UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS

HEARING ON S.2172

THE CONTRACT SUPPORT COST TECHNICAL AMENDMENTS OF 2004

April 28, 2004

TESTIMONY OF
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Mr. Chairman, my name is Lloyd Miller and I am a partner in the Washington, D.C.-based law firm of Sonosky, Chambers, Sachse, Endreson & Perry. I am deeply appreciative of the Committee's invitation to offer my expertise on the issues addressed in S. 2172, the proposed Tribal Contract Support Cost Technical Amendments of 2004. I appear today on behalf of 10 tribes and tribal organizations that together carry out several hundred million dollars in federal self-determination contracts or self-governance compacts within the States of Alaska, California, Idaho, Montana, Nevada and Oklahoma.[1] A copy of my resume accompanies my written testimony.

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No modern federal enactment has had a more profound impact on improving the governmental institutions of this Nation's Native American Tribes, nor on the Federal Government's relationship with those Tribes, than the Indian Self-Determination and Education Assistance Act of 1975. Inspired by Presidents Kennedy and Johnson, and specifically called for by President Nixon's historic 1970 Message to Congress,[2] this

[1] The Tribes and tribal organizations are the Alaska Native Tribal Health Consortium, the Arctic Slope Native Association, the Kodiak Area Native Association, and the Yukon-Kuskokwim Health Corporation, all of Alaska; Riverside-San Bernadino County Indian Health and the Southern Indian Health Council of California; the Shoshone-Bannock Tribes of Idaho; the Cherokee Nation of Oklahoma; the Shoshone-Paiute Tribes of Nevada and Idaho; and the Chippewa Cree Tribe of Montana.

[2] SPECIAL MESSAGE TO THE CONGRESS ON INDIAN AFFAIRS, [1970] Pub. Papers 564 (President Richard M. Nixon).

bipartisan enactment put an end to the discredited Termination Era in Native American affairs. Indeed, it established as the foundation of this Nation's Indian Policy the principle of Tribal Self-Governance and Tribal Self-Determination. All subsequent modern enactments in Indian affairs, be it in the arenas of education, housing, child welfare, environmental protection, law enforcement, resource development or gaming, trace their lineage back to the enlightened policy of Tribal Self-Determination which Congress announced in 1975. It is a powerful policy which only last week the Supreme Court once again acknowledged in the *Lara* decision.

The Indian Self-Determination Act marked a sharp break from the past. Prior to 1975, Tribal communities had, by successive Federal policies, been driven to near-complete dependence upon the Federal Government for the provision of those local governmental services that long ago the Tribes had provided for themselves. Whether the matter concerned education, law enforcement or health care, federal agencies – primarily the Bureau of Indian Affairs and the Indian Health Service – had come to control every aspect of reservation life. Indeed, over the course of a century and a half, an enormous Federal bureaucracy had emerged upon which Tribal communities were made dependent and over which Tribal governments had no control. Federal activities conceived centrally here in Washington typically had little relevance and effectiveness when carried out in Indian communities. Yet, there was little any Tribe could do to change the status quo, for even if a Tribe was prepared to contract the local administration of a federal clinic or other agency program, the decision whether to award such a contract was entirely within the discretion of the agency and subject to such funding limitations and conditions as the agency chose to impose.

The Indian Self-Determination Act of 1975 changed all that, in recognition of the fact that through enhanced local control, Tribal governments could vastly improve upon the federal government's performance while breaking the cycle of dependency. First, the Act took all contracting discretion away from the agencies, and vested in the *Tribes* the absolute choice whether to enter into a contract to administer a local federal clinic, hospital or other federal program. And second, it required that, in the event such a contract was requested, the agency would be required to include in the contract the full amount of funding the agency had to run the program itself. In effect, the Act required the bureaucratically unthinkable: that the BIA and IHS would, upon demand, divest themselves not only of all authority over a particular reservation program, but of all associated funding and personnel too.

In the early years following the ISDA's enactment, the federal bureaucracy resisted the Act's imperatives by erecting a multitude of barriers. With their own jobs on the line, hundreds of millions of dollars at stake, and the agencies' futures in very real jeopardy, this resistance was perhaps understandable, though certainly disappointing. The BIA's and IHS's misconduct during this period is well-known to this Committee, having been catalogued at considerable length in Senate Report 100-274 (1987).

Although the agencies' abuses here were across the board, the greatest abuse came in the agencies' failure to fund in full the audited contract support costs (also called "indirect" costs) required to administer these government contracts. (Incidentally, these costs are set by the government itself, through the negotiated and audited "indirect cost rate" process established under OMB Circular A-87.) This abuse was particularly unfair and discriminatory because all other government contractors in like situations are paid in full for the "general and administrative" overhead costs the contractors require to responsibly carry out a government contract. And, underfunding these contracts was particularly grave because, by chronically failing to pay these fixed costs the BIA and IHS were forcing Tribal contractors to rob the already insufficiently-funded contracted programs to make up for the shortfall in contract support costs.

A few excerpts from the Committee's 1987 Report puts in perspective the contract support cost problem this Committee grappled with 15 years ago:

> Perhaps the single most serious problem with implementation of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts. The consistent failure of federal agencies to fully fund tribal indirect 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 systems, property management and procurement systems and other administrative requirements. * * * It must be emphasized that tribes are operating federal programs and carrying out federal responsibilities when they operate self-determination contracts. Therefore, the Committee believes strongly that Indian tribes should not be forced to use their own financial resources to subsidize federal programs. [S. Rep 100-274, 8-9]
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> For several years the Bureau of Indian Affairs and the Indian Health Service have failed to request from the Congress the full amount of funds needed to fully fund indirect costs associated with self-determination contracts. [S. Rep 100-274, 9 (fn. omitted)]
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> The use of indirect costs is widely accepted by state, county and local governments, and by universities, hospitals and nonprofit organizations. The most relevant issue is the need to fully fund indirect costs associated with self-determination contracts. The Secretary of the Department of the Interior and the

> Secretary of the Department of Health and Human Services should request the full amount of funds from the Congress that are adequate to fully fund tribal indirect costs. Furthermore, the Bureau of Indian Affairs and the Indian Health Service must cease the practice of requiring tribal contractors to take indirect costs from the direct program costs, which results in decreased amounts of funds for services.
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> The Committee's amendment to the Indian Self-Determination Act are designed to require the Bureau of Indian Affairs and the Indian Health Service to comply with the requirement of the Act that indirect costs be added to the amount of funds available for direct program costs. [S. Rep 100-274, 11-12]
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> The Federal Government would not consider it proper to short-change funding for contracts with private suppliers of goods and services. When the Bureau of Indian affairs and the Indian Health Service contract with Indian tribes, however, they routinely fail to reimburse tribes for legitimate administrative costs associated with carrying out federal responsibilities. Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed. [S. Rep 100-274, 13]

When Congress in 1988 and 1994 addressed this problem head-on (Pub. L. 100-274; Pub. L. 103-413), the correction it crafted was to mandate full funding of these contracts. Thus the Act today requires that "[u]pon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under [§ 450j-1(a)]," *id.* § 450j-1(g) (emph. added), and it mandates that the contract amount "shall not be less than the applicable amount determined pursuant to [§ 450j-1(a)]." *Id.* § 450*l*(c), sec. 1(b)(4) (emph. added). Section 450j-1(a), in turn, requires in paragraph (1) that "[t]he amount of funds provided under the terms of self-determination contracts . . . shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs . . . for the period covered by the contract," and in paragraph (2) that "[t]here shall be added to the amount required by paragraph (1) contract support costs." (Emph. added.) *See also id.* §§ 450j-1(a)(2), (3) & (5) (describing the required "contract support costs" that "shall be added" to the contract). The Act further provides that, in the event of a dispute, the Contract Disputes Act provides a remedy in damages. *Id.* §§ 450m-1(a), (d) (referencing 41 U.S.C. § 601 *et seq.*). Through these principal means this Committee sought to assure that never again would Tribal contractors dealing with the government be second class government contractors. At the same time, and in order to preserve Congress's routine control over the appropriations process, the 1988 Amendments provided that the agencies' payment of the contract amounts would be subject to the "availability of appropriations." *Id*. § 450j-1(b).

Regrettably, in the nearly two decades since the enactment of the 1988 amendments, the agencies have persisted in their failure to fund contract support costs in full. Along the way, they have also sought to seize back the very discretion Congress deliberately wrote out of the Act. These actions have led to litigation which, in turn, has revealed both the power of the Indian Self-Determination Act and certain fundamental flaws in that Act.

For instance, several courts have held the government liable for failing to fund contract support costs fully in years when the agencies had lump sum appropriations legally available to pay such costs, and where the agencies could therefore point to no congressional impediment preventing them from doing so. *See e.g.*, *Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003) ($8.5 million award)*; Ramah Navajo Chapter v. Norton*, --- F. Supp. 2d ---, 2002 WL 32005254 (D. NM Dec. 6, 2002) ($29 million second partial settlement); *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D. NM 1999) ($79 million first partial settlement). The results, however, have not been consistent, as reflected in a recent decision from the U.S. Court of Appeals for the Tenth Circuit, *Cherokee Nation and Shoshone-Paiute Tribes v. Thompson*, 311 F.3d 1054 (10th Cir. 2002). *See also*, *Shoshone-Bannock Tribes v. Secretary, DHHS*, 279 F.3d 660 (9th Cir. 2002). Given these conflicting results, on March 22, 2004 the United States Supreme Court announced that it would consolidate the two *Cherokee* cases and resolve the questions presented under the historic facts at issue there.

These historic cases aside, however, more recent events have altered the legal calculus substantially. This is because since 1994 (in the case of the BIA) and since 1998 (in the case of IHS) Congress has ceased funding these contracts within a larger lump-sum appropriation. Instead, it has limited the appropriations available to the agencies to pay annual ISDA contracts to capped amounts that are woefully insufficient. Not surprisingly, these 'caps' have been a direct result of successive Administrations failing to prioritize full funding of these contracts in the annual appropriations process. In these changed circumstances, the courts have held the government immune from any obligation to fully fund these contracts at all, given the Act's "availability of appropriations" language. *E.g.*, *Babbitt v. Oglala Sioux Tribal Public Safety Dep't.*, 194 F.3d 1374 (Fed. Cir. 1999). Although litigation over the government's liability during these 'cap' years continues, *see e.g.*, *Pueblo of Zuni v. United States*, No. 01-1046 (D. NM) and *Tunica-Biloxi Tribe v. United States*, 1:02CV02413 (D.D.C.), the practical result has been a growing gap between the federally-audited indirect costs Tribes require to operate these federal contracts, and the amounts being paid to do so. Indeed, as an attachment to my testimony reflects, IHS now projects a staggering $111 million shortfall in contract support costs for FY2005, and we project BIA shortfalls of nearly half that amount.

The General Accounting Office's 1999 study of contract support costs confirms what Tribes have been saying for decades: that contract support costs are legitimate; that contract

support costs are essential and necessary to properly carry out federal self-determination contracts; and that under-funding contract support costs cheats the tribes and penalizes the Indian people served – by forcing reductions in federally-contracted programs to make up the difference. Given the courts' invocation of the statute's "availability" clause to bar any enforcement of these costs in the current changed environment of capped appropriations, we agree with the bill's sponsors that further reform is now needed, beginning with the repeal of the Act's "availability" clauses as contemplated by section 3 of S. 2172. By eliminating any argument that the Secretary lacks contracting authority for the full amount required to administer these contracts, the bill will hopefully provide the necessary incentive for future Administrations to secure the full appropriations necessary to meet the government's contract obligations. If not, the Act's existing remedial provisions will assure a judicial alternative under the Contract Disputes Act.

In sum, we support the heart of the bill, section 3, and attach to this testimony several suggested technical amendments intended to improve the section's internal consistency.

We also strongly support the two technical reforms offered by section 2 of the bill. First, a new Section 106A(a)(1) would provide that "except as otherwise provided by law," a tribal contractor "shall be entitled to recover its full indirect costs associated with any other federal funding received by the [tribal contractor] in accordance with [the contractor's] indirect cost rate agreement." This measure appears intended to eliminate all *non-statutory* caps that other federal agencies often impose on the payment of indirect costs due under grants and contracts that are awarded outside the Indian Self-Determination Act. (To clarify this intent, we recommend that the "except" clause be modified to read "except as otherwise provided by statute.") The "except" clause limits this reform so that it would not undo any existing *statutory* caps that limit the indirect costs that may be reimbursed under other grant and contract programs. As part of this new measure, Section 2 would also enact a new subsection (a)(2), specifying that the right to full non-ISDA indirect costs under subsection (a)(1) is not to "confer on [a tribal contractor] an entitlement to be paid additional amounts associated with other federal funding." As we read this provision, the reform made under new Section 106A(a)(1) would therefore *not* entitle a tribal contractor to additional funding under other contracts and grants, but only permit a Tribe to recover its full indirect costs out of such contracts and grants.

Clearly the troubling problem of underfunded indirect costs associated with other grants and non-ISDA contracts will not entirely disappear with this reform. However, the reform will certainly reduce the problem and we therefore support this aspect of S. 2172 as well.

Finally, section 2 of the bill would add a new section 106A(a)(2) to further the Act's overall goal of freeing Tribal contractors from unnecessary federal oversight. As the

Committee is aware, the 1994 Amendments promoted streamlining and enhanced flexibility in the Tribal administration of these contracts, in part by over-riding unnecessary provisions in existing OMB circulars governing costs that require agency pre-approval. *See* § 105(k) (mis-identified as 105(j) in the bill), codified at 25 U.S.C. § 450j-1(k). These reforms, however, technically only applied to self-determination contract funds. This limitation has created what some perceive to be a technical problem relating to those portions of a Tribe's contract funds that form a part of a Tribe's indirect cost "pool." As the argument goes, since an indirect cost "pool," by definition, contains both self-determination contract funds and other funds, the expenditure of these commingled funds cannot proceed under the liberalized rules set forth in § 105(k) only for self-determination contract funds. By adding a new section 106A(a)(2) to the Act, Section 2 of the bill provides a solution to this problem, extending § 105(k) to the expenditure of all funds in a Tribe's indirect cost pool.

All of our suggested amendments to S. 2172 accompany this testimony.

Before closing I would like to leave with the Committee an oft-quoted passage from Senator Inouye's remarks at a 1987 hearing preceding an earlier set of reforms, a statement that nicely summarizes both Congress's goals at the time and the noble objectives of S. 2172:

> 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.

Hearing on S. 1703 Before the Senate Select Committee on Indian Affairs, 100th Cong., 1st Sess. 55 (Sept. 21, 1987). If tribal contractors are to accomplish that federal mission – if they are not to be relegated to second-class status, somehow with fewer rights than Boeing or General Electric – then the least Congress can do is assure that payment for services rendered will be forthcoming each year. Prompt payment ought not to 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 United States in litigation.

Thank you Mr. Chairman for the opportunity to present this testimony today. I would be delighted to answer any questions the Committee may have.

SUGGESTED AMENDMENTS TO S. 2172

Page	Line	Text of Change	Explanation
2	9	change “law” to “statute”	use of word “law” may suggest it includes regulations (see page 5, lines 11-12)
3	7	delete “Federal”	deletion assures all funds in the indirect cost pools are freed of any OMB restrictions that conflict with § 106(k) of the Act
3	11	change “105(j)” to “105(k)”	the recent re-enactment of subsection 106(c) redesignated the cited subsection to its original location at § 105(k)
3	24	adding before the semicolon the following: and inserting “the provision of funds under this Act (excluding contract support costs) is subject to the availability of appropriations and”	conforms the amendment to this provision of Title I with the amendment made in Title V (see page 4, line 25)
5	17	Change “July 2” to “July 3”	conforms citation error to correct date set forth on line 18