is shown on the attached graph.

These preaward and startup costs were included in the shortfall amounts communicated to the Committees during the FY99 appropriations debates and in the calculations upon which the NCAI and IHS recommendations were based. It was clearly our (and other tribal representatives) expectation that 70% of all approved Contract Support Costs – including preaward and startup – would be paid in FY99. Congressman Hayworth and Chairman Young sent letters to IHS Director Dr. Trujillo clarifying that it was congressional intent to pay tribes on the ISD queue at least 70% of their contract support costs need, including prior years' preaward and startup costs (see attached letters). And IHS reports that it did pay one prior year's startup costs – FY98 – but is reluctant to pay other prior year costs. Despite correspondence and repeated inquiries, we have been unable to get IHS to make a decision or provide a written response on this issue. IHS's inaction on this issue is unacceptable and we seek the Committee's help in remedying this inequity.

In addition to the preaward and startup costs, IHS is refusing to reimburse to us our unreimbursed Contract Support Costs from FY96 through FY99 that total over \$10 million. While not directly involved, we are closely following the recently filed class action under which we may be able to recover these costs.

#### **Proposed Distribution of IHS's FY2000 Contract Support Funds**

After working on distribution of the \$35 million increase in FY99 contract support funds, the IHS Contract Support Workgroup began consideration of policy changes in response to the events of the FY99 appropriations debate and directives concerning contract support. The workgroup deliberations have resulted in a proposed revised circular. At the outset it is important to note that the proposed new circular accepts less than full funding and then proceeds to explain how the agency will distribute limited funds. It is not acceptable to us that the agency presumes these costs will be permanently underfunded.

The circular divides contract support funding into three pools: (1) an ISD pool for new or expanded contracts ("Pool 1"); (2) a pool for the Contract Support Cost needs of ongoing programs ("Pool 2"); and (3) a pool comprised of any additional funds available for shortfall ("Pool 3"). Perhaps the most significant aspect of the proposed change in policy is that the IHS will now look at a tribe's total contract support need and funding whereas in the past the IHS has considered only the tribe's contract support need associated with its new or expanded contract. The ISD fund will be used to pay contract support needs associated with new or expanded contracts at a rate as close to full funding as possible. A tribe's *ongoing* shortfall will not be paid from ISD funds however. This method in essence seeks to bring tribes from the bottom up to as close to full funding as appropriations permit.

Other than IHS's refusal to pay our preaward and startup costs and with the threshold caveat that IHS can only do so much with less than full funding, we have not objected to most of IHS's proposed new contract support policy. Of the options discussed, and if one accepts contract support will not be fully funded, the new policy goes the farthest toward funding all tribes' Contract Support Cost needs and moving towards total equity while minimizing disruption to existing programs. We want to be assured, however, that once funded, our level of funding will not be reduced unless Congress fails to appropriate a recurring level of funds. Another absolutely critical aspect will be timely information gathering and inclusion of tribes' true future needs in IHS's budget requests. We do, however, object to annual redistribution within IHS Areas as we believe this favors some areas over others and would like to see IHS return to timely national redistribution of contract support funds.

The success of the new policy will be largely dependent on adequate annual appropriations to fund tribes' true contract support needs. Most fundamentally, we reject the underlying premise of the IHS circular – that it is acceptable to have a regime where a tribe contracts to operate federal programs for the federal government serving federal beneficiaries without the minimally necessary funding to administer those federal programs. This point is especially important when compared to direct services provided by IHS that have full "Contract Support Cost" funding.

### **NCAI and GAO Reports**

Community representatives provided information to the GAO for its consideration in its report and followed closely the work of the NCAI Contract Support Workgroup. We believe each report makes a significant contribution to the ongoing debate and solution of contract support issues.

**NCAI Report.** The NCAI Report provides a very thorough and well-written documentation of the history and development of the current state of federal Indian Self-Determination and contract support funding policy. We concur with its findings and wish to emphasize our support for the following points.

The report emphasizes in several places the need for full funding of tribes' Contract Support Costs. The report documents past failures on the part of the BIA to implement "grandfathering" or flat rates in large part because such changes were not accompanied by initial full funding. The report also recognizes that in projecting future need, annual inflationary increases must be added to the recurring amounts and that contract support requirements should be included with all program increases and new initiatives. NCAI's recommendation that the agencies continue to report fully to Congress tribes' contract support needs is crucial to obtaining and maintaining full funding.

The report confirms that the indirect cost rate negotiation system has proved the most workable in light of providing some uniformity for determining diverse tribal needs. The report further confirms the increases in contract support need are due to increased contracting and the associated increase in contract support needs. We urge that the Administration and Congress further acknowledge that these increases are legitimate and necessary costs of the federal policy

of tribal self-determination. And it has been our experience that the benefits – in terms of increased access, improved services and improved health status that come with the devolution of federal authority to local tribal governments – more than compensate for any marginal increase in total program cost. This fact should be recognized to put in context the House Appropriations Committees concern that increases in contract support are at the expense of program increases. To the contrary, it is the *underfunding* of Contract Support Costs that comes at the expense of programs, as tribes are compelled to divert program resources to cover the government's contract support debt. As noted in the NCAI report, we believe that further development of the idea of "benchmarking" should be made and that through such benchmarking, we may be able to achieve greater consistency while preserving sufficient discretion to allow for tribes' diverse needs and accounting systems.

**GAO Report.** We believe the ultimate value in the GAO report is that it confirms that the contract support dilemma for tribes is *real*, that is, the failure to fully fund Contract Support Costs adversely affects our local programs and our ability to efficiently administer them. The report recognizes that this is a result the authorizing Committees have repeatedly sought to avoid and eliminate in amendments to the Indian Self-Determination Act, and is absolutely counter to successful implementation of self-determination policy. Also, importantly, the report validates the longstanding tribal position that increases in Contract Support Costs are attributable to increased contracting rather than uncontrollable increases in indirect cost pools and rates. In fact, the report concludes tribes' rates have remained relatively stable over the last ten years at approximately 25 percent. The report also clarifies some of the common misperceptions about differing rates among tribes – an important point in dispelling the notion that some tribes manipulate their rates or operate inefficiently.

Contrary to the GAO report's reluctance to make predictions about future Contract Support Cost needs, however, we believe the stability in rates coupled with the agencies' hopefully improved data concerning tribes' contract support needs should enable the agencies to fairly accurately predict new contracts coming on line. In fact, we view it as a function of the agencies to know and guide tribes through the initial contracting processes – this should include working with tribes to include their future contract support needs in IHS's budget requests.

The GAO report further confirms the effect of shortfalls on tribal programs. The documentation in the report mirrors our experience. Our Health Care Corporation's transition from federal to Tribal operation required extensive development of administrative – personnel, procurement, finance, information – systems and training. To function effectively and efficiently, change is still underway and more is necessary to upgrade antiquated medical records and information gathering systems which are absolutely critical in accessing information concerning the number of patient visits, reasons for patient visits, and the number of visits per diagnosis. The law requires and we were promised reimbursement for these items. After three, almost four, years of operating with from none to just over 50 percent of our IHS approved contract support need, the lack of contract support funding threatens the Corporation's financial stability. We are faced with options such as reductions in services and limitations on our ability to expand into other areas of health care delivery. The GAO report is useful in confirming the effects of shortfalls on tribes. This information now needs to be taken seriously and used to support the need for full funding to avoid these detrimental effects on our programs, and to

recognize that some initial investment in our infrastructure is necessary to realize increased administrative efficiencies such as more effective patient referrals and maximizing billing of third party resources.

And last, the GAO offers four alternatives for funding tribes' contract support needs. Of these alternatives, we favor options one and four. The first option is to fully fund Contract Support Costs. We believe this option, coupled with several of the recommendations in the NCAI report, would meet both tribal and federal interests on this issue. For instance, with the development of benchmarking and revisions to OMB circulars recognizing cost and audit issues unique to tribal operations, we believe a greater degree of consistency can be achieved so far as the allowable items included in tribes' indirect cost pools for operating similar programs. Intertribal collaboration, such as our arrangement with the nearby Ak-Chin Indian Community, should also be explored where feasible to reduce administrative costs and maximize economies of scale. Accompanying these tribal efforts toward consistency and economy, the federal government must recognize tribes' true costs of operating federal programs. Toward this end, we encourage the BIA to revise policies that ignore or dilute its responsibility for known costs, such as BIA's failure to pay direct Contract Support Costs and dilution of its responsibilities for indirect costs attributable to BIA programs as in the *Ramah* case.

We also support further development of option 4, which is to incorporate contract support into tribes' program budgets -- essentially consolidating, "grandfathering", or "base budgeting" contract support and program funding. We strongly believe, however, for this option to be successful, the amount of contract support consolidated in the first year must be full funding of contract support need. There also must be provision for annual increases in the consolidated amount tied to a nationally recognized inflationary index, and some provision for administrative increases tied to significant program increases. With these provisions, we believe option 4 offers considerable potential toward meeting tribal and federal concerns. Our Health Care Corporation is an ideal candidate to demonstrate the potential success of Option 4, and we would be pleased to continue to work with the Committee on such a demonstration.

#### SUMMARY

In summary, the following are the beliefs and recommendations of the Gila River Indian Community:

- Contract Support Costs for IHS and BIA programs need to be funded at the 100% level.
- As our own experience indicates, inadequate funding of Contract Support Costs results in funds being shifted from direct service provision to support.
- Past attempts by IHS and BIA to equitably distribute partial Contract Support Costs have not worked and have in fact caused harm to the Gila River Indian Community contracted programs by reducing our Fiscal Year 1999 Contract Support Cost award by \$790,000.
- Current attempts by IHS and BIA to develop new, "fairer" policies for distributing less than full funding for Contract Support Costs are built on the wrong premise and represent



just a band-aid solution; they do not solve the underlying problem, which is a lack of full funding.

- The GAO report on Contract Support Costs was an objective report with supportable recommendations. We support recommendations 1 and 4: full funding for Contract Support Costs, and incorporating these costs into contract program budgets.
- We would be willing to participate in a pilot program that implements a combination of GAO recommendations 1 and 4.
- There must be a single, consistent federal policy dealing with Contract Support Costs that applies to any and all self-determination/self-governance contracting by tribes.

### CONCLUSION

In conclusion, the Gila River Indian Community believes strongly that full Contract Support Cost funding is necessary to continue paving the road to self-determination that the Congress outlined and that we have been traveling for almost 25 years now. In our health programs, we have directed the maximum amount of resources into direct patient care and specifically toward the worst health problems facing our Community. With our BOR program, we have made more progress toward a functioning water delivery system in the four years we have operated under a self-governance agreement than under past federal operation. In law enforcement, we have a more stable and reliable police department than when we relied upon the BIA to operate it. We ask that you help us preserve and continue the success of our self-governance by committing to contract support policies that first acknowledge our contract support needs as legitimate and necessary and then fully fund these needs.

As our experience with the IHS shows, the past contract support policy has served to penalize us for contracting. We contracted with the hope of reversing the reductions in services we experienced in the early 1990s when the IHS budget failed to keep pace with inflation and other cost factors. After four years of minimal federal Contract Support Costs, however, we are facing the harsh reality of imposing service reductions ourselves to cover necessary but unfunded administrative costs and infrastructure improvements. Full funding of Contract Support Costs will help Congress achieve its stated goal of "supporting and assisting Indian tribes in the development of strong and stable tribal governments," able to operate programs at a par with other federal agencies. Tribes have repeatedly proven that the self-determination framework created by Congress can build tribal administrative capacity, reduce federal bureaucracy, and, most importantly, improve the quality of life of tribal members.

As both the GAO and NCAI reports confirm, the current contract support system is sound in that the costs incurred are reasonable and legitimate, and necessary to prudently administer federal programs at the local level. Now it is time to make the funding part of the system work by doing whatever is necessary in the appropriations system to assure these federal obligations are fully paid each year. We can refine the system through benchmarking and other efforts aimed at consistency and economy.

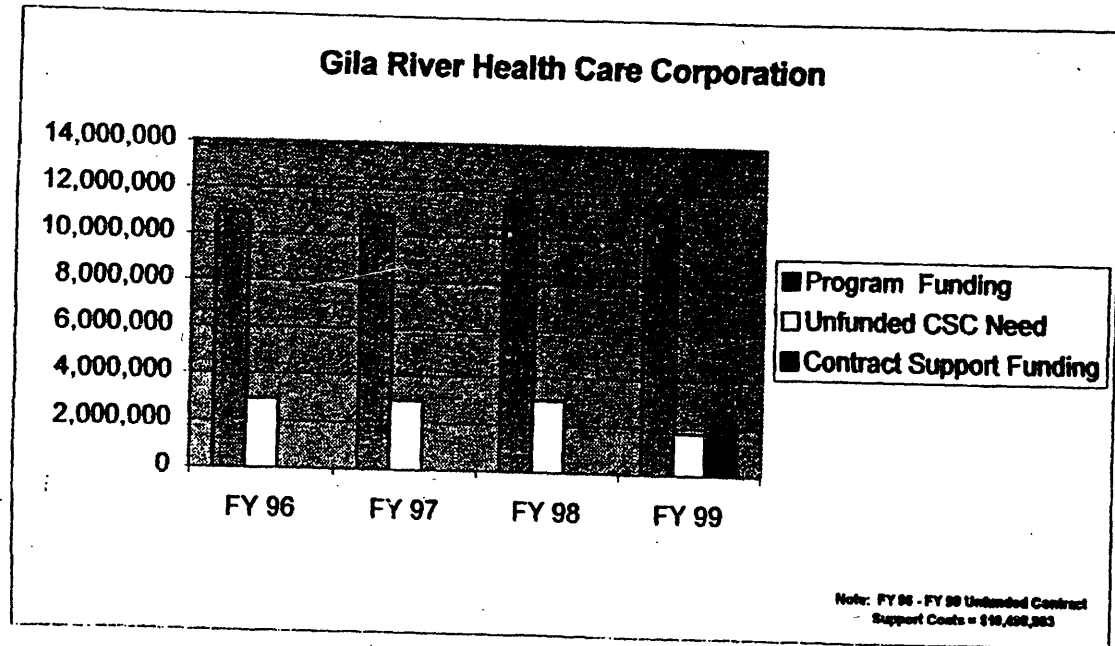
Our contracted programs have suffered from years of less-than-100% funding for the necessary Contract Support Costs. Gila River has been patient, hoping that with appropriate funding and guidance from the Congress and consistency of application by BIA and IHS, that the Contract Support Costs crisis could be resolved. As you are aware, other tribes, whose patience has run out, are moving beyond Congress and into the courts to seek remedies to this problem. If there is not a timely solution by Congress and the Administration in the area of Contract Support Costs, we may likewise be forced to seek judicial help.

In these times of significant budget surplus, we encourage the federal government, in fulfillment of its legal responsibility, to commit to fully funding and supporting Contract Support Costs.

Mr. Chairman and members of the Committee, thank you for the opportunity and honor of testifying today on this issue on which basic support for our community service programs depends. We thank you for your past support and look forward to continuing to work with the Committee as it deliberates over a sustainable solution to contract support issues.

Gila River Health Care Corporation

	Program Funding	Unfunded CSC Need	Contract Support Funding
FY 96	10,854,383	2,887,266	0
FY 97	10,891,730	2,697,200	0
FY 98	11,260,134	2,998,916	0
FY 99	11,576,260	1,717,511	2,067,573



**Congress of the United States**  
**House of Representatives**  
**Washington, DC 20515**

October 13, 1998

Chairman Ralph Regula:  
Appropriations Subcommittee on Interior  
B 308 Rayburn House Office Building  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairman Regula:

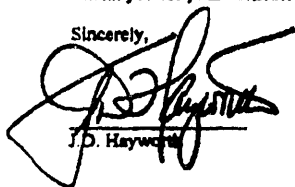
We are writing to you to express our support for compromise language that would distribute Indian Health Service (IHS) contract support cost funding in a way that is fair to tribes currently receiving contract support cost funding and to tribes that are on the queue list.

As you know, we are deeply concerned about the crisis in funding for Native American health care. Chairman Young wrote you a letter on this subject on October 9, expressing the views of the Alaska delegation on this subject and setting forth a proposal for compromise.

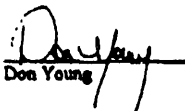
It is our understanding that, based on an increase of \$35 million for contract support cost funding, this proposal would not result in less than 70% funding of contract support costs for those programs in the queue list. Based on this understanding, we are fully supportive of Chairman Young's proposal. We urge you to adopt this proposal as the House position on this issue.

Thank you for your consideration of our request.

Sincerely,



J.D. Hayworth



Don Young



Dale E. Kildee

cc: House Majority Whip Tom Delay  
Speaker Newt Gingrich

**Congress of the United States**  
**House of Representatives**  
 Washington, DC 20515

April 13, 1999

Dr. Michael Trujillo  
 Director  
 Indian Health Service  
 Parklawn Building  
 5600 Fishers Lane  
 Rockville, Maryland 20857

Dear Dr. Trujillo:

While I applaud your office's commitment and efforts in trying to disburse the \$35 million in contract support cost (CSC) funding Congress appropriated in fiscal year 1999 (FY 99), I am also writing to you to voice my strong opposition to any change in the distribution methodology from the National Congress of American Indians (NCAI) working group's recommendations.

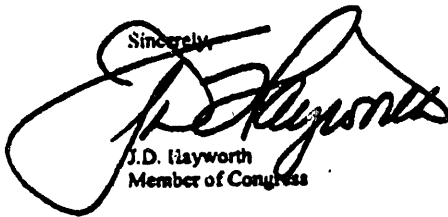
It is my understanding that the Department of Justice has recently recommended that the Indian Health Service (IHS) not include pre-award and start-up costs incurred by tribes in the distribution of FY 99 CSC funds. For IHS to change the distribution methodology from the NCAI recommendations, especially after months of discussions with the NCAI working group to address tribal, congressional and IHS concerns, would only serve to adversely affect tribes' legitimate expectations.

As you can see from the attached letters, I joined several of my colleagues in endorsing a plan to appropriate the \$35 million for the ISD queue in CSC funding so that tribes would not receive less than 70 percent of the level of funding agreed upon between that tribe and the IHS. As you will recall, this understanding was shared by the Administration, OMB, Senate Majority Leader Trent Lott, Senate Appropriations Chairman Ted Stevens, House Resources Committee Chairman Don Young, House Majority Whip Tom DeLay, the NCAI, the Congressional Native American Caucus, and many others.

Congressional intent was to ensure that the many tribes on the ISD queue, some of them waiting for funding for many years, would receive at least 70 percent of their total CSC funding needs in FY 99, including prior year pre-award and start-up costs. Failing to do so would seriously undermine the integrity of the appropriations process.

In accordance with all laws, regulations, and agency policy, I urge you to accept the NCAI working group's recommendations. Thank you for your attention to this matter, and please accept my best regards.

Sincerely,



J.D. Hayworth  
 Member of Congress

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