

**TESTIMONY
OF
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U.S. DEPARTMENT OF THE INTERIOR
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
HEARING ON
S. 2172, THE "TRIBAL CONTRACT SUPPORT COST TECHNICAL AMENDMENTS OF
2004"**

APRIL 28, 2004

Good morning, Mr. Chairman and Members of the Committee. My name is William Sinclair, and I am the Director of the Office of Self-Governance and Self-Determination at the Department of the Interior. I am pleased to be here today to present the views of the Department of the Interior on S. 2172, a bill to amend Public Law 93-638, the Indian Self-Determination and Education Assistance Act of 1975 (the Act). Although the Department supports funding contract support costs to assist federally recognized tribes in developing strong tribal governing institutions and to enhance their capacity to administer tribal programs, we cannot support this bill.

Over 90 percent of all federally recognized Indian tribes either contract individual programs or compact federal services pursuant to the Act. As you stated, Mr. Chairman, upon the introduction of the bill, the Congress and the Executive branch have "embraced and expanded" tribal compacting and contracting. The Act was amended in 1984, 1988, 1994, and again in 2000.

The original Act required that the tribes receive the full amount of federal funds that the programs would have received had the Secretary continued to operate them directly. This amount is often called the "secretarial amount." As the program developed, tribes were concerned that they were not receiving amounts sufficient to cover the full administrative costs of the programs. One of the reasons for this deficiency apparently was that the "secretarial amount" required to be paid by the original statute included only the funds that the Secretary would have provided to operate the programs directly, and did not include additional administrative costs that the tribes incurred in their operation of the programs, which the Secretary would not have directly incurred (for example, the cost of annual financial audits, liability insurance, and other administrative requirements). These additional administrative or other expenses related to the overhead incurred in the operation of the programs are considered "indirect costs."

Thus, Congress enacted the Indian Self-Determination Amendments of 1988 requiring that the Secretary provide funds to more accurately reflect all administrative costs incurred by contracting and compacting tribes. The amended statute provided, "[t]here shall be added to the [secretarial

amount] contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management." However, there are exceptions to this obligation of the government to pay full contract support costs. One of these exceptions states that the provision of these funds is subject to the availability of appropriations. 25 U.S.C. 450j-1(b). Another exception provides that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization." 25 U.S.C. 450j-1(b).

The issue raised in S. 2172 that is of most concern to the Department is in section 3 of the bill. Section 3 attempts to make contract support costs similar to an entitlement by eliminating all references within the Act that make payment of funds "subject to the availability of appropriations." It is also unclear if this section is also attempting to make all contracted and compacted programs similar to an entitlement by also removing "subject to the availability of appropriations" from Section 105(c)(1) of the Act. In essence, if Section 3 were enacted it would attempt to make all federal programs contracted or compacted, and all contract support costs associated with administering these contracted and compacted programs non-discretionary.

Implementation of this provision would make the Department vulnerable to costly and time-consuming litigation as we could not fully fund all contracted and compacted programs, and their related contract support costs without significantly affecting other equally important federal programs.

In addition, Section 3 also amends the funding provision in Section 408 of the Act to read, "In any case in which contract support costs are *not* provided for, there are authorized to be appropriated such sums as are necessary to pay those costs." As Congress has recognized, the BIA has many competing priorities that provide necessary funding for and delivery of important services for federally recognized Indian and Alaska Native Communities. Beginning in 1994, Congress has placed a legislative ceiling on the amount the Department could use toward contract support costs. This ceiling provision has continued to be included in each annual Interior Appropriations Act. In fact, for FY 2004 the statutorily mandated ceiling for contract support costs is \$135,315,000. Enactment of this ceiling is important as it reflects the need to ensure that all Indian Affairs related programs have sufficient resources to carry out their responsibilities and functions.

We believe strongly that contract support cost funding enables tribal governments to develop the administrative infrastructure critical to their ability to successfully operate programs. However, if S. 2172 is enacted the Department will be placed in the difficult position of having to reduce funding for other equally important federal programs, most likely those that are either inherently federal functions or services directly offered to Indian tribes. The practical reality is that services, such as those administered by the Office of Federal Acknowledgement are inherently federal and cannot be contracted or compacted by federally recognized Indian tribes. The Department would be forced to reallocate funding and resources away from non fiduciary trust programs such as the federal acknowledgement process to fully fund indirect costs for contracting and compacting tribes.

Section 2 impacts all federal agencies, including those who are not testifying before the Committee today. If enacted, this provision would attempt to bind all federal agencies to fully fund indirect

contract support costs at the level of each agency's negotiated indirect cost rate agreement. Again, implementation of this provision would most likely create significant budgetary pressures for other agencies, and may discourage these agencies from engaging in contracting and compacting with Indian tribes in the future.

In addition, Section 2 authorizes tribes to use indirect cost funding for other uses, not related to those of indirect administrative costs. We are unclear as to the need for this provision. Section 2 implies that full funding for all indirect costs is not needed, and that this funding is for other purposes not related to the indirect administrative cost of a specific contract or compact. Also, the Department agrees with the Indian Health Service and seeks clarification as to whether section 106(k) should have been referenced in this section.

Section 4 attempts to supersede any conflicting provision of law. The effects of this provision are unknown as it appears to attempt to override all previous appropriations and authorizing statutes and federal regulations governing tribal contracting and compacting of federal services and programs. Finally, S. 2172 attempts to prematurely circumvent a case that is currently pending before the Supreme Court, *Thompson v. Cherokee Nation*, 334 F.3d 1075 (July 3, 2003). The Court has also granted *certiorari* on March 22, 2004, to hear another case on this issue from the 10th Circuit, *Cherokee Nation of Oklahoma and Shoshone-Paiute Tribes of the Duck Valley Reservation v. Thompson, et al*, 311 F.3d 1054 (10th Cir. 2002). The Court will soon hear oral arguments on these cases and deliberate on the important contract support cost issues raised in them.

Mr. Chairman, funding for indirect contract support costs remains a serious issue for Congress, the Administration and Indian tribes. We would like to continue to work with the Committee and the tribes in addressing the concerns associated with contract support costs.

This concludes my statement. I will be happy to answer any questions you may have.