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NATIONAL CONGRESS OF AMERICAN INDIANS
TESTIMONY BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
HEARING ON
INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANT ACT
AND CONTRACT SUPPORT COSTS**

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Good morning Chairman Campbell and distinguished members of the Senate Committee on Indian Affairs. My name is W. Ron Allen. I am President of the National Congress of American Indians (NCAI) and Chairman of the Jamestown S'Klallam Tribe located in Washington State. On behalf of NCAI, the oldest, largest and most representative Indian organization in the nation, I would like to thank you for the opportunity to testify this morning on the issues of the Indian Self-Determination and Education Assistance and Contract Support Costs. NCAI was organized in -1-944 in response to termination and assimilation policies and legislation promulgated by the federal government which proved to be devastating to Indian Nations and Indian people throughout the country. NCAI remains dedicated to the exercise of tribal sovereignty and the continued viability of tribal governments. NCAI also remains committed to advocating aggressively on behalf of the interests of our 250 member tribes on a myriad of issues including the development of contract support costs solutions and funding options in the Bureau of Indian Affairs and the Indian Health Service.

I. INTRODUCTION

The Indian Self-Determination and Education Assistance Act (ISDEAA) authorizes tribes to contract to operate Bureau of Indian Affairs (BIA) and Indian Health Services (IHS) government programs serving the Indian recipients of those programs. The point, as you well know, is multi-faceted: (1) to reduce the federal bureaucracy; (2) to place Indian programs in the hands of the Indian people being served; and (3) to enhance and empower local tribal governments and institutions.

However, the shortfall in contract support costs due under the Act has impeded the achievement of those goals, and has, in fact, penalized our tribal people-the real and ultimate victims of the shortfall. Given the severity of those shortfalls, the impact on the programs themselves, and the growing drumbeat of litigation, last year NCAI took the initiative to form a National Policy Workgroup on Contract Support Costs.

II. NCAI NATIONAL WORKGROUP ON CONTRACT SUPPORT COSTS FINAL REPORT

The purpose of our workgroup was to come to a thorough understanding of the contract support cost system as it has evolved over the years, to identify the problems that have developed and to explore solutions. After thirteen months of work, eleven national meetings, countless smaller working sessions and thousands of hours of volunteered time, we are proud to present to you our Workgroup's Final Report. It is important to underscore the fact that our Report and recommendations is the result of a great deal of hard work and diligence on the part of Tribal leaders, and technical and legal representatives who are experts in this specialized topic.

In preparing this Final Report, it was our intent and desire to be as inclusive as possible. All relevant agencies were invited to participate, including the BIA, IHS, the Office of Inspector General of the Department of the Interior, the Department of Health and Human Services Division of Cost Allocation, and the Office of Management and Budget. indeed, we even had hopes early on that our report would be a joint tribal-federal report, although eventually that was not possible. While federal representatives actively participated in our Workgroup meetings and discussions, this effort and final report was initiated by the tribes.

In July 1999, the BIA released a separate contract support cost policy which was developed without our knowledge or involvement. I am greatly disturbed and outraged over the substance of this proposal as well as the process utilized in developing this document. NCAI objects to the draft policy as a whole; and strongly urge that the BIA work with the NCAI Workgroup to develop solutions. Despite these problems and disappointments, our NCAI final report went forward, resulting in 31 key findings, 8 guiding principles and 16 major recommendations, some of which I will mention here.

III. NCAI FINAL REPORT - FINDINGS

In the findings section, our work confirmed the integrity of the indirect cost negotiation system as carried out by the Department of the Interior Office of Inspector General. We found it to be free of collusion, over-reaching or abuse, a finding echoed in the General Accounting Office report.

Second, we found that this indirect cost negotiation system has proven to be appropriately flexible to differing tribal conditions. Tribes, like states, counties and cities, are all different. They not only use different accounting systems, practices and materials, but they face vastly different circumstances. Workers' compensation systems may in one part of Indian Country cost many times what the cost is somewhere else. Salaries vary-just as do utilities, rent and the like. Climate alone can play a large role, as can the extent of isolation, and we found the indirect-cost system to be uniquely sensitive to all these factors.

Many in the Administration and Congress have been led by the perception that indirect cost rates have been out of control leading to radically escalating contract support costs. Interestingly, just like the BIA and IHS, we found that indirect rates had in the aggregate remained surprisingly stable -- even flat -- at under twenty-five percent. This finding directly answered the concern by some that indirect costs were out of control and abused by tribes who saw the sky as the limit on indirect costs. That myth is now firmly dispelled.

Our report reveals that the increase in contract support costs is directly related to the success of the implementation of the ISDEAA. Tribal contracting and compacting activities accelerated to their peak in the mid-1990s in response to the 1994 ISDEAA Amendments and extension of the self-governance initiative to IHS. The trend in the transfer of federal Indian programs to tribal operation under the ISDEAA has leveled off from the peak experienced in the mid-1990s, and with a few notable exceptions should remain constant in the years ahead.

We also found that this static, aggregate, twenty-five-percent rate was less than one-half the indirect rate of DHHS itself, as well as various other federal agencies, universities, state agency service providers and most private foundations.

We found that the contract support cost shortfall is projected to be relatively small in fiscal year 2000 compared to the overall agency budgets and the magnitude of tribal contracting and compacting. At IHS, it is about \$1 00 million, including a small inflation factor (estimated at 3.5 percent). At BIA, it is approximately \$65 million, including adjustment for inflation and factors related to the *Ramah* case (estimated at \$21 million). These numbers are actually smaller than what we expected to find.

Finally, we found that contract support costs are for the most part expected to rise slowly in the years ahead. For the BIA, whose total estimated contract support costs requirements are roughly \$180 million (which includes adjustment related to the *Ramah* case), the expected annual increase is less than \$12 million a year, or about 7 percent. For the IHS, whose total estimated contract support cost requirements are roughly \$310 million, the expected long-range increase is \$10 million a year, or about 3 percent. These are modest increases indeed.

IV. NCAI FINAL REPORT - RECOMMENDATIONS

In light of these and other findings, we made several recommendations, including the following:

First, we concluded that contract support costs can and must be fully funded. They are an obligation of the federal government, both legally and contractually. This payment is also morally right -- consistent with the devolution movement and local empowerment, tribal governments should not be required to permanently reduce funding for their programs and services. Although not specifically

addressed in our report, there are really only three choices to address contract support cost funding issues:

- The appropriations committees can appropriate the full amount required-which under today's caps is difficult, at best;
- The appropriations committees can appropriate less, and leave tribes to sue to recover the rest; or
- Appropriate measures can be enacted to make contract support costs a true entitlement in terms of its funding mechanism in Congress.

Given the genuine pressures facing the appropriators, I suggest this Committee give this third option very serious consideration. Cost-wise, the impact is infinitesimal relative to the non-discretionary federal budget. In terms of American Indian and Alaska Native governmental, social and health care programs, however, the impact would be clear, immediate and substantial.

Second, we recommend that the OMB issue a new cost circular specifically devoted to tribes and the unique laws that affect tribes. OMB continues to aggregate tribes in circulars with state and local governments, although Congress regularly recognizes that tribal 'governments do not have the same available resources to accommodate such circular conditions. Such a proposal was included in the 1994 amendments to the ISDEAA, but was deleted at the last moment at OMB's request. Particularly since Congress, in the ISDEAA has enacted special cost accounting principles applicable only to tribes, an OMB circular specific to tribes will eliminate the current confusion that exists between those statutory provisions and the existing general circular.

Third, we recommend that Congress authorize one to two years for the development and field testing of a potential 'bench-marking' idea that would help bring greater consistency among similarly situated tribes. The idea here is to develop ways of bench-marking particular contract support cost components, so that tribes and government negotiators would have signposts to guide their negotiations, without actually dictating the outcome. If successful, such a proposal could help even out the highs and lows among tribes, thus achieving greater equity between all. Unfortunately, coming up with the precise benchmarks is a fairly technical undertaking that was beyond what we could do in the first year of our work.

Fourth, we believe IHS and BIA should be encouraged to work jointly together in the development of a contract support cost "base budget" approach such as is already under development, and as also described in alternative four to the General Accounting Office report. The agencies should be asked to inform Congress whether any further authorization is necessary to proceed with this efficiency innovation.

Fifth, we recommend that the BIA immediately come into compliance with the law and with the applicable regulations by recognizing and paying direct contract support costs such as workers' compensation and unemployment insurance. Not only must the BIA come into conformity with the law, but it must aggressively go forward and inform each and every tribal contractor that the Bureau will now begin complying with the ISDEAA in this critical respect.

Sixth, we recommend that BIA payment policies more closely mirror IHS policies by promoting first, and foremost, financial stability. As judges have held, neither tribes nor the ultimate Indian beneficiaries are well-served by a system under which the BIA holds back substantial contract support funding until the end of the fiscal year. Rather (and unless overpayments would result) tribes should receive at least the same amount of funding they received in the prior year, and such funds should be paid at the beginning of the fiscal year, not at the end.

Finally, we recommend that the so-called "other federal agency" finally be tackled head-on by Congress. Currently, we operate under a system where a government-wide OMB circular establishes the rules for determining tribal indirect-cost needs, but not all federal agencies feel bound by the circular. As a result, tribes are once again squeezed in the middle. As a first step here, we recommend that Congress call upon the GAO to study the source of each federal agency's restriction on the recovery of indirect costs. Once the source of those restrictions is known, Congress can consider appropriate legislation to overcome the barriers that currently pose such difficult problems for tribes.

V. S. 979 - PERMANENT IHS SELF-GOVERNANCE LEGISLATION

During this session this Committee considered S. 979, permanent authorization for Self-Governance at the Indian Health Service, and study of Self-Governance's applicability to other agencies within the Department of Health and Human Services. Issues were raised, however, that the permanent authorization would also lead to a significant increase in the need for contract support cost funds.

The ISDEAA authorizes and requires tribes to be Self-Determination contractors before transferring to Self-Governance status. To date, all Self-Governance compacts with IHS were preceded by Self-Determination contracting. This means that most, if not all, contract support costs are already in the system under self-determination contracting and were not new costs.

Since the permanent Self-Governance legislation in S. 979 focuses on tribe/agency relationship issues, rather than not expanded eligibility, it does not significantly implicate the contract support cost debate and quest for solutions in a meaningful way. As such, S. 979 should not be held hostage as we

struggle with the difficult resolutions to the shortfall in contract support funding. To the extent that S. 979, can play any role in identifying the solutions, it does so by requiring clear reporting from the Administration as to programmatic funding needs as well as contract support cost requirements; one of the issues that GAO noted to be a problem in their report.

VI. CONCLUSION

In closing, we strongly recommend that all members of the Committee take the time to review the executive summary included in our NCAI final report. I would like to close my remarks by quoting two short paragraphs from our report which I believe put the issue well:

No single policy in the history of American Indian affairs has more forcefully and effectively permitted tribes to empower their tribal institutions and their people. No single policy has more effectively served to break the cycle of dependency and paternalism. No single policy has better served the philosophy of devolution-moving federal resources and decision making to that level of local government that is closest to the people. And, no single initiative has contributed more to the improvement in the conditions facing American Indian people.

As the Nation enters the new millennium, it is essential that the American people recommit fully and keep faith with the Self-Determination Policy and empowerment of tribal governments consistent with the devolution movement. Only through the continuation of that policy can America both respect the fundamental government-to-government relationship that exists between tribes and the United States, and fulfill the Federal Government's trust responsibility to protect the interests of Native American tribes.

Thank you, Mr. Chairman, for the honor to testify today on this most critical issue. NCAI, Tribal leaders as well as our legal and technical representatives, look forward to continuing to work with you on the development of contract support costs solutions and funding options.