SENATE COMMITTEE ON INDIAN AFFAIRS
HEARING ON THE PRESIDENT'S 2014 BUDGET REQUEST

April 24, 2013

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My name is Lloyd Miller and I am a partner in the law firm of Sonosky, Chambers, Sachse, Miller and Munson, LLP. I appear here today as counsel to the National Tribal Contract Support Cost Coalition. The Coalition is comprised of 20 Tribes and tribal organizations situated in 11 States and collectively operating contracts to administer $400 million in IHS and BIA services on behalf of over 250 Native American Tribes.[1] Its work is devoted exclusively to matters pertaining to contract support costs, and, as this Committee is well aware, the payment of contract support costs is essential to the proper administration of federal contracts awarded under the Indian Self-Determination Act.

In 1988 former Chairman Inouye noted that no single enactment has had a more profound effect on more tribal communities than has the Indian Self-Determination Act, and no issue was more critical to its success than the payment of contract support costs. Today we celebrate the fact that, over the course of nearly four decades, Tribes and inter-tribal organizations have taken over control of vast portions of the Bureau of Indian Affairs and the Indian Health Service, including federal government functions in the areas of health care, education, law enforcement and land and natural resource protection. Today, not a *single* Tribe in the United States is without at least one self-determination contract with the IHS and BIA. Collectively, the Tribes administer some $2.8 billion in essential federal government functions, employing an estimated 35,000 people. Contract support cost issues thus touch *every* Tribe in the United States.

In 1988 this Committee enacted Public Law 100-472, eliminating any possible doubt that self-determination contracts are fully enforceable under the Contract Disputes Act. The Committee did so by adding Section 110 to the Indian Self-Determination Act. In one hearing on this issue, Senator Inouye pointedly noted how the agencies historically had failed to treat tribal contractors on a par with other contractors, and he vowed to press on with amendments which would guarantee real remedies for real contracts. In making this historic change, the Committee explained it was overruling contrary court decisions like *Busby School of the Northern Cheyenne Tribe v. United States*, 8 Cl. Ct. 596 (1985), which had treated these contracts as if they were mere discretionary grants and, on that basis, had denied a Tribe the right

[1] The NTCSCC is comprised of the: Alaska Native Tribal Health Consortium (AK), Arctic Slope Native Association (AK), Central Council of the Tlingit & Haida Indian Tribes (AK), Cherokee Nation (OK), Chippewa Cree Tribe of the Rocky Boy's Reservation (MT), Choctaw Nation (OK), Confederated Salish and Kootenai Tribes (MT), Copper River Native Association (AK), Forest County Potawatomi Community (WI), Kodiak Area Native Association (AK), Little River Band of Ottawa Indians (MI), Pueblo of Zuni (NM), Riverside-San Bernardino County Indian Health (CA), Shoshone Bannock Tribes (ID), Shoshone-Paiute Tribes (ID, NV), SouthEast Alaska Regional Health Consortium (AK), Spirit Lake Tribe (ND), Tanana Chiefs Conference (AK), Yukon-Kuskokwim Health Corporation (AK), and the Northwest Portland Area Indian Health Board (43 Tribes in ID, WA, OR).

to any damages for the agency's failure to pay full contract support costs. S. Rep. No. 100-274, at 34-35 (1987) (discussing *Busby*).

Last year the Supreme Court once again vindicated this Committee's actions, agreeing that, "[c]onsistent with longstanding principles of Government contracting law, we hold that the Government must pay each tribe's contract support costs in full." *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2186 (2012) (discussing and reaffirming *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005)). The Court emphasized that "the Government's obligation to pay contract support costs should be treated as an ordinary contract promise." *Id*. at 2188. Two months later, the U.S. Court of Appeals for the Federal Circuit applied this ruling to the Indian Health Service, concluding that "[t]he Secretary [was] obligated to pay all of ASNA's contract support costs for fiscal years 1999 and 2000." *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, No. 2010-1013, Order at 6, 2012 WL 3599217 (Fed. Cir. Aug. 22, 2012). In short, it is today beyond any reasonable debate that the payment of contract support costs is a binding contractual obligation due all Tribes that operate BIA and IHS contracts.

In its FY 2014 Budget, I am saddened to say that the Administration has not embraced the rule of law; it has instead sought to change it.

First, it has submitted a budget which falls $140 million short of what is required to honor all tribal contracts with the Indian Health Service. The Budget is also $12 million short of what is required to honor all BIA contracts.

Second, the Administration has proposed a statutory 'amendment-by-appropriation,' seeking to cut off all future contract rights. It has done this by proposing to give legal effect to a "table" which each Secretary would someday provide to the appropriators, specifying the maximum amount each tribal contractor would be entitled to be paid. Since each tribal contract is "subject to the availability of appropriations," the Administration hopes this language will limit what is "available" to the amount in the "table." The Administration does not propose that a Tribe cut back on its administration of a contracted hospital or clinic, or a police department or detention center. The Administration only proposes to cut off what the government would pay a Tribe to provide those services.

This is an extreme and unwarranted overreaction by the Administration to another loss in the courts. But it is not surprising. For years the agencies have kept their heads in the sand about their contract obligations to the Tribes. They have acted as if these contracts were just another program to be balanced against other programs or activities the agencies felt were important to prioritize, including protecting and growing their internal bureaucracies. They have treated these self-determination contracts as second-class contracts, and the Indian Tribes as second-class contractors.

They would never behave in this fashion if an IHS hospital were contracted out to Sisters of Providence, or a BIA detention center were contracted out to the Corrections Corporation of America. Yet they find it perfectly acceptable to do so when the contract is with an Indian Tribe.

What is perhaps most striking is that the Administration has proposed converting these contracts into second-class contracts only months after the Supreme Court declared these to be "ordinary contract promise[s]" which must be paid in full. It is not honorable—indeed, it is discriminatory—for the Administration now to propose a special limitation applicable to *Indian* contracts only. I am also concerned that it may be confiscatory, and thus unconstitutional under the Fifth Amendment, as well as improper under the Appropriations Clause, because the proposed amendment essentially tells the Tribes they must do their contracted work and must accept less-than-full payment, to be set at the agency's whim and with no recourse.

It is, of course, the "no recourse" aspect of this new idea that is most troubling. For over 120 years it has been bedrock law that if the government cannot, or will not, pay a contractor, the contractor has recourse through the courts. *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892). If an overall appropriation is capped (as has been the case with contract support costs), there is always recourse in the courts for those tribal contractors who suffer underpayments.

A judicial remedy for any underpayment permits a cap to withstand legal, and constitutional, scrutiny. But once that relief valve is shut off, the risk of unconstitutional action rises. In *Cherokee Nation v. Leavitt*, the Supreme Court warned that "[a] statute that retroactively repudiates the Government's contractual obligation may violate the Constitution." 543 U.S. 631, 646 (2005). The Court also warned against the "practical disadvantages flowing from governmental repudiation." *Id*.

Consider what it is the Administration is actually proposing. The Administration is not proposing that the Appropriations Act include a line-item specifying the maximum amount of funding available to pay a given contractor. That is what occurred in *Sutton v. United States*, 256 U.S. 575 (1921), and that is one of the options the Supreme Court described in *Ramah*, 132 S. Ct. at 2195 ("Congress could elect to make line-item appropriations, allocating funds to cover tribes' contract support costs on a contractor-by-contractor basis."). Instead, the Administration is proposing that the agencies, and <u>*not*</u> Congress, will specify how much each Tribe would be paid—but just in contract support costs—and the agencies would do so only *after* the contract support cost appropriation is enacted, and after the agencies have made an assessment about how they wish to divide up that appropriation. They would do all this long after the Tribes had signed their contracts, long after the Tribes had substantially performed those contracts, and long after the Tribes had incurred costs carrying out those contracts.

In essence, the Administration proposes that a Tribe should contract to run a hospital, clinic or detention center for a full year, but that if any shortfall occurs in the required administrative costs—costs that *the government*, itself, set in the first place—then the Tribe must somehow contribute the unpaid balance. That sort of forced volunteer services may well violate the Appropriations Clause, by effectively taking away from Congress the power to regulate spending on federal projects. Serious constitutional problems are also implicated when the agency makes an after-the-fact determination that the government is not going to pay for services rendered. These are certainly not the straightforward "line-item appropriations" that the Supreme Court said were possible if Congress wanted to limit the government's exposure for contract damages.

For the foregoing reasons, the National Tribal Contract Support Cost Coalition respectfully urges this Committee to recommend that the Senate Appropriations Committee reject the Administration's effort to radically alter both the structure of the annual appropriations bill and the fundamental nature of Indian Self-Determination Act contracts. If a sea change in federal Indian policy is to be considered by Congress, and if the change potentially implicates issues of constitutional dimension, due deliberation should begin with this Committee. Such changes should not be worked through stealth amendments made to appropriations laws.

I testified earlier today before the House Appropriations Subcommittee and offered the following five recommendations which we also hope this Committee will consider forwarding to the Senate Appropriations Committee:

1. Congress should reject the Administration's proposed restructuring of the annual appropriations Acts.

2. Congress should either eliminate the current earmarking caps on contract support cost payments (as was the case with the IHS appropriation until FY 1998, and with the BIA until FY 1994), or raise the IHS cap to $617 million and the BIA cap to $242 million. But whatever funding levels end up being fixed in the bill, Congress should not deny Indian Tribes the very same contract remedies that every other government contractor possesses; which the Supreme Court in the *Ramah* and *Cherokee* cases confirmed protect Indian contractors, too; and which this Committee put into law 25 years ago.

3. The Administration should be directed to engage Tribes in true and thoughtful government-to-government consultation, consistent with President Obama's November 5, 2009 Memorandum directing full implementation of Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"), 65 Fed. Reg. 67,249 (2000). In so doing, we recommended that the Administration also be directed to work with the National Congress of American Indians, impacted tribal organizations, and experts in the field. We explained that if legislative changes are jointly deemed necessary, the goal should be the development of a joint federal-tribal proposal. To assure full and adequate consultation, we also urged that the Administration be directed not to bring any proposal back to the Appropriations Committees sooner than the FY 2016 appropriations cycle, to be sure that any federal-tribal proposal has been fully vetted in advance with this Committee and the House Natural Resources Committee.

4. On a related topic, the Coalition requested the Subcommittee's assistance in forcing the disclosure of IHS data which the Secretary has failed to share with Congress and the Tribes, contrary to federal law. Section 106(c) of the Indian Self-Determination Act requires that an annual shortfall report on past and anticipated contract underpayments be delivered to Congress by May 15. The IHS report on FY 2011 data—*two year old data*—has still not been submitted to Congress. The 2009 and 2010 Reports were only submitted last Fall, the former report having thus been submitted *three years late*.

Without accurate data, this Committee cannot perform its constitutional oversight function. Without accurate data on appropriations expenditures, the appropriations committees cannot perform their constitutional function. And without accurate data, Tribes cannot know

what the agencies are doing with their contract funds. To be clear, all of these contract support cost funds belong to the Tribes. They are not the agencies to keep and spend for themselves. The agencies therefore have a special duty to account promptly and fully on how the Tribes' funds have been spent.

Since the agencies routinely invoke the "deliberative process privilege" under 5 U.S.C. § 552(b)(5) to resist disclosure, we requested the insertion of language waiving that provision for all CSC data not disclosed on or before May 15. Past data errors are a reason to disclose data, not to keep data secret long until after it is useful. The recent withholding of CSC payment data must stop.

5. Finally, we noted that the President's Budget now routinely omits any mention of the total projected amounts required for IHS and BIA contract payments. Until the FY 2011 Budget, such projections were routinely included in the Budget narrative. The Coalition asked that the Subcommittee direct the Secretaries to include this data in future Budget submissions, so that it is plain from the face of the Budget precisely how well—or how badly—the agencies are proposing to honor their contractual commitments to the Tribes.

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By any measure, the Indian Self-Determination Act has been a stunning success, most importantly for the Indian citizens served, but also in the strengthening and maturing of modern tribal government institutions. This Committee has had everything to do with bringing about the conditions necessary for that success. Now is not the time to adopt changes that will inevitably drive Tribes to retrocede their contracted activities to the federal government, turning back the clock on the most successful initiative the United States has ever launched in Indian affairs. And it is certainly not the time to do so through stealth appropriations initiatives which are not first aired fully before this Committee.

This Committee wrote the Indian Self-Determination Act, and it is for this Committee, alone, to decide whether circumstances warrant weakening its protections for Indian Tribes.

It is a rare privilege to appear here today. On behalf of the over 250 federally-recognized Tribes represented by the National Tribal Contract Support Cost Coalition, I humbly thank the Committee for this opportunity to testify on the Administration's proposed FY 2014 Budget.