S. HRG. 108–540

TRIBAL CONTRACT SUPPORT COST TECHNICAL AMENDMENTS

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

ON

S. 2172

TO MAKE TECHNICAL AMENDMENTS TO THE PROVISIONS OF THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT RELATING TO CONTRACT SUPPORT COSTS

APRIL 28, 2004
WASHINGTON, DC

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TRIBAL CONTRACT SUPPORT COST TECHNICAL AMENDMENTS OF 2004

WEDNESDAY, APRIL 28, 2004

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m. in room 485, Senate Russell Building, Hon. Ben Nighthorse Campbell (chairman of the committee) presiding.

Present: Senators Campbell, Inouye, and Murkowski.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. The committee will come to order. We meet today to receive testimony on S. 2172, the Tribal Contract Support Cost Technical Amendments of 2004.

[Text of S. 2172 follows:]

II

108TH CONGRESS
2D SESSION

S. 2172

To make technical amendments to the provisions of the Indian Self-Determination and Education Assistance Act relating to contract support costs, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 8, 2004

Mr. CAMPBELL introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

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A BILL

To make technical amendments to the provisions of the Indian Self-Determination and Education Assistance Act relating to contract support costs, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Tribal Contract Support Cost Technical Amendments of 2004''.

SEC. 2. AMENDMENT DETAILING CALCULATION AND PAYMENT OF CONTRACT SUPPORT COSTS.

The Indian Self-Determination and Education Assistance Act is amended by inserting after section 106 (25 U.S.C. 450j–1) the following:

''SEC. 106A. CONTRACT SUPPORT COSTS.

''(a) OTHER FEDERAL AGENCIES.—

''(1) IN GENERAL.—Except as otherwise provided by law, an Indian tribe or tribal organization administering a contract or compact under this Act shall be entitled to recover its full indirect costs associated with any other Federal funding received by the Indian tribe or tribal organization in accordance with an indirect cost rate agreement between the Indian tribe or tribal organization and the appropriate Federal agency.

''(2) NO ENTITLEMENT.—The right of recovery under paragraph (1) does not confer on an Indian tribe or tribal organization an entitlement to be paid additional amounts associated with other Federal funding described in that paragraph.

''(b) ALLOWABLE USES OF FUNDS.—

''(1) DEFINITION OF SECRETARY.—In this subsection, the term 'Secretary' means the Secretary or head of any Federal agency providing funds to an Indian tribe or tribal organization.

''(2) USE OF FUNDS.—Notwithstanding any other provision of law (including a regulation), an Indian tribe or tribal organization that is administering a contract or compact under this Act and that employs an indirect cost pool that includes funds paid under this Act and other Federal funds shall be entitled to use or expend all Federal funds in the indirect cost pool of the Indian tribe or tribal organization without the approval of the Secretary in the same manner as is permitted under section 106(j).''.

SEC. 3. AMENDMENTS CLARIFYING CONTRACT SUPPORT COST ENTITLEMENT.

(a) AMOUNT OF CONTRACTS.—Section 105(c)(1) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j(c)(1)) is amended by striking the second sentence.

(b) REDUCTIONS AND INCREASES.—Section 106(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j–1(b)) is amended in the matter following paragraph (5)—

(1) by striking ''the provision of funds under this Act is subject to the availability of appropriations and''; and

(2) by adding at the end the following: ''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.''.

(c) CONTRACT MODEL.—Subsection (c) of section 108 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450*l*(c)) is amended in section 1(b)(4) of the model contract set forth in that subsection by striking ''Subject to the availability of appropriations, the'' and inserting ''The''.

(d) APPLICABILITY TO AGREEMENTS WITH THE SECRETARY OF THE INTERIOR.—Section 408 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 458hh) is amended by inserting before the period at the end the following: ''(including such sums as are necessary to pay contract support costs, when not otherwise provided for)''.

(e) APPLICABILITY TO AGREEMENTS WITH THE SECRETARY OF HEALTH AND HUMAN SERVICES.—Section 519 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 458aaa–18) is amended—

(1) in subsection (b), by striking ''the provision of funds under this title shall be subject to the availability of appropriations'' and inserting ''the provision of funds under this title (excluding contract

support costs) shall be subject to the availability of appropriations''; and

(2) by adding at the end the following:

''(c) NECESSARY CONTRACT SUPPORT COSTS.—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.''.

SEC. 4. EFFECT ON OTHER LAW.

(a) IN GENERAL.—Except as provided in subsection (b), this Act and the amendments made by this Act supersede any conflicting provisions of law (including any conflicting regulations) in effect on the day before the date of enactment of this Act.

(b) EXCEPTION.—Nothing in this Act shall be construed to alter in any manner the ruling of the United States Court of Appeals for the Federal Circuit rendered on July 2, 2003, in Thompson v. Cherokee Nation, 334 F.3d. 1075 (July 3, 2003).

○

The CHAIRMAN. Since President Nixon's time Indian tribes have shown that they are much better prepared than the Federal Government at providing services and programs to tribal members. There is no question on that point. Our policy as the Congress is to encourage more tribes to become contracting tribes, but frankly they will not be willing to do so if they are not equipped with all the tools and resources they need.

We will hear today from a commercial contract expert and, as he will testify, in all other contracts that the United States enters there is no question that the cost to carryout those contracts are provided to the contractor. I think that tribal contractors should be treated the same way.

I will enter my complete statement in the record so that we can move along, because I have a time conflict this morning with a markup in another committee. So we will go ahead and when Senator Inouye gets here we will make his opening comments.

With that, we will ask our first panel to be seated. That will be William Sinclair, the director of the Office of Self-Governance and Self-Determination from the Department of the Interior; and Dr. Charles Grim, director of Indian Health Service for the Department of Health and Human Services. I think what we will go ahead and do is start with you, Dr. Grim, if we could. Your complete testimony, by the way, will be included in the record. I understand Douglas Black will be here accompanying you, is that right?

Mr. GRIM. Yes, sir; and also Ron Demeray.

The CHAIRMAN. Mr. Demeray is also here accompanying you. Okay. Why don't you go ahead and proceed. Your complete testimony will be in the record, if you would like to abbreviate.

STATEMENT OF CHARLES GRIM, DIRECTOR OF INDIAN HEALTH SERVICE, DEPARTMENT OF HEALTH AND HUMAN SERVICES ACCOMPANIED BY DOUG BLACK, DIRECTOR, OFFICE OF TRIBAL PROGRAMS, DEPARTMENT OF THE HEALTH AND HUMAN SERVICES; AND RON DEMERAY, DIRECTOR OF SELF-DETERMINATION SERVICES, DEPARTMENT OF HEALTH AND HUMAN SERVICES

Mr. GRIM. Thank you, Senator Campbell. I will do so.

As you indicated, I also have Doug Black, our director of the Office of Tribal Programs and Ron Demeray, our director of the Self-Determination Services team in that same office, so that we can be responsive to the committee's questions.

Mr. Chairman, the IHS has testified previously before this committee on the importance of contract support costs, the promotion of strong, stable tribal governments, and the provision of quality health care. I come before you today in support of your continued efforts to address CSC issues.

A little update on what the Indian Health Service is doing in that realm. We continue to work with tribal leaders and their representatives on a regular basis to improve the administration and allocation of contract support costs in the Indian Health Service.

We have had four CSC policies in the IHS since 1992. Each policy has been an improvement on its predecessor based on our accumulated experience and our ongoing discussions with tribes concerning the agency's management of contract support costs. Earlier

this month, we met again with representatives of tribes to consider several changes to our existing CSC policy that are intended to further improve the manner in which we manage contract support costs.

Our CSC policy contains allocation procedures that are intended over a period of time to reduce the disparity in CSC funding among tribes in our system, without reducing CSC funding for tribes that are still underfunded. The allocation procedures we use were developed once again in consultation with tribes to address the present environment in which available contract support cost appropriations are insufficient to fund the total CSC need.

S. 2172 contains provisions that appear to legislate the full funding of contract support costs. At the crux of the CSC dilemma and controversy are provisions in the Indian Self-Determination Act that are seemingly in conflict with one another. The law directs the Secretary to fund the full amount of need for such costs, while elsewhere in the act it provides that contract funding is subject to the availability of appropriations. As a result, the IHS continues to be involved in litigation over contract support cost issues that are rooted in this confusion. In November, the Supreme Court will hear arguments concerning this conflict in statutory interpretation.

S. 2172 attempts to address and ostensibly end the confusion over CSC by amending the act to fully fund these costs. Although I have been a strong advocate for increased contract support cost funding throughout my tenure as director and throughout my career in the Indian Health Service, I am concerned about this provision. S. 2172 does not specify the sources of funding that will be used to fully address the CSC need and I would be opposed to funding for CSC that comes from existing IHS appropriations for health care programs and services and supersedes the other critical priorities for budget increases for all IHS-funded programs.

S. 2172 also contains a provision that reaches outside of the IHS and BIA by allowing tribes to recover their full indirect cost needs from awards made by other Federal agencies. This provision would result in the diversion of limited program funds to administration and create an inequity in treatment between tribal and non-tribal grantees. The Department cannot support the requirements of this provision.

In closing, I would again like to express my support for contract support costs and the activities of this committee. Senator Campbell, I would also like to thank you for your efforts and achievements on behalf of Indian people as chairman of this committee.

I would like to complete my opening comments by emphasizing that the IHS is committed to upholding, promoting and strengthening the principles of the Indian Self-Determination Act, the empowerment of tribal governments, and the government-to-government relationship that exists between Indian Nations and this country.

Thank you for the opportunity to discuss S. 2172 and contract support costs in the IHS. At this time, we are available to answer any questions that you might have.

[Prepared statement of Mr. Grim appears in appendix.]

The CHAIRMAN. Thank you, Dr. Grim.

Mr. Sinclair, if you would go ahead and proceed.

STATEMENT OF WILLIAM A. SINCLAIR, DIRECTOR, OFFICE OF SELF-GOVERNANCE AND SELF-DETERMINATION, DEPARTMENT OF THE INTERIOR

Mr. SINCLAIR. Yes, sir; thank you.

Good morning, Mr. Chairman. I am William Sinclair, director of the Office of Self-Governance at the Department of the Interior. I am pleased to be here today to impart the Department's views on S. 2172, to amend Public Law 93–638.

The Department supports developing strong tribal governments by having contracts and compacts with over 90 percent of all Indian tribes and by funding contract support costs incurred by those tribes. However, we are unable to support this bill.

As background, the original act requires that tribes who are contracting and compacting for services, or a program, receive full Federal funding that the Secretary would have expended if the Secretary had provided the service directly.

In addition, the Secretary is required to provide contract support costs to those contracting and compacting tribes to cover overhead expenses incurred by those tribes in implementing the contracts and compacts. For example, a tribe's personnel or accounting operation that provides administrative support services to more than one contract would be eligible for contract support.

In 1988, the Act was amended requiring the Secretary to provide contract support funding for all administrative costs incurred by contracting and compacting tribes. However, the act also says that the provision of the funds are subject to the availability of appropriations, which leads us to our major concern with the bill. Section three of the bill attempts to make contract support costs similar to an entitlement by eliminating all references within the Act that make payment of funds, quote, "subject to the availability of appropriations," unquote.

Similarly, if the words "subject to the availability of appropriations" are eliminated in section 105(c)(1) of the act, then funding for all programs included in compacts and contracts could be considered as an entitlement.

Section three of the bill also amends section 408 of the act which authorizes appropriations of the act. The bill would add the following language: "Including such sums as are necessary to pay contract support costs when not otherwise provided for." As Congress has recognized, the BIA has many competing priorities that provide necessary funding for many important programs and services for Indian and Alaska Native communities. We believe that this language inappropriately singles out contract support as a high priority at the expense of other high priorities that tribal communities have.

Beginning in 1994, Congress placed a legislative ceiling on the amount the Department could use toward contract support costs. The ceiling provision has continued to be included in each annual Interior Appropriations Act. For fiscal year 2005, the statutorily mandated ceiling that is being requested for contract support is $133.3 million. Enactment of the 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 that there is some ambiguity created between the ceil-

ing provision contained in congressional appropriations language and what is authorized by section 3 of the bill.

We recognize that the full funding of contract support costs remains a major issue for all parties involved in contracting and compacting Federal programs and services under the act. If S. 2172 is enacted, the Department will be forced to reduce funding for equally important federal programs, some of which may be for inherently Federal functions and for programs and services directly to tribes, and for programs and services included in contracts and compacts. The latter would make the Department vulnerable to costly and time-consuming litigation.

Section 2 impacts all Federal agencies including those who are not testifying before the committee today. If enacted, this provision would bind all Federal agencies to fully fund indirect costs at each agency's negotiated indirect cost rate. Implementation of this provision would most likely create some budgetary pressures on other agencies and may discourage these agencies from engaging in contracting and compacting with Indian tribes in the future.

In addition, section two authorizes tribes to use indirect cost funding for other uses not related to indirect administrative costs. We are unclear as to the need for this provision because it implies that full funding for all indirect costs is unnecessary.

Finally, section 4 attempts to supersede any conflicting provision of the 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.

Mr. Chairman, funding for contract support remains a serious issue for the Congress, the Administration, and Indian tribes, and we would like to work with the committee and the tribes in addressing these concerns in the future.

This concludes my statement. If you have any questions, I would be glad to answer them.

[Prepared statement of Mr. Sinclair appears in appendix.]

The CHAIRMAN. We will. My question is, if this is not the answer, what is, to improve contracting and compacting since most tribes certainly agree with it and have done very well in the attempts to manage their own affairs? Clearly, a bill cannot become a law unless it is supported by the Administration, so I would hope as we move along both of you are willing to work with our staff and try and find something that can be a vehicle for change that is going to benefit tribes.

I have to tell you, this will be my last trip. As you know, I am going home. But it has always been a concern of mine that an awful lot of agencies in Washington, it seems to me, are just scared to death of any kind of change that might benefit tribes. They always give us this kind of doublespeak. They want to do things to help Indian people, but when it comes right down to supporting a bill that will help Indian people, somehow they find a reason to oppose the damn bill. I have never quite understood that.

If the Department of the Interior and the Indian Health Service both are really, their mission under the legislation that empowered them in the first place is to try to help Indians, we are not doing a very good job of it. It is as simple as that.

Although I will not be here to fight the battle and Senator Inouye will not be on the committee either next year, in our tenure, he as chairman and me also following his leadership as chairman, that is something we faced right from the beginning, that people continually here in Washington tell us how much they want to help Indians, then when you propose a bill that helps Indians, they finally want to dissect it in 17 different ways and, what do you know, they have to come in an oppose the darn bill.

So I would hope that you are willing to sit down with staff and try to find some middle ground where we can in fact help Indians help themselves more. I will submit some of my questions in writing to you, if you would answer them when you can.

Thank you.

We will now move to the next panel. That will be Ron Allen, chairman of the Jamestown S'Klallam Tribal Council from Washington; and Chadwick Smith, principal chief of the Cherokee Nation in Tahlequah, OK.

Gentlemen, as with the first panel, your complete written statement will be included in the record. I would appreciate it if you would abbreviate some, and we will try to move forward. You already heard how the Administration feels about this bill. It is not my belief and I know it is not a lot of the tribes' belief, but we will move along and hear you. Why don't you go ahead and proceed.

Ron, nice to see you again here.

STATEMENT OF RON ALLEN, CHAIRMAN, JAMESTOWN S'KLALLAM TRIBAL COUNCIL

Mr. ALLEN. Good to see you again, too, Mr. Chairman. It is always an honor and a pleasure to be here before this committee to testify on behalf of NCAI and my tribe, the Jamestown S'Klallam Tribe up in Western Washington.

This issue is clearly an important issue to the tribes. We could not agree with you more in terms of the commitment that the Congress and the Administration should be making to the tribes to help advance policies that have been 30 years old in terms of helping the tribes become more self-determinant and self-reliant. That is an agenda that has been clearly articulated by this committee many, many times over the years.

We are quite frustrated with this issue. I chair the Contract Support Task Force for NCAI and have helped champion our collective political strategy effort to try to persuade the Congress and the Administration to close this gap. We firmly believe that the way that the Federal Government is dealing with the tribes is a discriminatory policy. Nowhere else in this Government that deals with contracting of any other services or activities or functions with mainstream America in any venue do they treat contractors like they do Indian tribes.

Without a doubt, it amazes us that as tribal governments, and as Congress and Administration after Administration has promoted that the tribes become self-reliant and do for ourselves, take care of our own community, be able to manage all of these affairs from public safety to natural resources and so forth, and yet they do not completely fund the contractual expenses. Our minds are boggled. Why?

We get GAO reports. We have conducted our own reports and analyses of other institutions who also get Federal contract support. And yet we still do not find any consistency on how the Federal Government is dealing with this particular issue.

In the end, the bottomline is that tribes are having to subsidize this activity to assure that as we are carrying out these functions and that we are accountable showing we are responsible, and that we are doing a good job. So the bills come in and the Federal Government is not paying their share, then who is? We have to do that. Otherwise, we get penalized and get scrutinized for mismanaging Federal dollars in those activities, as if we are the problem.

We are not the problem. We have many successes. Self-governance and self-determination has been shown to be unequivocally successful out there in our communities. Unfortunately, the Federal Government is not doing its part. We get a little frustrated how the Administration and the Congress has played a bit of a shell game for us. We go to the Administration and say, we want you to submit a budget where you are going to fully fund 100 percent. They point the finger at the Congress, and then Congress says, no, we do not want to pay 100 percent. We go to Congress and say, what is going on? Why can't we close this gap? There is only so much money.

Well, the Administration does not submit a budget to us that closes the gap, so they apparently do not believe it is a priority.

So we are going back and forth on this issue and not finding any solution to it. NCAI and our tribes who have been working on this issue unequivocally for a lot of years now believe that this bill can help close the gap. It provides clear instructions to the Administration, you need to submit a budget to us that closes this gap and treats the tribes in their governmental contracting relationship with the Federal Government like all other contractors. You will submit a budget and pay 100 percent. You will not cause the tribes of having to go to court to try to get our remedy.

So here we are spending our own tribal money trying to get the Federal Government to own up to its responsibilities, and yet the Federal Government cannot seem to find a way to make that happen.

So we believe this bill goes a long way and we would hope that we can move it or some variation of it along to provide that very clear unequivocal direction. We think that we are doing a good job out there in our communities. We do not believe the Federal Government can and ever will fully fund all the needs of our community. We have documented to this committee and others that there is a huge amount of unmet needs in our communities. We do not ever believe that gap will be closed, but at least with the existing functions and programs that we are contracting out, at least with those you could pay 100 percent and that would be a fair relationship with the tribes.

I will close. You have my testimony with some of the more specifics about our suggestions with regard to this bill, and this technical amendment bill. But the issue for us, Senator, is how we are going to close this gap and stop this discriminatory policy as it applies to the Indian tribes. It is an atrocity. It is embarrassing and we

are just really frustrated that it still exists. We want a solution. Right now, we are not finding anybody who is providing us a solution.

We appreciate your leadership and Senator Inouye's leadership to say, look, enough is enough; let's solve this problem and get on to other issues that are more important.

Thank you.

[Prepared statement of Mr. Allen appears in appendix.]

The CHAIRMAN. Thank you for that testimony.

Ron, I agree with you, tribes are not the problem. Washington is the problem and some of us certainly recognize that. You know as well as I do that discrimination against Indian people is not exactly new around this place or in many places in America.

Very frankly, I hope that Indian country really registers their displeasure this November. Washington is the only game in town for Indians anymore. You know that as well as I do. It just seems to me what Indian people have got to do is get more active in public policy, not less active, because very clearly regardless of Administration, whether it is Republican or Democrat, there are people and will continue to be people in Washington who are more concerned about taking away what is left in Indian country, rather than helping Indians be self-sufficient. That is a sad commentary, I have to tell you.

Thank you for your testimony.

Mr. Smith, nice to see you here. Thanks for being here.

STATEMENT OF CHADWICK SMITH, PRINCIPAL CHIEF, CHEROKEE NATION

Mr. SMITH. Good morning, Chairman Campbell. I personally want to thank you for your service to Indian country. We value that. You are very special to us. We are sad to see you go.

My name is Chad Smith and I am the principal chief of the Cherokee Nation, a federally recognized Indian nation with over 244,000 citizens and 23 treaties with Great Britain and the United States.

Before I talk about what I wanted to say, I found it very interesting from Mr. Sinclair's position that apparently with self-governance contracts there is are different definitions. A self-governance contract has a different definition than other kinds of contracts in the private sector and with other Federal agencies, and an obligation does not have the same definition in Indian country as it does in the rest of the contracting world. We found that a bit peculiar. It seems like in Federal contracting there is one uniform definition for contracting obligation.

Let me say, I am a student of history in Federal Indian policy. It appears that every 20 to 40 years a pendulum swings, the pendulum of public sentiment and Federal policy. At one extreme, this sentiment and policy is hostile to American Indian tribes. At the other end of that swing, it allows tribes to determine their own destiny. Each hostile Federal policy has failed. There was extermination in the 1770's; removal in the 1830's and forced assimilation; and in the 1890's ethnocide; and in the 1920's relocation; and termination in the 1950's.

The one policy that has been successful is self-determination and self-governance. This is one that each of us, Indian and non-Indian, hold precious in our own lives, where we control and become responsible for our own futures.

The Cherokee Nation was one of the first tribes in the United States to execute a self-determination contract with the original 1975 Self-Determination Act. In 1990, we were also the very first tribe to execute a self-governance agreement under title III of the Act.

Of course, pursuant to the act, we carry out a wide realm of services and sometimes folks ask what we do at the Cherokee Nation. We tell them we do everything the United States does except raise an army, from health care to social services to education.

Unfortunately, the nation's progress has been severely impeded by the Government's not funding the required support costs as mandated by this act. Since the time of the first self-governance compact in 1990, the Cherokee Nation has never been fully funded with the contract support cost as mandated by the Indian Self-Determination Act, which amounts to over $4.7 million a year for these fixed costs. We cannot create these programs without the administrative tools provided by contract support cost.

As a result of the gross underfunding of these contracts, the nation has had to forego such substantial service to thousands of the Indian people simply to cover the shortfall in the government funding. This compounds an already deficit funding level and required us to ration basic health care and other services to our citizens. This has worked a great hardship on our people, who must rely on these programs and facilities for their basic health care, and that is why I am here today.

I would like to share with you a brief story. It is a story about a 42-year-old Cherokee man, a laborer, who has been suffering chronic knee pain since 1995 and has been placed on multiple medications to help reduce the pain and swelling, but they have not been successful. His condition has continued to deteriorate, as shown by his x-rays, which now shows bone-on-bone. He needs a total knee replacement. This is not a service we can provide in our outpatient clinics.

Referral was sent to a specialty care, but it was denied due to lack of funding. This left this strong otherwise healthy man unable to perform his job as a carpet layer. This man quickly lost his job and his family was unable to pay its bills. The family turned to our Human Services Department for emergency help, which provided only limited relief. The family was ultimately forced to move in with the wife's parents, which added additional stress on his family. The husband became severely depressed due to being unemployed and living in constant pain.

A once-productive member of our community, this man now cannot provide for his family, play with his kids, or have a moment that he is not in pain. Rather than being able to earn a living free of chronic pain and being a contributor in the Cherokee community, this family must seek assistance from other resources.

We see these cases every day and I am sure you hear about them. This situation could have been prevented had we had the resources to perform the knee replacement on this man, a simple sur-

gery, allowing him to work again. But knee replacements and similar procedures must be deferred, many times indefinitely, due to heart attacks, strokes, and other immediately life-threatening conditions that demand higher priority for our limited funds.

The Cherokee Nation has tried to resolve these issues. We have been to the court. The Supreme Court is going to be looking at this in the next coming months. We do not believe this is the way to resolve these situations.

How can we be asked to satisfy the performance of these contracts without full payment by the agencies? It is clear that reforms are needed and we strongly support S. 2172 and we applaud the committee for including the provisions, especially in section three, that are key to strengthening the mandate to fully pay contract support cost. This clause prevents us from not knowing up front what the contract is going to be, how much we will have to budget, how to manage those scarce resources. Nobody in the private sector would imagine going into contract open-ended, not knowing what the amount and scope of the services would be, and expected to subsidize that contract with their own funds or perform less than what the requirements were.

It is often repeated in these hearings that the greatest threat to the success of the Self-Determination Act is the failure to fully fund contract support cost. On behalf of the Cherokee Nation, I can tell you that the contract support funding has indeed been one of our greatest problems that impeded our progress.

Thank you, Mr. Chairman. We strongly support your bill, S. 2172. It really is not a mundane, simple issue. It undermines the whole idea of the relationship between this government and these tribal governments. We believe that a contract should be a contract, an obligation should be an obligation, and these support costs be fully provided for.

Again, thank you, Mr. Chairman.

[Prepared statement of Mr. Smith appears in appendix.]

The CHAIRMAN. Thank you for that testimony. I guess I am a little old-fashioned, but I believe that a nation's word is like a person's word. You give you word, you ought to keep it. If a nation gives its word, it ought to keep it. You mentioned the hostile policies of the past have failed. We all recognize that. I have to tell you, from my own perspective we have too many of our current policies that are also failing because there are too many people still looking for end-ways around implementing the policies. I think a lot of that, very frankly, is driven by turf or emotion or money or something else, but we are not doing the best we can for Indian people. That is for sure.

Let me start with Ron, and maybe ask a couple of questions, Ron. It seems to me that part of the reasoning for the Federal agencies is so that the 638 contract tribes, that are bound by congressional appropriations, can kind of stand in the shoes of the Federal Government. I know that contracting tribes can access the GSA, for instance, their purchasing schedules. If a tribe purchases a computer, as an example, a computer system, and 638 contract funds are exhausted, who is responsible for that expense? The Federal Government or the tribes?

Mr. ALLEN. In our opinion, it is the Federal Government who is responsible.

The CHAIRMAN. In your experience, what difference is there between a private government contractor and an Indian tribal government contractor?

Mr. ALLEN. There is no difference, Senator. There absolutely is no difference.

The CHAIRMAN. So they ought to be treated alike? Is that your position, too?

Mr. ALLEN. Exactly.

The CHAIRMAN. As it is mine.

Mr. ALLEN. We also believe that this issue is not just with the BIA and IHS. It is with the Federal Government. This policy should be consistent with regard to any contract that deprives a securer from any agency or department in the Federal Government.

The CHAIRMAN. Interior and Indian Health Service, excuse me, the HHS claim that fulfilling the contract support cost agreements they made will mean that they have to cut funding for direct service tribes. Do you agree with that?

Mr. ALLEN. To fully fund it?

The CHAIRMAN. They will have to cut funding for direct service tribes.

Mr. ALLEN. Yes; if they were to redirect moneys that they have available to fully fund contract support, that means that some programs, some activities somewhere will be diminished.

The CHAIRMAN. And what would be ways to make sure that those tribes are not impacted?

Mr. ALLEN. We believe that legislation should make it very clear that contract support should be fully funded for all activities, and that on top of the program activities that are provided to the tribes, that those moneys should be made available.

We believe that the Congress really does need to make sure that it needs to increase the budget that it makes available for Interior, for Indian Affairs, or IHS; that as they identify those activities, the contract support just accompanies it. It should not diminish programs. The point I did not make earlier is that the way the policy is administered right now, it means that we have to diminish programs. For us to administer these contracts appropriately and responsively, to do that and cover those costs, that means that they come from the programs. The programs have to be diminished to balance out that administrative responsibility.

The CHAIRMAN. Maybe I have it wrong, because finance is not my strong suit. But it just seems to me that contracting, when the Federal Government gives direct funding through contracting to the tribe, it is a more efficient use of taxpayer money. Because if we filter it through all the process and then down to the tribe, there is always some peeled off through salaries and all kinds of things, travel, you name it.

So if we appropriate a dollar and we contract with the tribe and give them that dollar, I know where that is going. I know what is happening to it. But if we put it through the system, I often wonder how much of that dollar to the tribe actually gets to deal with the problems they are facing.

I sometimes think that is why we get opposition, regardless of whose Administration it is, is that they do not want to diminish what they consider is part of their turf. But from a dollar and cents standpoint, when we talk about whether contracting would save or cost more, I think it is in the best interests of the taxpayer at large to direct contracting to Indian tribes as we do with other entities.

Mr. ALLEN. We could not agree more. When we advanced self-governance throughout the 1990's and said that we can manage these programs and functions much better than the Federal Government, the deal was that the tribes should be able to negotiate from the Federal Government every function and activity, every function, all the way to the Secretary's office, so that we could take over everything we wanted to take over.

In principle, it started that way. But slowly but surely, they are digging in their heels and they are retracting from it. So that is becoming more and more challenging. Our success, both through self-governance and title I contracting, has shown that the tribes are more efficient. I can tell you, if we said no, we are sick and tired of not being fully funded, and returned all the programs and activities, the Federal Government would have one difficult time taking over those programs. It would be a greater diminishment of those services.

The CHAIRMAN. Yes.

Mr. SMITH. Senator Campbell, if I may?

The CHAIRMAN. Yes.

Mr. SMITH. It is not only efficiency. It is also effectiveness, with the flexibility of the self-governance policy, it allows us to be responsive to our local needs. It helps us put a priority on the most critical needs. It allows us to do strategic planning for decades to come. So it is not only efficient, it is effective.

The CHAIRMAN. Yes.

Chief Smith, in your case, in your testimony you noted that the Cherokee Nation had to forego substantial services because of the CSC shortfalls. What were some of the services that you had to forego?

Mr. SMITH. Health care, Indian child welfare, law enforcement, anything that is under our self-governance policies through the Bureau of Indian Affairs or IHS.

The CHAIRMAN. You also noted in your testimony that the Cherokee Nation took over operation of the health programs in the early to mid-1990's. During that time, you did not receive any contract support funding for those programs? Is that true?

Mr. SMITH. For that period of time, yes, sir.

The CHAIRMAN. Why would the Cherokee Nation take over those programs if you were not going to receive the contract support funding? And knowing that history, do you have plans to take over more programs or not?

Mr. SMITH. Anytime we look at a program, as how we can best can provide a service; not whose turf we are on, ours or yours or the IHS; we have taken over those programs because we believe, and we have been able to demonstrate, that we have done a better job, more responsive, more effective, more efficient, created partnerships with local county governments, State governments, Federal agencies. We have a vested interest in making it successful.

The CHAIRMAN. I thank you for appearing and supporting this bill. I know Senator Inouye will be also grateful for that. With only 70 days left of this session, and so many things backlogged, very frankly I do not know if we are going to be able to make much progress or not, but I would hope so. Whoever comes in to take our seats, at the next term Senator McCain will be the chairman. As you know, Ron, he can be a real tiger when he wants to and hopefully he will pursue this. If we cannot get it through, he will.

When I am back in the private sector, I certainly will try to make it a priority of mine to make sure the Indian voice is still heard here.

Thank you for appearing today. I appreciate it.

Mr. SMITH. Thank you, sir.

Mr. ALLEN. I would say, Mr. Chairman, Indian country is going to be very active in the upcoming elections. We are going to make it real clear where our priorities are and what we are going to be seeking from presidential candidates to congressmen with regard to where do you stand with regard to your relationship with Indians and the Federal Government's obligations to Indians. We will be out there. Our voters will be out there.

The CHAIRMAN. Good. Glad to hear that.

The third panel will be Herbert Fenster, Esquire, McKenna, Long and Aldridge of Denver; and Lloyd Miller, Sonosky, Chambers from Anchorage, AK. Go ahead. Sit down there.

Nice to have you both here.

Why don't we go ahead and start with Mr. Miller.

STATEMENT OF LLOYD MILLER, SONOSKY, CHAMBERS, SACHSE, MILLER AND MUNSON, ANCHORAGE, AK

Mr. MILLER. Thank you, Mr. Chairman. It is an honor to be here this morning.

The CHAIRMAN. You can also abbreviate and we will put your full testimony in the record.

Mr. MILLER. Absolutely.

As this committee is all too aware from its frequent return to the Indian Self-Determination Act, no single issue has plagued the success of the Indian self-determination policy more than underfunding contract support costs. For tribes that are running hospitals and clinics and law enforcement programs, no other deficiency in the Federal system plagues the successful implementation of those contracts as much as the underfunding of contract support costs.

This committee said it in 1988. The single most serious problem with implementation of the Indian self-determination policy is the underfunding of contract support costs. The committee enacted amendments to remedy that policy; that was the primary purpose of the 1988 amendments.

The problem, however, is, as you have heard today, embedded in the act itself. On the one hand, in 1988 Congress amended the act to mandate that the Secretary, upon the approval of a self-determination, shall add to the contract the full amount of funds to which the contractor is entitled, including, quote, "contract support costs." Congress even provided a remedy in court under the Contract Disputes Act for damages if there was insufficient payment. But Congress also provided in the act that the agency's payment

of contract amounts is subject to the availability of appropriations, and appropriations have indeed been capped for the BIA since 1994 and for IHS since 1999.

This has created an untenable position, where Congress directs the agencies to award contracts for specific sums that Congress mandates be paid in full, but at the same time a later Congress, acting at the agencies' instigation due to insufficient Administration requests, also limits the legal availability of the appropriations to pay the full amount.

Contractors are caught in the middle, fully performing their contracts to operate Federal programs, but with the agencies now regularly requesting insufficient appropriations to pay the very contracts it has signed. At the very time it is signing the contracts, it is requesting insufficient funds to pay the contracts.

Indeed, as currently implemented, the contractors are now regularly kept in the dark about exactly how much they will be paid in the contract year until the year is almost over and performance is nearly complete.

I am here a little bit to talk about litigation. Litigation, as an alternative mechanism, has not proven to be efficacious, to say the least. On the one hand, it is true that judgments have been awarded against the BIA largely for pre-1994 contract claims totaling some $115 million in damages. But other cases have dragged on for years and years. Most recently, we now have the two Cherokee cases, one involving the Cherokee Nation, the other the Cherokee Nation and the Shoshone-Paiute Tribes, and the 10th Circuit and the Federal Circuit Court of Appeals have reached different conclusions. The Supreme Court will resolve the differences in the views of the law reached by those two courts. This teaches us that litigation is not an efficient means of remedying the shortfall in these contracts.

Worse yet, both for contractors and for the achievement of Congress' goals, in the one case where the agencies' appropriations were actually capped by an appropriations Act, the court ruled that the tribes' contract amount, not just the agencies' ability to pay it, but the contract amount itself, was limited to the insufficient appropriations, even though the appropriations came in bulk and there was no way for the tribe to know how much it had in its contract.

Against this backdrop, S. 2172 is a welcome development and a necessary change. The measure will overcome the agencies' excessive reliance on the clause and conform the act to other government contracting regimes where an insufficient agency appropriation never stands in the way of the fulfillment of a government promise in a contract.

At the conclusion of my written testimony, I quoted at some length Senator Inouye's remarks in connection with the 1988 amendments. Those remarks reflected the committee's goal at the time once and for all to place tribal contractors on the same footing as other government contractors. Time has shown that to achieve that goal still requires the kind of reform proposed by S. 2172. In this way, prompt payment of the contracts will no longer be dependent on the politics of the budget process, competing demands within the agencies, or the fortitude of tribal contractors like the

Cherokee Nation to take on the United States of America in litigation.

Thank you, Mr. Chairman, for the opportunity to testify.

[Prepared statement of Mr. Miller appears in appendix.]

The CHAIRMAN. Thank you, Mr. Miller. Thank you very much.

Mr. Fenster.

STATEMENT OF HERBERT FENSTER, ESQUIRE, McKENNA, LONG AND ALDRIDGE, LLP, DENVER, CO

Mr. FENSTER. Yes, Senator; Mr. Chairman, I appreciate the opportunity to appear and speak before the committee. I want to state right away that I have no expertise in Indian law. I appear as an expert in government contract law in which I have had experience over more than four decades. That expertise includes Federal funding and cost allowability.

I think the best I can do in an oral statement to supplement my written statement is to point out some analogies between Indian contracting as it is seen here, and government contracting elsewhere. For example, the Department of Defense would never appear before a congressional committee and even suggest that its contractors bear some of their overhead costs. That is unthinkable. No defense contractor would agree to bear a substantial portion of its overhead costs. Government contracting under the Federal acquisition regulations actually prohibits a contractor from doing so.

Similarly in civilian contracting, GSA would never go to IBM and suggest to IBM that they provide computers partially at their own cost by bearing their indirect expenses of manufacturing of those computers. That is unthinkable.

Again, as my written testimony points out, it is not only illegal, it is unconstitutional. It is unconstitutional for the executive branch to go out and augment appropriations made by Congress by forcing its contractors to bear some of those expenses.

A better example yet is Iraq today. Today in Iraq, the Department of Defense and the Department of State are contracting out infrastructure support services. Infrastructure, health care services, schooling services are being contracted out to private enterprise. Why? Because it is far more effective to do it that way and government cannot provide those services in the first place.

However, no suggestion is ever made that the contractors over there in Iraq are going to bear some part of the cost, for example, the indirect costs of providing those services. I want to tell you, Mr. Chairman, that the indirect costs of providing those services are enormous, often amounting to two or three times the direct costs. Yet those contractors are being fully compensated and are earning a profit on that work, as you can see from a lot of the very disparaging statements that are made about them in the news media.

Unless the Chairman has questions?

[Prepared statement of Mr. Fenster appears in appendix.]

The CHAIRMAN. Yes; several. You mentioned, I believe, it is unconstitutional to make contractors bear the over costs. Why isn't it unconstitutional to do that when they are forcing Indians to bear the over costs? I am not a constitutional authority.

Mr. FENSTER. In that area, Mr. Chairman, I am an authority. It is unconstitutional because article I, section 9, clause 7 of the Con-

stitution recites that no funds shall be drawn from the Treasury other than by an appropriation. The General Accounting Office [GAO] long ago held that to require a contractor to pay for part of the costs of contracting for government services is to augment the appropriation, in other words to go around the congressional opportunity to provide the funds.

The CHAIRMAN. If you cannot have the remedy through legislation like this bill I think is part of the remedy, what option do the tribes have? Do they just have to go to court and sue the Federal Government?

Mr. FENSTER. This may not be a popular answer, even among the tribes, but the tribes' option is to turn the services back to the Government to be performed. The Government is suggesting in its testimony today that if that happened, the inference is that it would cost less. That is not true. We know from many experiences, including my written testimony reference to the FAIR Act, that it is far more cost-effective to contract out those services. So the Government would achieve no good result by receiving the services back to be performed.

The CHAIRMAN. You made reference to what we are doing in Iraq, and I support our efforts in Iraq as just one Senator, but I recognize the costs, too. It is amazing that there is so little accountability in some of these cost overruns in Iraq, and yet every dime that potentially goes to American Indians we have everybody and their brother around this place looking over their shoulders to see how it is being spent.

Mr. FENSTER. Mr. Chairman, I think you raise a good point, and that is accountability. There is no suggestion in any of the testimony today that these indirect costs are unreasonable. As a matter of fact, the inference is that they are very reasonable. They are providing the services more cost-effectively than the Government could do itself.

Similarly, in Iraq just by analogy, those contracts are all audited. They are audited by the Defense Contract Audit Agency, by GAO. Although there are a lot of disparaging remarks being made, there is no suggestion based on any hard facts that those services are being provided in Iraq for some outrageous sum. That is not the case.

The CHAIRMAN. That is right.

Let me, before I ask some questions, Senator Murkowski has joined us. Did you have an opening statement, Senator? Or did you just want to listen and ask some questions yourself?

Senator MURKOWSKI. Mr. Chairman, thank you. I do not have an opening statement. I do have just one quick question of Mr. Miller, and that is it.

The CHAIRMAN. Why don't you go ahead, then I will ask several of mine.

Senator MURKOWSKI. Just very, very briefly, and I apologize that I was not here for the previous testimony. Mr. Miller, if you could just give me a quick summary, I guess, of the effect that the shortfall on the contract support cost has had on the tribal programs in Alaska.

Mr. MILLER. Thank you very much, Senator Murkowski.

The effect of the contract support cost shortfall in Alaska is devastating. We are talking about a State where we experience third-world conditions, as the Senator knows, in many of the villages where there is not enough safe drinking water even to assure against communicable diseases. The contract support cost shortfall in Alaska is the largest among all of the regions of the country in terms of total contract support shortfalls, which today are projected at $111 million.

The Alaska Native Tribal Health Consortium alone is short $11 million in its hospital operations in Anchorage. That number is duplicated for the Southeast Alaska Regional Health Corporation, the Yukon-Kuskokwim Health Corporation, the Bristol Bay Area Health Corporation. Virtually all of the corporations and tribal programs operating health care in Alaska with contracts with the Indian Health Service are severely underfunded.

It absolutely compromises their ability. The reason I say that is because contract support costs, being audited, they are audited, they have to be audited by a certified public accountant and the audit has to be furnished to the government. Those audited costs are fixed costs. They are the costs of insurance. They are the costs of the audit itself. They are the costs of the financial management system the tribe has to have.

The tribe, when it fails to receive the full amount from the agency, cannot go without incurring the costs. They have to pay that bill. We heard this in the Cherokee Nation's testimony. Since the costs are fixed and the tribe has to pay it, there is no choice. It has to come out of the program. There is simply no choice. So we have a dollar-for-dollar reduction in programs.

Senator MURKOWSKI. So when you say that it has to come out of the program, then, what specifically are we seeing, for instance, when you spoke to the effect on the Tribal Health Consortium? If it is coming out of the program, where are we seeing it?

Mr. MILLER. They have reduced their ability to purchase contract health care services. They have reduced the services they can provide at the hospital itself. They have reduced their physician contracts that they would otherwise enter into. It can affect the entire salary scheme of a tribal organization such that they cannot attract the same caliber of people to work at the institution.

If the Senator would like, I can certainly provide a profile for several of the corporations showing where the reductions are felt and how that translates into services, if that would assist the committee.

Senator MURKOWSKI. Thank you. I appreciate that, Mr. Chairman.

Mr. MILLER. You are very welcome.

The CHAIRMAN. Thank you.

Thanks to both of you for your testimony. You heard Ron Allen mention how frustrated he is. I think he voiced the opinion of an awful lot of Indian people. You, Mr. Fenster, said you do not have expertise in certain areas. After being here the number of years that I have been here, I am convinced we do not need so many people with expertise. We need more people with a good heart who have a real commitment to fairness. That is what we do not have. We have too many people that get frankly totally embroiled in the

legalese when they ought be reading the good book more than the law books, it seems to me, when we are trying to do what is right for people.

In any event, let me ask both of you, or at least Mr. Miller, a couple of questions. As a result of the CSC shortfalls, Indian tribes may not find it feasible to take over certain programs or services and forego the contracting. Do you consider that an acceptable response to the shortfall program, just turning it back?

Mr. MILLER. It is not an acceptable response, but it is a predictable response.

The CHAIRMAN. Maybe the only one.

Mr. MILLER. It is the only response. In fact, today new contracting has stopped dead in its tracks. There is virtually no tribe in the country that will take on the operation of a new program with IHS or any significant program with the BIA. Maybe that is the way the agencies want it, but that is certainly what they have achieved.

The CHAIRMAN. I am inclined to think so.

Mr. MILLER. I want to emphasize that it is the agencies that have achieved it. We heard this morning Mr. Sinclair testify that the BIA budget request for 2005 is $133 million. The problem is that it is $50 million short. That is not something to be proud about.

The CHAIRMAN. No; I have to plead a little bit guilty myself on that because I am on the Appropriations Committee. But if I am not mistaken, out of this 15-person committee, I think there are three, Senator Inouye and I do not know who else, Senator Johnson and myself that are all on Appropriations, but I think I am maybe the only one on Interior Appropriations, but maybe there are just one or two of us on Interior Appropriations. Of course, most Indian money goes through there.

When you think of 100 Senators and then 435 on the other side, the numbers do not favor us very well when we try to add money. Even people from both sides of the aisle that try and do that, we are numerically such a small number that we just cannot get everything we want. But we fight the good battle every year, as you know. I know we do not come up with either the expectations or what is needed to resolve some of the problems in Indian country.

Mr. MILLER. This is why I think the reform reflected in the bill is so important. We cannot count, and it does not matter the Administration, Democratic or Republican, we cannot count on the agencies or OMB to submit to the Congress a funding request that will include full funding for these contracts, although they will always fully fund the Defense Department and GSA contracts. We cannot.

In that environment, it has nothing to do with partisan politics; only Congress has the answer. Only Congress can turn their hands by enacting legislation that makes it clear that in the absence of full appropriations, they will be sued and successfully. By golly, under that kind of pressure, the agencies and OMB will make a proper request that can be considered by the Congress.

The CHAIRMAN. Congress itself is an animal that responds to pressure, too, as you probably know. I think the unfortunate reality is that Indian country is still very small as a voting group. That

is the pressure they have to bring to bear sooner or later, like everybody else in the country has already learned.

Back in 1999, the GAO noted significant inconsistencies in applying its CSC policies at both the Bureau and the IHS. As I understand it, the IHS revised its CSC policies in 2001, but it is notably different from the BIA. Has that revision helped the tribal contractors or not? What problems still remain? Are you familiar with that, Mr. Miller?

Mr. MILLER. Very much so, Mr. Chairman.

The Indian Health Service policy is designed to deal with an underfunding situation. The Indian Health Service has devised a variety of means of allocating the misery among the contractors who are not being fully paid.

Having said that, the Indian Health Service is doing a reasonable job in allocating an insufficient amount. The problem, of course, is the insufficient amount, but putting that aside. The Bureau of Indian Affairs has devised an entirely different means, and the means employed by the Bureau of Indian Affairs is such that tribal contractors never know until the end of the year how much money they are going to have to carry out the contract they have just completed performing. That makes no sense.

So the BIA has been urged by tribes to develop a policy that would closely mirror, if not replicate, the Indian Health Service policy. The Assistant Secretary for Indian Affairs now has under review a draft policy developed by a joint BIA-tribal work group. We just met yesterday afternoon to go over that policy. We have agreed to meet again in two weeks. So we are hopeful that the BIA will improve its system so that at least there is predictability in the current situation of underfunding until a bill like S. 2172 becomes law.

The CHAIRMAN. I have always been one that believes that negotiating is better than litigating if you can avoid it. I know sometimes there is no other option. You heard me ask the previous panel, what recourse is there? Should they just sue the government or what, to try to resolve this impasse? Could you tell me what options you think are open to the tribal contractor? They have negotiated with the U.S. to carry out a program for services and then found out that the CSC component of the negotiations turned out not to be mandatory, but discretionary by the Government. What options do they have if we cannot fix it through a bill that we have before us?

Mr. MILLER. I think we cannot fix it with a bill like this. If the appropriations continue heading in the direction they have been heading—which is not only flat, but compounding the flat appropriations, rescissions that have actually reduced the amount of contract support cost in the last 2 years—if we keep heading in that direction, I think we are in jeopardy of seeing wholesale retrocessions, the return of these contracted programs to the Federal Government.

Then you will have the scenario, Mr. Chairman, you described earlier, where instead of one dollar going to the tribal community to serve the tribal community, it is one dollar going to the BIA to serve the tribal community, out of which we would be lucky if 20 cents actually got there. I think that would be a terrible setback

for the policy of Indian self-determination and the Congress should not permit that to occur.

The CHAIRMAN. Yes; I have no further questions.

Senator Murkowski, did you have any further?

Senator MURKOWSKI. I do not, Mr. Chairman.

The CHAIRMAN. I may submit some in writing, though, because I certainly appreciate your testimony and I find it very enlightening and certainly helpful to me.

Senator MURKOWSKI. Thank you. I am fine.

The CHAIRMAN. You have none.

I thank all the witnesses that appeared today. With that, the hearing is adjourned.

[Whereupon, at 10:55 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF W. RON ALLEN, CHAIRMAN, JAMESTOWN S'KLALLAM TRIBE

Chairman Campbell, Vice Chairman Inouye, and members of the Senate Committee on Indian Affairs, my name is W. Ron Allen and I am chairman of the Jamestown S'Klallam Tribe in Washington State. I also serve as Treasurer for the National Congress of American Indians and Chair of the NCAI National Policy Work Group. on Contract Support Costs. It is an honor to present testimony in support of S. 2172, a bill to make technical amendments to the contract support cost provisions of the Indian Self-Determination and Education Assistance Act.

NCAI is the oldest, largest, and most representative organization of American Indian and Alaska Native tribal governments and was founded in 1944 in response to Federal termination policies and hostile legislation that proved devastating to Indian nations. To this day, NCAI remains committed to the restoration and exercise of tribal sovereignty and the continued viability of all tribal governments. NCAI, representing over 250 member tribes, has been particularly active in advancing solutions to the problems created by the chronic under funding of contract support costs for those tribes and tribal communities that administer Federal Government programs under the Indian Self-Determination Act.

Introduction

For the last 30 years, the promotion of tribal autonomy and self-governance has been the hallmark of this Nation's Federal Indian policy, the cornerstone of which is the Indian Self-Determination and Education Assistance Act of 1975. The act authorizes tribes to enter into contracts or self-governance compacts to administer Federal programs previously administered by the departments of Interior and Health and Human Services for the benefit of tribal members. The well-documented achievements of the self-determination policy for tribal communities have consistently improved service delivery, increased service levels, and strengthened tribal governments and tribal institutions. Every Administration from Nixon to Bush has embraced this policy and Congress has repeatedly affirmed it through extensive strengthening amendments to the Self-Determination Act enacted in 1988 and 1994.

Long recognized by this committee, one of the greatest obstacles to the full implementation of the policy has been the consistent failure of the Bureau of Indian Affairs and Indian Health Service to fully fund the contract support costs required to carryout Federal programs. A 1999 GAO study[1] concluded with the finding that failing to fully reimburse contract support costs effectively penalizes tribes for exercising their self-determination rights, forces cuts to tribal programs in order to cover the shortfall, and leads to partial termination of the Federal Government's trust responsibility. As a matter of Federal contracting principle, tribal contractors, like all other government contractors, should be promptly paid in full-payments not depend-

[1] GAO/RCED–99–150, Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to be Addressed, June 1999

ent on the politics of the budget process, the competing agency demands in OMB, or the willingness of tribal contractors to litigate.

S. 2172 Contract Support Cost Technical Amendments

The NCAl Policy Workgroup on Contract Support Costs since its inception has offered several key recommendations, some of which we are pleased to find reflected in S. 2172 and which are supported by NCAL The following summarizes our views.

1. Contract support costs must be fully funded.

The NCAI Policy Workgroup on Contract Support Costs issued this position as its first and most important recommendation in its July 1999 final report, a recommendation also supported by the GAO June 1999 study. The shortfall in IHS contract support cost at year-end FY04 is $93 million; using the estimated flat. FY05 appropriation, at year-end FY05 the shortfall would be $111 million. For BIA, including the estimated direct CSC required per *Ramah, Oglala, Zuni* v. *Norton,* the shortfall in contract support costs for FY03 is $45 million; at year-end FY04, the BIA shortfall will by $48 million; at year-end FY05, the shortfall would be $50 million.

Contract support costs are a legal and contractual obligation of the Federal Government. Under funding contract support treats tribes as second-class contractors and is unacceptable. Indian tribes ask nothing less than to be treated as other comparable government contractors.

Section 3 of the bill accomplishes this in two ways. First, the bill eliminates ambiguous provisions in the law which have been seized upon by the government as a justification for under funding contract support costs. Second, section 3 exempts contract support costs from the "subject to availability of appropriations' provisions in the Indian Self-Determination Act.

2. Congress should promote financial stability and efficiency in tribal operations.

Section 2 addresses the fact that the indirect costs paid to tribes are pooled with other Federal funds administered by a tribal contractor, and are spent out of single account. This section of the bill reinforces subsection 106(i) and (j) of the Indian Self-Determination Act by assuring that tribal funds pooled within a tribe's indirect cost pool may be spent under the same guidelines that apply to self-determination funds. For instance, a tribal contractor can use self-determination funds to purchase computer hardware without first securing advance agency approval. Once the self-determination funds are placed in a tribe's indirect cost pool, however, the Office of Inspector General suggests that the pooled funds cannot be used for new computer hardware because the pool also includes other Federal funds besides Indian Self-Determination Act funds. Section 2 of S. 2172 clarifies that the self-determination rules regarding expenditure of funds set forth in subsections (i) and (j) of the Act apply to the tribal expenditure of all other pooled Federal indirect cost funds administered by a tribe under any other Federal statute. NCAI applauds this clarification that will put an end to a needlessly nonsensical approach.

3. Federal agencies other than BIA and IHS must finally conform their practices to the government-wide Federal indirect cost system.

The failure of other Federal agencies besides the BIA and IHS to pay their appropriate share of indirect costs continues to place tribes administering Federal programs in a deplorable bind. Many other agencies refuse to adhere to the government-wide indirect cost rate set by each tribe's Federal cognizant agency under OMB Circular A–87 (usually, the Department of the Interior's Office of Inspector General).

Historically, the OMB indirect cost system has been the most reliable and sound system for fairly determining each tribe's prudent requirements for contract support. The NCAI Contract Support Workgroup found that past efforts to replace the indirect cost system have failed in not accounting for programmatic differences, sizes of tribes, geographical locations, and other variations in tribes and contracts. Under the OMB indirect cost system, requirements are fixed by the tribe's Federal cognizant agency, the agency under which the tribe does the most contracting. The accounting principles reflected in that agreement should then be binding on all other Federal agencies. All branches of the Federal Government must respect the indirect cost requirements for the system to work for tribal governments. NCAI supports the first provision in section 2 of S. 2172 that will remedy this long standing accounting turmoil for tribes.

Conclusion

The National Congress of American Indians strongly supports S. 2172 as a means to affirming tribal autonomy, self-governance, as well as tribal accountability. We commend the committee for its commitment to Indian country, our self-determination and self-governance rights, and to legislation that will promote tribes' ability to serve their members for generations to come. NCAI and its member tribes firmly believe that these proposed amendments are consistent with this Congress' and Administration's agenda to enhance more independent and self-reliant communities. Thank you for this opportunity to testify before your committee and I welcome any questions you may have.

PREPARED STATEMENT OF CHARLES GRIM, D.D.S., M.H.S.A., ASSISTANT SURGEON GENERAL, DIRECTOR, INDIAN HEALTH SERVICE

Mr. Chairman and members of the committee:

Good morning. I am Dr. Charles W. Grim, the director of the Indian Health Service. Today, I am accompanied by Douglas Black, director of the Office of Tribal Programs and Ronald Demaray, director, Self-Determination Services. The Department of Health and Human Services [Department] is pleased to have this opportunity to present testimony on S. 2172, the "Tribal Contract Support Cost Technical Amendments of 2004." The bill before us today, S. 2172 seeks to address some of the more significant problems that Tribes and the Administration have grappled with for several years—notably, the issue of contract support costs [CSC] funding.

Our position is clear: We believe strongly that CSC funding enables tribal governments and other tribal organizations contracting and compacting under the Indian Self-Determination and Education Assistance Act [ISDEAA or Act] to develop the administrative infrastructure critical to their ability to successfully operate their health programs.

As the principal authors of the Indian Self-Determination and Education Assistance Act, this committee is well aware that a primary goal of the ISDEAA is to maintain the ". . . Federal Government's unique and continuing relationship with, and responsibility to, individual Indian Tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian Tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." [Section 3(b), ISDEAA]. One integral tool in carrying out that policy is the provision of Tribal contract support costs. We believe the Department has implemented this landmark legislation in a manner consistent with the intent of the Congress when it passed this authority that reaffirms and upholds the government-to-government relationship between federally recognized Indian Tribes and the United States.

At present, the share of the IHS budget allocated to tribally operated programs is in excess of 50 percent of total IHS program funding. Approximately $1.5 billion annually is now being transferred through self-determination agreements to tribes and tribal organizations. Contract support cost funding represents approximately 19 percent[1] of this amount, providing the average Tribe with approximately 81 percent[2] of its total negotiated CSC amount. The assumption of programs by tribes has been accompanied by significant downsizing at the IHS headquarters and Area Offices and the transfer of these resources to tribes.

Contract support costs are defined under the ISDEAA as an amount for the reasonable costs for those activities that must be carried out by the tribal contractor to ensure compliance with the terms of the contract and prudent management. They include costs that either the Secretary never incurred in his direct operation of the program or are normally provided by the Secretary in support of the program from resources other than those under contract. It is important to understand that, by definition, funding for CSC is not automatically included in the program amounts contracted by Tribes. The ISDEAA directs that funding for tribal CSC be added to

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[1] Funding awarded to tribes in fiscal year 2003 exceeded $1.5 billion while CSC funding provided was $269 million.

[2] Total negotiated CSC estimates in fiscal year 2003 were in excess of $350 million while funding appropriated for CSC was $269 million with an additional $16 million of tribal shares available for CSC.

the contracted program to provide for administrative related functions necessary to support the operation of the health program under contract or compact.

The Department has been an active participant with tribes in furthering the Federal Government's administration of CSC by developing a comprehensive CSC policy to implement the statutory provisions of the ISDEAA. In fact, IHS and tribal representatives met earlier this month to further refine that policy and to discuss current issues associated with the funding of tribal CSC. Generally, tribes have been supportive of the IHS and our efforts to implement the ISDEAA and to distribute available CSC funding.

While we welcome the efforts of this committee to address these CSC issues, the Department has serious concerns with this bill. The amendments proposed in S. 2172 are not simply "technical" amendments. These are proposed changes to current law with far-reaching consequences for programs subject to the act and for all other Federal programs that provide funding for Indian tribes. Because of the legislation's potentially far-reaching implications for Federal agencies not here today, we respectfully request that the committee keep the hearing record open so that such agencies may submit written statements about issues relating to the bill.

At this time, I will share our key concerns with S. 2172.

Let me begin by stating that from the perspective of the Department and, I believe, that of the tribes, the single most significant aspect of this legislation is section 3(a)-(e) (Amendments Clarifying Contract Support Cost Entitlement). Provisions in titles I, IV, and V of the ISDEAA currently provide that funding for contract support costs is "subject to the availability of appropriations". Section 3 strikes this "subject to. . . " language and adds new language authorizing appropriations for CSC. We assume from the section heading that the intent of these amendments is to create an entitlement to full funding of contract support costs. We do not believe the amendments succeed in establishing an entitlement for this funding, though they could be read as providing a priority for funding for contract support costs over funding for other tribal programs. As a policy matter, we cannot support the creation of a CSC entitlement, as it would address only one component of health services to tribes and would benefit only those tribes that choose to contract. We also believe the lack of clarity in this provision would result in further debate and more litigation over tribal CSC.

We believe that section 3, even if it were amended to clearly accomplish its intent, would result in significant adverse budget implications for IHS, tribes to whom IHS provides health services, and other affected Federal programs. Contract support funding, like all IHS funding, is categorized as domestic discretionary funding and is, therefore, subject to annual appropriations.

This legislation would *authorize* the appropriation of full funding of CSC but the level of CSC funding would appear to remain part of the discretionary budget. We are concerned that additional dollars needed to provide full CSC funding would have to come from existing or future appropriated IHS funds and supersede other critical priorities for budget increases for tribal health programs, including funding for the provision of critical health care services and maintenance of the IHS service delivery infrastructure.

We believe that the costs of the funding under section 3, relative to the shifting of funding away from other critical healthcare initiatives, would be prohibitive. For example, funding the total negotiated CSC request in 2003 would have required an additional $65 million. When Congress authorized the ISDEAA, it wisely directed that CSC funding, indeed the funding for all ISDEAA programs, is "subject to the availability of appropriations". Striking that language from the ISDEAA, as proposed in S. 2172 would create budgetary confusion and place the provision of direct health care by both the tribes and the IHS at great risk. For these reasons, the Department cannot support the amendments made by section 3.

Section 2 of S. 2172 reaches beyond IHS within the Department of Health and Human Services and beyond the Departments of Health and Human Services and the Interior by proposing a new section 106A(a) to the ISDEAA that refers to other Federal agencies' requirements to pay indirect costs [IDC]. The intent of this section is to authorize Tribes to recover the full funding of their indirect cost need, consistent with their indirect cost rate agreement established with the cognizant Federal agency. Again, we do not believe this amendment establishes this authority. For those other Federal agencies, the intended requirement to fully fund CSC for their programs would likely create significant budgetary and programmatic limitations by diverting funds to pay for administrative costs. For example, non-IHS programs within the Department of Health and Human Services would be required to pay tribes full CSC at a rate exceeding other non-tribal grantees, and these increased expenditures would reduce the amounts available for key programs such as the

Head Start Program. The Department cannot support the intent to establish these requirements under this proposed section.

We are also concerned about the potential conflict of proposed section 106A(a)(2), which provides that additional amounts are not authorized to be paid under this authority subject to the "except as otherwise provided by law. . . " proviso in section 106A(a)(1), and section 4(a) which provides that the provisions of this act supersede any conflicting provision of law.

Section 106A(b) again reaches beyond IHS within the Department of Health and Human Services and beyond the Departments of Health and Human Services and the Interior by authorizing tribes to utilize funds provided by other Federal agencies in accordance with section 106(j) of the ISDEAA. We ask whether it was the Committee's intent to cite section 106(k) as opposed to section 106(j). Section 106(j) pertains to the authority of tribes to use funds provided under an ISDEAA award to meet matching requirements under other Federal or non-Federal awards. Section 106(k) authorizes tribes to use ISDEAA funding, without the requirement of prior Secretarial approval, for any of the twelve [12] specific costs listed. In any event, the committee may wish to consult with the National Business Center in the Department of the Interior concerning the necessity or appropriateness of this proposed new section.

Section 4(a) provides that this legislation supersedes conflicting law, which raises questions concerning its effect on annual appropriation language and the "[e]xcept as otherwise provided by law" proviso in section 2.

Section 4(b) provides an exception to section 4(a) to require that the implementation of these amendments not be construed to alter the ruling of the U.S. Court of Appeals for the Federal Circuit in the *Thompson* v. *Cherokee Nation* case, notwithstanding conflicting opinions in both the 9th and 10th U.S. Circuit Courts of Appeals. The committee should be made aware that the *Cherokee* decision, in the U.S. Court of Appeals for the Federal Circuit and a related *Cherokee* decision in the 10th Federal Circuit Courts of Appeals are under review by the U.S. Supreme Court.

The IHS is committed to Indian self-determination and we believe our record in promoting the intent and spirit of the ISDEAA speaks for itself. We enthusiastically support tribes in their varied efforts to assume programs under the ISDEAA. Our goal is to work together in harmony rather than under the constant possibility of litigation.

This concludes our comments on S. 2172, the "Tribal Contract Support Cost Amendments of 2004." Thank you for this opportunity to discuss contract support costs in the IRS. We would be happy to answer any questions that you may have.

PREPARED STATEMENT OF WILLIAM SINCLAIR, DIRECTOR, OFFICE OF SELF-GOVERNANCE AND SELF-DETERMINATION, DEPARTMENT OF THE INTERIOR

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-l(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-l(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 fiscal year 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 acknowledgment 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 certioraris 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.

PREPARED STATEMENT OF CHAD SMITH, PRINCIPAL CHIEF, CHEROKEE NATION

Good morning Mr. Chairman. My name is Chad Smith and I am the principal chief of the Cherokee Nation, a federally recognized Indian tribe of over 244,000 citizens, nearly one-half of whom live within the 7,000 square mile Cherokee tribal jurisdictional service area in Northeastern Oklahoma. The Cherokee Nation has approximately 1,800 tribal employees (making it one of the largest employers in Northeast Oklahoma), nearly 45 percent of whom work in the Nation's health services department.

The Cherokee Nation was one of the first tribes in the United States to execute a self-determination contract under the original 1975 Indian Self-Determination Act and in 1990 was also the very first tribe to execute a self-governance agreement under title III of that act. Since 1994 all of our self-determination programs have been administered under Self-Governance compacts with the Department of the Interior and the Department of Health and Human Services.

Pursuant to our compact with the Department of the Interior, we carryout a wide array of Federal Government programs serving Indian people, including credit and finance programs; agricultural, forestry and real estate services; tribal courts; social services, Indian child welfare and housing improvement programs; a general assistance program; Johnson O'Malley education programs; law enforcement services; the "TEA–21" and related roads construction, planning and maintenance programs; Individual Indian Money services; higher education and adult education services; and child abuse and early childhood wellness programs.

Under our Self-Governance compact with the Department of Health and Human Services, the Cherokee Nation operates six rural outpatient clinics providing Indians with primary medical care, dental services, optometry, radiology, mammography, behavioral health services, medical laboratory services, pharmacy services, community nutrition programs, and a public health nursing program. The Nation also operates inpatient and outpatient "contract health" medical referral programs for management of specialty care.

The Cherokee Nation has been able to make tremendous improvements to these formerly Federal programs and services. The Self-Determination Act has allowed the Nation to step forward, resume responsibility for its own affairs and make these programs more responsive and accountable to the Cherokee people. This was clearly the intent of the Indian Self-Determination and Education Assistance Act. Unfortunately, the Nation's progress has been severely impeded by the Government's failure to fund required contract support costs as mandated by the Self-Determination Act. This happened despite the Congress' efforts to prevent such systematic underfunding of contract support costs by making several strengthening amendments to the act in 1988 and 1994.

Since the time of our first Self-Governance compact with the Department of the Interior in 1990, the Cherokee Nation has never been fully funded with contract support costs as mandated by the Indian Self-Determination Act. The BIA neglects to fund the Nation about a quarter million dollars in indirect costs annually, and fails to pay us any "direct" contract support costs at all, estimated at $300,000 annually. As for the Indian Health Service, in 1992 and 1994, respectively, the Cherokee Nation began operating the Redbird Smith Health Center in Sallisaw, OK, and the Wilma P. Mankiller Health Center in Stilwell, OK. In 1995, Cherokee Nation began administering the W.W. Hastings Indian Hospital's "contract health" medical referral outpatient program, and in fiscal year 1997, the Cherokee Nation assumed control of that facility's "contract health" medical referral inpatient program. It may come as a shock to this committee that at no time until September 1999 did the Cherokee Nation ever receive any contract support funding for the operation of

these four multi-million dollar programs. Today, the Nation is funded at only 64 percent of its requirement for contract support for our IHS programs, a shortage of $4.2 million per year. In total, the Nation is not funded for $4.75 million for these fixed, contract support costs each year.

Because the Government has grossly underfunded these contracts, the Nation has had to forego substantial services to thousands of Indian people, simply to cover the shortfall in Government funding. This has worked a great hardship on people who must rely on these programs and facilities for their basic health care, and that is why I am here today.

Eight years ago Cherokee Nation tried to informally resolve its issues with the Indian Health Service. When those efforts failed, in September 1996 we filed a formal claim under the Contract Disputes Act. More than 1 year later the claim was denied in its entirety by the IHS, covering three different annual funding agreements for 1994 through 1996. We then took an appeal to the Interior Board of Contract Appeals, where we prevailed, and the case was upheld on appeal to the Federal Circuit Court of Appeals.

In 1999, we brought a second claim in Federal court in tandem with the Shoshone-Paiute Tribes of the Duck Valley Reservation, against the IHS for underpayments in 1997. The tribes did not prevail in this suit, nor did we prevail in our appeals to the 10th Circuit. Due to the inconsistency with the Federal Circuit, these Cherokee cases have been recently approved for review by the Supreme Court. Despite the Nation's commitment of significant resources to these multi-million dollar claims, these efforts have yet to produce any relief for the Nation.

We do not believe that litigation is an efficient way to resolve funding problems. Although litigation may be our only option for dealing with the past, the current situation is untenable and cries out for attention from Congress.

The current system simply should not go on any longer. Neither the BIA nor IHS pays full contract support costs even though all other Government contractors receive their full administrative overhead when they deal with the Federal Government. Although we make these agreements and take over significant responsibilities from the Federal Government, the Nation is consistently treated as a second-class contractor—a situation we believe to be unacceptable. Neither agency even requests full contract support funding from Congress, at times because they haven't the will, and at other times because the Department or the Office of Management and Budget stands in the way. And, of course, there are other, competing demands on the appropriations committees.

The contract support cost problem has caused severe financial strains on the Cherokee Nation's programs and facilities, as it has for many other tribes in the country. What it means in real terms is that the Nation must reduce these critical health, education and other programs to pay for these shortages. This compounds an already deficit funding level, requiring us to ration basic health care and other services to our citizens.

Given the conduct of the agencies and recent court decisions, it is clear that reforms are needed. Congress intended that tribes would be fully paid contract support costs if they agree to take over the administration of these Federal programs. But that is not what has happened, and the courts have been slow to respond, if at all. For this reason, the Cherokee Nation strongly applauds the chairman for his leadership in introducing S. 2172.

S. 2172 addresses the most severe problems in the current contract support system in a thoughtful and carefully considered way, without demolishing the entire foundation of the Indian Self-Determination Act. This is a key point, because the basic contract support processes that are in place today-for instance the processes for setting indirect costs and direct costs-are functioning well. Indeed, even the General Accounting Office has confirmed the integrity of the system. Rather, it is the substantial impediments to executing that system that are the focus of S. 2172.

The Cherokee Nation strongly supports the enactment of S. 2172, and I would like to pause to comment briefly on a few of the bill's provisions.

First, we strongly support a reform included in section 2 to finally resolve the accounting quagmire created when the government-wide indirect cost rate is not followed by all government agencies. This accounting mess has led not only to an under-calculation in indirect cost rates, but it has also severely strained the ability of tribes to operate all their Federal programs across all agencies within OMB's guidelines. For nearly 20 years tribes have called for reform in this area, and finally, it appears that real reform is at hand.

We also applaud the committee for making clear in section 2 that existing statutory flexibility in the expenditure of self-governance funds, to best meet special or unique local needs, continues when self-determination funds are pooled with other funds in each tribe's "indirect cost pool." Obviously, funds in that pool lose their in-

dividual identity, and we are alarmed that the Office of Inspector General of the Department of the Interior has taken the position that the flexibility expressed in the Indian Self-Determination Act suddenly disappears once self-determination funds are pooled with other Federal funds.

Most importantly, we strongly support the committee for its inclusion of provisions in section 3 that are key to strengthening the mandate to fully fund contract support costs. The removal of the "availability" clauses will reduce the argument that the Secretary lacks the authority to fully fund contracts negotiated under the Act. Courts have at times interpreted the "availability" clauses to negate the mandate to fund contract support costs, an interpretation that effectively downgrades our Government contracts, negotiated in good faith, to something more akin to a discretionary grant. The reforms in section 3 would help to remedy that problem.

4 It is often repeated in these hearings that the greatest threat to the success of the Self-Determination Act is the failure to fully fund contract support costs. On behalf of the Cherokee Nation I can tell you that contract support funding has, indeed, been one of the greatest problems that has impeded our progress. There is so much more that we can do, and so much more that we must do, to meet the critical health, education, economic and social needs of our citizens and all other Indians eligible for our services. We are delighted to be able to carryout the Federal Government's trust programs, delighted because history shows that we have the capacity and vested interest to do a much better job than Federal bureaucracies. But our ability to administer these programs successfully and to maximize delivery of high quality services to Indian people, depends on having adequate contract support cost funding.

Thank you Mr. Chairman, for the opportunity to testify in support of S. 2172.

UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS

HEARING ON S.2172

THE CONTRACT SUPPORT COST TECHNICAL AMENDMENTS OF 2004

APRIL 28, 2004

TESTIMONY OF HERBERT L. FENSTER, ESQ.
MCKENNA LONG & ALDRIDGE LLP

Mr. Chairman, my name is Herb Fenster. I am a partner in the national law firm of McKenna Long & Aldridge. I practice in the Washington and Denver offices of my firm. I have been in practice here in Washington for more then 43 years specializing in Government Contract Law and in litigation with the Federal Government. My detailed resume is appended to my written testimony.

In connection with my practice of Government Contract Law, I have had considerable experience in addressing issues in a sub-specialization which I refer to as "Federal Funding Law". This latter subject has to do with the Constitutional, legislative and administrative process by which Congress appropriates and the Executive Branch spends monies in connection with the performance of government contracts.

I should note to the Committee that my firm and I are getting ready to submit an Amicus Brief to the Supreme Court in the pending two cases that involve certain of the issues before this Committee.

I have been asked by the Committee to testify concerning the government contracting and federal funding implications of changes proposed in the Indian Self-Determination and Education Assistance Act by S.2172, the Tribal Contract Support Cost Technical Amendments of 2004. My reading of those proposed amendments indicates that they are intended to make clear that what are referred to as "support costs" will be treated just the same as what we generally refer to as "program costs".

Stated in more simple terms, and without government contract parlance, it would appear that the objective of the amendments is to insure that the costs normally incurred by a contractor (in this case the contracting Indian Tribes) in administering the programs are treated precisely the same as the actual program costs themselves. In government contracting we generally divide contract costs into two categories, "direct costs" and "indirect costs." I believe that the proposed language with the changes suggested by Mr. Miller, would accomplish this purpose particularly when one understands the circumstances in which the amendments are being proposed. Those circumstances include at least two decisions from two U.S. Courts of Appeals coming to opposite conclusions on the same facts. Since Mr. Miller has testified on the substance of those two decisions, which are now before the Supreme Court, I shall not go into just what happened in each of those cases.

In addition, I believe that the amendments would clarify that, so long as the recovery of support costs is within the language of the relevant contracts, the government will be contractually bound to pay these indirect or "support" costs regardless of whether it has reserved

adequate funding from its appropriations for such payments. As I shall point out, this clarification is entirely consistent with existing federal funding law.

I would like to give the Committee a perspective of existing government contracts and federal funding law that, in my view fully supports the proposed amendment. To do so I shall address, briefly, four points.

1. The Payment of Indirect Costs is an Integral Part of Contract Cost Payment

The payment of "indirect costs" is an integral part of costs that are paid by the government in every government contract. I know of no law and no regulation that would permit the government to single out such indirect costs and disallow their recovery. In fact, doing so would be contrary to at least two sets of regulations that govern the management of costs under government contracts. The first of these regulations is the Federal Acquisition Regulations (the "FAR") which are nearly uniformly mandatory for use by all executive branch agencies. Part 31, Subpart 2 and particularly Paragraph 31.203 governs the definition and allowability of indirect costs. That Paragraph makes it very clear that such costs are an integral part of the costs the government expects to pay for the performance of contracts. What differentiates such costs from "direct" costs is the fact that indirects are generally of a kind that are incurred for several different purposes and therefore must be "pooled and "allocated" usually on a benefits basis. There is certainly no dispute over these assumptions. Paragraph 31.204 of the FAR then goes on to specify in no uncertain terms that such indirect costs ". . . shall be allowed to the extent they are reasonable, allocable, and determined to be allowable under . . . 31.203 . . . ."

Now, we recognize that OMB Circular A-87 governs the allowability of indirect costs in contracts with Indian Tribes. However, there is absolutely nothing in the very brief language on the subject in that circular that would begin to suggest that any different result is intended. In other words, it is just as clear from the circular that such costs are to be paid in the same manner as in any other government contract.

A second set of regulations also governs the allowability of indirect costs under government contracts. This is the Cost Accounting Standards which, by law, (41 U.S.C. 422(f) 3) are mandatory for use in government contracts. Standard 418 dictates not only the definition of indirect costs but also the manner in which they are to be charged under government contracts. Without a detailed analysis of this very complex Standard, it is fair to say that the Standard makes it very clear that indirect costs are allowable under government contracts and the Standard interposes no limitation that would support what the government has done in the situation that is being addressed by this Committee, none at all.

It is my view that the disallowance of indirect costs by the government in this instance makes no sense at all. Not only does it violate all known cost allowability principles applicable to all government contracts, it also creates an arbitrary and illogical division between the kinds of costs that are reasonably and normally incurred in the performance of any government contract. I should point out in this connection that the government has never alleged that these costs are unreasonable or that they should be denied because of any circumstance that would reflect on their importance in actually achieving the objectives of the contracts.

2. The Denial of Recovery of Indirect Costs Produces an Illegal Arrangement Between the Government and the Tribes

While it may seem somewhat surprising to this Committee, it is actually illegal for the government to enter into any contract arrangement under which the contractor provides goods or services for which it will not receive compensation. Such an arrangement is barred by 31 U.S.C. 1342. That provision prohibits a contracting officer from creating an agreement under which the contractor becomes a "volunteer" of its services. The reason for this prohibition is that such an arrangement would augment appropriated funds in violation of Article I, Section 9, Clause 7 of the Constitution under which no funds may be drawn from the Treasury except under appropriations made by Congress; this is, as the Committee knows, the heart of the "Purse Strings" power. In other words, in this instance, causing the Tribes to bear the indirect cost expense would result in bypassing the appropriations process for the recovery of costs incurred in performing services for the government.

3. To Be Legal, Contracts With the Government Must be Fully Funded At the Time of Award

This brings me to a fundamental legal error in the procedures being followed by the government in the case of these contracts with the Tribes. It would seem that the government, after awarding these contracts, assumes that it can adjust the amount of money it will pay for the performance of the work covered by the contract. The premise is that, if the government determines that the amounts in its accounts at the Treasury are inadequate, it can simply pay less then the indirect costs incurred even though the contract otherwise requires such payment. This notion is directly contrary to law.

The Anti-Deficiency Act (31 U.S.C. 1341) a critical and venerable statute, mandates that no contract shall be made that is not fully supported by appropriated funds. In passing on the requirements of this statute, the Supreme Court recently stated that government contracting officers are barred ". . . from entering into a contract for the future payment of money in advance of, or in excess of an existing appropriation." What the government has been doing in the case of the contracts under consideration by this Committee directly violates this language. In other words, it is legally impermissible for a government agency to award a contract in the first place and later determine that it lacks adequate funds to pay for the contract work. It is the implicit requirement of this statute that the government determine before the award of any contract that it has adequate appropriated funds available to pay the contractor.

One would, however, be impermissibly naïve to assume that there are not instances in which, for whatever reasons, the government does not, in fact, exhaust its funds in particular accounts before it completes payment under particular contracts. When this happens, the inability of the government to pay does not result in the contractor forfeiting its right to payment. What the government has been doing in the instances being addressed by the Committee does not reflect a proper interpretation of the law, in my view. One hundred and twenty-one years ago, almost to the day, the United States Court of Claims held, in a case also involving Indian Tribes' interests:

> . . . we have never held that persons contracting with the government for partial service under general appropriations are bound to know the condition of the appropriation account at the Treasury or on the contract book of the Department. To do so might block the wheels of the government. The statutory restraints in this respect apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the government.

(*Dougherty v. United States*, 18 Ct. Cl. 396 (1883)).

About ten years later, the Court of Claims again had occasion to address this subject and reemphasized the point:

> An appropriation per se merely imposes limitations upon the government's own agents; it is a definite amount of money entrusted to them for distribution; but its insufficiency does not pay the government's debts, nor cancel its obligations, nor defeat the rights of other parties.

(*Ferris v. United States*, 27 Ct. Cl. 542 (1892)).

This has become known as the "Ferris Doctrine" and its meaning here is simply this: If the government awards several contracts for the services at issue here and then exhausts the funds necessary to pay for those services, it must answer in breach of contract. It cannot so condition the payment of its debts as to enable it to escape those debts when, for whatever reason, it exhausts its accounts on the books of the Treasury.

4. The Conduct of the Government Here Would Seriously Inhibit Important Outsourcing Initiatives

Several years ago, Congress passed the Federal Activities Inventory Reform Act ("FAIR") Act. The intent of that statute was to encourage Executive Branch agencies to privatize and outsource work that could be more effectively and cost effectively accomplished by the private sector. But even without that express Congressional encouragement, it has become very obvious over the last several decades that outsourcing of many functions is important to government both to contain costs and to insure that services are more effectively accomplished. We see particularly today many contracts with the private sector both at home and abroad that are too often criticized but imperative both to accomplish the work and to do so both timely and cost effectively.

Thus it is passing strange for the Solicitor General, in the case that will be heard by the Supreme Court (and is noted in Mr. Miller's testimony), to have stated:

> That condition on the government's payment obligations reflects the fact that, under ISDA, the Tribe is substituted for a federal agency in furnishing governmental services. A federal agency

> administering those programs directly would be constrained by the availability of appropriations and the allocation of funds among its programs; Section 450j-1(b) places Tribes taking over those programs in a similar position.

Quite apart from the fact that, with all due respect, the Solicitor General is dead wrong as a matter of law, the policy implications of what he has said should not be adopted in any form whatsoever by this Committee. To do so would create a serious impediment to outsourcing of these functions, a process that is intended not only to improve the very services involved, but also actually to decrease the total costs of those services. In the instant case, to suggest that the Tribes must stand in the shoes of the agencies from whom they are taking over the services is to inhibit and defeat the very self determination objectives of the enabling statute.

Thank you Mr. Chairman for the opportunity to present my views on the subject before the Committee today. I would be most pleased to answer any questions the Committee may have.

Herbert L. Fenster

Partner, Denver and Washington, D.C.

Practice Areas

Litigation
- Contract law
- Procurement law
- Environmental law
- Tort law

Administrative Law

Professional Affiliations

United States Supreme Court
The District of Columbia Bar
The Colorado Bar
American Law Institute

Mr. Fenster is a partner in the law firm of McKenna Long & Aldridge LLP, where he has been in practice for forty-three years; he is resident in the Washington, D.C. and Denver, Colorado offices. Mr. Fenster specializes in litigation, particularly, against the United States and on the subjects of procurement, environmental, administrative and tort law. He has had extensive experience in the negotiation, interpretation, and litigation of contracts for major weapons systems, as well as the procurement of research and development. Mr. Fenster has had extensive involvement in critical legal and regulatory issues arising in the award and termination of major weapons programs. He has lectured and testified extensively on the subject of government contract finance and accounting from both industry and government perspectives.

Mr. Fenster chaired the Student Affairs Advisory Board at the University of Colorado and is currently a member of the Board of Directors of the University's Alliance for Technology Learning and Society ("ATLAS"). He advises the University on a wide range of privatization projects.

Mr. Fenster holds degrees in architecture/civil engineering, history, and economics from the University of Pennsylvania, and is a graduate of the University of Virginia Law School. Mr. Fenster is an author and lecturer on government and administrative law subjects. He was litigation counsel for the Reagan-Bush Campaign Committee and for the Grace Commission. Mr. Fenster is a director of the U.S. Chamber of Commerce National Chamber Litigation Center and a corporate and foundation director and trustee.

Mr. Fenster led a multi-firm team of lawyers who, on February 23, 1998 obtained a judgment against the United States in the amount of $3.877 billion, the largest judgment ever entered against the government. He represents the Secretary of the Interior in Indian Trust Litigation before the federal courts. Mr. Fenster represents many Colorado and Denver area aerospace and defense contractors and a number of construction contractors in the Rocky Mountain region, nationally and internationally.

Mr. Fenster is a specialist in litigation under a number of federal statutes including the Administrative Procedure Act, the Federal Advisory Committee Act, the Foreign Sovereign Immunities Act and the Freedom of Information Act.

Mr. Fenster is the general counsel of the Coalition of Republican Environmental Advocates and is a member of the board of the Republican Patrons of the Arts. He is a former University Trustee and represents universities and other not-for-profits and M&O and closure contractors in matters relating to regulation by the Department of Energy.

UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS

HEARING ON S.2172

THE CONTRACT SUPPORT COST TECHNICAL AMENDMENTS OF 2004

April 28, 2004

TESTIMONY OF
LLOYD B. MILLER, Esq.
SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON, LLP.

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.

* * *

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

[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.

specifically called for by President Nixon's historic 1970 Message to Congress,[2] this 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

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

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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> * * *
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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)]

* * *

> 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.
>
> 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]

* * *

> 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* § 106(k) (mis-identified as 106(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 § 106(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 § 106(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 "106(j)" to "106(k)"	the recent re-enactment of subsection 106(c) redesignated the cited subsection to its original location at § 106(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