**United States Senate Committee on Indian Affairs**

**Hearing on “Contract Support Cost and Sequestration:**

**Fiscal Crisis in Indian Country”**

**by Lt. Governor Jefferson Keel**

Madam Chair and members of the committee, thank you for holding this important hearing and for the opportunity and honor to appear before you today.

Our job as leaders is to help our people in any way we can. We want them to be successful for themselves, their tribes and their communities. It is our responsibility as leaders to make sure our citizens have access to a quality education, housing, health care and safety. It is our duty to provide support for them while they pursue their dreams.

The contract support cost issue truly is a “crisis” for the Chickasaw Nation, both when it comes to the status of our claims that have been pending with IHS for over 8 eight years, and when it comes to the continuing annual shortfalls we suffer and which we must therefore subsidize year in and year out.

The failure of at least two federal agencies, the Indian Health Service and the Bureau of Indian Affairs, to defy judges’ orders to meet their financial obligations to the tribes is disgraceful. We know to the penny what IHS owes every year, because IHS is required by law to report to Congress on what it owes the Chickasaw Nation. It is also required by law to report to Congress every year how much IHS failed to pay us. So figuring out what IHS failed to pay us isn’t rocket science: it’s already been calculated, certified by IHS, certified by HHS, and reported to Congress. All this is laid out in the IHS Manual and in section 106 of the Self-Determination Act, and for us that totals $36,188,534.

In reality, when you factor in lost third-party collections, the Chickasaw Nation has accumulated well over $50 million dollars of non-payment over the past 16 years. Because the Nation was not paid contract support costs in full, we were forced to reduce services to our patients which caused a reduction in third-party collections opportunity. Our latest claim for 2013 alone was over $14 million. On average, for every $3,500 lost, we could have served another patient as an inpatient, or outpatient, including provision of X-ray, laboratory services and pharmaceuticals. With a claim of well over $50 million (cumulative from 1996-2013) we could have handled between 14,000 and 20,000 more patient visits.

The Chickasaw Nation operates a 72-bed state-of-the-art hospital, the Chickasaw Nation Medical Center (CNMC), in Ada, Oklahoma. This is an IHS hospital. In addition, the Nation operates IHS-funded health center clinics in Ardmore, Tishomingo, Purcell, and Durant, as well as wellness centers in Ada, Ardmore, and Tishomingo, and additional nutritional centers in Ardmore and Purcell. These healthcare facilities employ approximately 1,100 people, including physicians, registered nurses, dentists, physicians’ assistants, nurse practitioners, midwifes and a very considerable support staff from receptionists to billing clerks to janitors. In the 12 month period ending May 31, 2011, our medical center performed 2,664 surgeries, and experienced 588 births, 8,422 inpatient days and 2,392 admissions. During the same period, the Nation had 445,478 in-patient visits.

This is one of the largest tribally-operated health care systems in the United States, and much of it, including our clinics and Ada Medical Center, are IHS-funded facilities. The Chickasaw Nation compacts with IHS to operate them for the government under the self-governance provisions of Title V of the Indian Self-Determination Act. We do this because, as history has shown, we run them better than IHS ever did or ever could. We cut the red-tape, we are more efficient, and we redesign the IHS programs to match what our people actually need. We are, of course, fully accountable to IHS, and after the close of every year we provide IHS with a comprehensive audit of how we spent our compact funds. But unlike IHS, we are also accountable to our own tribal citizens, and that is the driving reason why our services in every respect far outshine what IHS was ever able to do.

For as long as we can remember, IHS has underpaid the Chickasaw Nation’s negotiated requirements for contract support costs. The Indian Self-Determination Act says that IHS is required by law to negotiate those requirements with us and to then add those costs in full to our compact every year. That is the negotiated contract price. Most of these negotiated contract support cost requirements are to cover our personnel management, accounting, procurement, and other overhead costs of the Nation without which we could not operate. They cover our annual audit costs. They cover our insurance costs. In the general government contract setting they are called G&A costs—general and administrative costs. So this is not a system that is unique to tribal contracting or to the Chickasaw Nation.

Our contract support cost requirements have been calculated every year by IHS through provisions now contained in the IHS Manual. (The Bureau of Indian Affairs has a very similar set of instructions for calculating these costs for our compact with the BIA.)

For years, IHS told us that it had no responsibility to pay us our full contract support cost requirement. It would pay some of our costs, but then not the rest. Some years we were actually told we had to wait on a waiting list—even though we were running a government contract and operating services for IHS. But as the Committee is aware, in 2005 the Supreme Court ruled that IHS was wrong to have told us that. The Supreme Court in the Cherokee Nation case said our contract was no less binding on the federal government than any other government contract. So later in 2005 we filed claims reaching back to 1995, and since then we have regularly filed additional claims up through 2012.

But, even though IHS had detailed records, and had submitted detailed reports to Congress, about how much it owed us each year, IHS would not settle our claims. By 2012—7 years after filing our first claims—IHS finally paid us $7 million to settle just the first 15 months of our claims. But we had a total of 18 years of claims pending with IHS, not just 15 months.

In 2012, the Supreme Court spoke again, and it again said the government was liable for failing to pay our full contract support cost requirements. The Federal Circuit Court of Appeals also rejected all kinds of other defenses IHS had thrown up. So you would think that in 2012, finally, all of our remaining 16 years of claims would finally be resolved. After all, in its reports IHS told Congress we had not been paid $36,188,534 through 2012. At a minimum you would think the Nation would have swiftly gotten a check for that $36,188,534.

Instead, IHS announced that it was not going to focus on what it had failed to pay us, but focus on what the Chickasaw Nation spent in IHS funds. Naturally, since the Nation could not spend what IHS did not pay, the net result is the government would owe us virtually nothing. And that is exactly what IHS told us earlier this year: that IHS would pay us virtually nothing.

In April we sat down for two days of negotiations with IHS in Anaheim California. By the end of those discussions we thought we were making progress. IHS first promised to get us a fresh offer in May, then in June after we provided additional documentation, then in July, and on and on. Seven months later we have still not heard back from IHS, and we have no idea if we will ever hear back from IHS. It’s basically radio silence, and every time IHS says it will get us a number, nothing happens. Most recently, the Judge said we should propose a trial date for next year because nothing is happening.

This is the story of just one of the so-called 54 active settlement negotiations the IHS Director has said is underway at this time. I know from other tribal leaders that in most other instances, nothing has happened at all. IHS may have a list somewhere of dozens of cases it would like to settle out of the 200 cases involving 1600 claims; but in one of the first cases to go into the settlement process after the Supreme Court Ramah decision came down—our Chickasaw Nation case—nothing is happening, and nothing has been happening for months.

There are several things that need to happen immediately.

First, the Supreme Court has said IHS should have paid us in full, and IHS has already told Congress what it would have paid us if it had paid us in full. At least for the basic claim amount, settlement should have been instantaneous after the June 2012 Ramah decision. IHS should announce it will pay us these reported shortfall amounts, and this Committee should instruct IHS to do so.

Second, Congress should direct the appointment of a Special Master, someone like Ken Feinberg who settled the BP oil spill claims and the September 11 claims.

Third, Congress should direct that all claims will be settled before June 2014, the 2 year anniversary date of the Ramah decision.

Fourth, Congress should amend the ISDA to make perfectly, absolutely, beyond-any-shadow-of-a-doubt clear, that the issue here is what did the IHS fail to pay, not what did the Tribes spend. The agencies’ so-called “incurred cost” approach is unsupported by anything in the law and is just a gimmick they invented to chop down the amount the government owes us. We had a deal. The government failed to honor the deal. The Supreme Court said that was wrong. The government now just needs to honor the deal.

Fifth, Congress should reject the Administration’s recent counter-attack on the Tribes and reject these new contract-by-contract caps that OMB has asked Congress to include in the appropriations for this year. Apparently no good deed goes unpunished. The Tribes actually win a case in the Supreme Court—actually they win that case twice—and OMB’s response is to try and reverse that victory by legislative fiat hidden in an Appropriations Act. That is wrong, it is immoral, and it is illegal. Instead, the job now is to honor these contracts in full on a going-forward basis, just like any other government contract. To my surprise, even the U.S. Chamber of Commerce has condemned OMB for daring to permanently underpay these government contracts.

Finally, Congress should direct both agencies to work openly with tribal leaders and tribal contracting experts when exploring any contracting reforms. Just as the contracting process should be transparent and accountable, so, too, the process for regulating the contracting process needs to be open and transparent.

No changes to the contract support cost system should be made without full consultation, and an open and transparent process visible to all interested Tribes and tribal contracting experts. If, as IHS seems inclined to often say, the so-called Federal Advisory Committee Act is unintentionally creating an impediment to full and open participation by all tribal representatives and experts, then that Act needs to be amended. The time has to end when the Secretary or the Director of IHS are permitted to tell tribal representatives in a room that they are forbidden to speak.

Before closing, I just want to say one word about the Ramah case. That is the pending class action that is addressing 19 years of contract support cost claims against the BIA. I have been told that a year and a half after the decision came down, the government is about to start a statistical sampling of about 9,000 contracts. I am also told that when each tribe’s contract is selected, the issue the government will look at is not what the BIA failed to pay, but what the Tribe spent. Again, you cannot spend what you are not paid. We are about to see years of sampling and tribal studies to come up with some global number that has nothing to do with what the government actually owes.

In the Supreme Court case, in one place the Court says that over the course of certain years the BIA failed to pay “between 77% and 92% of tribes’ aggregate contract support costs.” As that statement shows, we already know what the BIA failed to pay, and the Supreme Court understood that. This new sampling idea is but another example of lawyers and agencies gone wild. The Ramah case has been decided, finally, by the Supreme Court. It is time to bring it to an end. It should have been ended last year. Again, a Special Master appointed by the President or by Congress should be directed to cut through all the delay tactics and get this case settled at once.

Thanks to many blessings, the Chickasaw Nation has been able to weather the challenges it has confronted by the failure of the IHS and the BIA to honor their contract obligations to the Nation, and through the Nation the government’s obligations to our citizens. We have been able to cover the government’s shortfalls with our own money. We have been funding an unfunded mandate that the Supreme Court says the government should have paid.

But most other Tribes have not been as fortunate, and the shortfalls have caused real heartache and suffering for tribal people.

I ask the Committee to do everything in its power to see these contract support cost issues promptly resolved and put to rest. We have far more important work to do than to litigate with the government for another 10 or 20 years over past contract liabilities. We ask Congress to pass legislation so that tribes can receive proper payment in exchange for the services the Tribes provided in good faith on behalf of and in reliance upon the federal government.

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Regarding sequestration, for tribal nations there are no positive effects of sequestration to speak of. Tribal leaders have been dealing with underfunded or drastic cuts in program funding for many years. Cuts in budgets cause rippling effects, cuts in services, which causes loss of jobs, which devastates families, and damages the local economies. However, sequestration does require the federal government to make some decisions regarding the size and functions of the various departments within the federal government itself. Again, tribes have been doing this for years.

The inherent sovereign rights of Indian tribes was recognized by this country’s founding fathers, and affirmed in the United States Constitution. At its most basic level, the economic success of the United States is built upon the land and natural resources that originally belonged to the tribal nations. As you well know, the underpinning of federal spending in Indian Country is based on sacred treaties between Indian tribes and the United States of America. This sacred trust between tribes and the federal government commits our federal partners to the protection of Indian lands; the protection of tribal self-governance; and the provision of social, medical, and educational services for tribal citizens. The authority to fund programs that fulfill this responsibility is founded in the U.S. Constitution. More fundamentally, full funding for the Indian Country budget was pre-paid with the loss of our land, and with our ancestors blood. We are not a “line-item” to be negotiated away, we are a commitment to be honored.

Tribal leaders know the pressures of scarce resources better than most, and each of us has had to make hard decisions to build the economic strength of our peoples. In order to reduce their reliance on the federal government for the provision of services to our peoples, many tribes have entered the business world. Tribes are diversifying our economies and are now providing high quality services to our people.

In some areas across the country, Indian gaming has become the lifeblood of tribal communities. There are a number of tribes that are making unprecedented progress. Gaming revenues provide those fortunate tribes with the access to funding that is necessary to diversify their economies. Tribes are now reaping those benefits and are reinvesting in their own communities. These successes allow us to raise the quality of life for our citizens, and at the same time provide tremendous benefits to our local non-Indian communities.

In Oklahoma, you see the result of tribal leaders who have stepped up to the plate and made the tough decisions. We’ve gone from managing poverty to advancing prosperity. Tribal Nations in our State contribute almost $11 billion to the State’s economy, and five percent of the jobs in the State are provided by Tribal Nations.

The tribal business community has an important role to play in the ever evolving global economy. For tens of thousands of years, our people have been stewards of the environment. But, we are also successful stewards of our economies and societies. As tribal businesses continue to grow, it is more and more clear that we bring value to the table.

The Chickasaw Nation understands that we are part of the emerging economy, one that is built on the complexities of people, communities, and an inter-connected world community. We, along with other tribes, are proactively participating in defining and shaping the new global marketplace. The Chickasaw Nation has a diversified economic portfolio that includes a bank (Bank2), a tribal corporation, Chickasaw Nation Industries (CNI), a metal fabrication facility, a chocolate factory (Bedre), and healthcare and energy development ventures that provide a high rate of return.

The Menominee Nation has a large and successful timber operation in Wisconsin with a sawmill and a furniture manufacturing facility. The Menominee forestry program is one of the most well-managed timber operations in the world. The Three Affiliated Tribes in North Dakota is building an oil refinery on its lands which will benefit the entire country, and there are other tribes with much to offer.

Tribal Nations in Washington sell Northwest Pacific oysters to Japan. The Cherokee Nation has a growing international tourism business relationship with Germany. Tribal Nations are also expanding their manufacturing capacity as contractors. For example, the Penobscot Nation in Maine manages a portfolio that includes a wood recycling business and another business that builds guidance systems for military applications. Another high profile example of tribal business success is found in one of the most bold entertainment chain transactions I am aware of in Indian country, in which the Seminole Tribe of Florida purchased the globally-recognized Hard Rock Café business for $965 million dollars. The Tribe now owns Hard Rock Cafes in 53 countries and has only seen an annual increase in locations since the deal was finalized in 2006.

Across Indian country tribal leaders are working together to find ways to capitalize on these opportunities. One of the ways that we can improve our communities and strengthen our tribal economies is through Inter-Tribal Trade. There are many tribes that have developed resources and diversified their economies, and they are now poised to assist other tribes. It is up to us to find ways that we can assist in these efforts. Indian country can and should, develop an Inter-Tribal Trade agreement that tribes can use to work with each other.

Trade has always been at the core of our way to interact with one another, and with others. Like CEO’s, tribal leaders are required to consider political, economic, and business risk when making decisions about when to expand, when to borrow money, and when to diversify. In addition, we must ensure our enterprises remain competitive by developing new market shares; by providing appropriate incentives for our employees and, by leveraging innovation. But the role of tribal and Indigenous leaders goes well beyond that of a CEO.

We also have unique political, business, and cultural risks that need to be carefully measured. For example, when we consider a new business venture, strategy, or market, we need to make certain it fits with the values of our communities. We need to make sure any development will provide real opportunity for productive and meaningful employment for our citizens. We need to consider how and when we best utilize our limited natural and geographic resources.

Most importantly, we consider to whom we are answerable. Tribal leaders must decide whether to reinvest our dividends in our business for possible future growth or help those in need at home. We consider the sacrifices made by our ancestors to hold on to our land when we choose to develop our land or utilize our resources. And, we strive to make decisions that will improve the quality of life for our community today and in the long term. These are often hard choices and heavy responsibilities. But if we take the necessary steps to position ourselves to take advantage of current opportunities and trends, tribal leaders are poised to make significant advances for their people, enterprises, communities, and nations in the decades to come.

We can reach out to one another, create government and enterprise partnerships and establish nation-to-nation trade. In the past, trade among our Nations has produced peace, cultural exchange, and wealth for our people. We need to form more partnerships based on government-to-government trade.

The promise of economic strength that will come from working together will enable us to address one of the most pressing issues today: fighting poverty in our communities.

Tribes are working together more closely than ever before, to protect our sovereign rights and to make advances on many key legislative issues. Some of these include helping Congress to pass a clean “Carcieri” legislative fix so that Tribes can continue economic development activities and continue reducing their reliance on the federal budget. As I noted, we also need to secure full payment for contract support costs, so that our contract with the government, just like our other business contracts, are honored. We also need to secure advanced appropriations for the Indian Health Service to further stabilize this most essential governmental program.

From land restoration, to education, to tax reform, to energy, to health -- Indian country has a stake in every federal policy decision. Indian issues are not partisan issues. The last few months have made it clear that Indian country is common ground for all members of Congress.

Tribal Nations and Congress must all continue to work together to open new windows of opportunity to secure our communities, and most importantly secure our futures as sovereign nations. Whether it be the farm bill or language preservation, Indian Country must remain focused on all windows of opportunity and engage on issues of significance.

It’s also time for Congress to make some tough decisions, too. It’s time to once and for all deal with the devastating effects of the sequester. Our Tribal Nations cannot sustain the ongoing effects of Congress’ refusal to keep its pre-paid commitments to the Tribal Nations.

Over the past four years we have made significant progress with Congress and the Administration. We need the President and Congress to work with us to address outstanding issues regarding contract support costs and to sustain this work that will take our nation-to-nation relationship to the next level.

We must continue to create action plans for energy security and natural resources, and to protect our cultures and languages. Most importantly we must protect the very basis of our communities - our people - and more critically the future of our communities: our children. This means doing everything we can, on every issue, to take proactive steps. We ask Congress to honor its obligations and to hold the Tribal Nation’s harmless in future budget actions.