

**UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS**

**OVERSIGHT HEARING ON
CONTRACT SUPPORT COSTS**

**TESTIMONY OF
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Mr. Chairman, for the record my name is Lloyd Miller and I am a partner with the law firm of Sonosky, Chambers, Sachse, Miller & Munson. I appear today on behalf of 13 tribes and tribal organizations that together carry out over \$ 100 million dollars in federal self-determination contracts in the states of Oklahoma, Arizona, Washington, Nevada, Idaho, Montana, California and Alaska.¹

The General Accounting Office's careful study of contract support costs confirms what tribes have been saying for over twenty years: that contract support costs are legitimate; that contract support costs are essential and necessary to properly carry out federal self-determination contracts; and that underfunding contract support costs cheats the tribes and penalizes the Indian people served — by forcing reductions in contract programs to make up for the government's contract support shortfall.

These conclusions are not new to this Committee. Twelve years ago this Committee leveled a broadside attack on the agencies for “the[ir] consistent failure to fully fund tribal indirect

¹Our clients in contract support matters include the Cherokee Nation and the Chickasaw Nation of Oklahoma, the Gila River Indian Community Health Care Corporation of Arizona, the Squaxin Island Tribe of Washington, the Shoshone-Paiute Tribes of Nevada and Idaho, the Shoshone-Bannock Tribes of Idaho, the Chippewa Cree Tribe of Montana, the Southern Indian Health Council of California and the Ketchikan Indian Corporation, the Yukon-Kuskokwim Health Corporation, the Arctic Slope Native Association, the Kodiak Area Native Association, and the Eastern Aleutian Tribes, all of Alaska.

costs,” S. Rep. No. 100-274 at 8 (1987). The Committee found that “self-determination contractor's rights have been systematically violated particularly in the area of funding indirect costs,” and it characterized this particular failure as “the single most serious problem with implementation of the Indian self-determination policy.” *Id.*

The Committee further found that the BIA and IHS had utterly and consistently “failed to request from the Congress the full amount of funds needed to fully fund tribal indirect costs,” *id.* at 9, a failure which the GAO now tells us has continued unchanged for another 12 years.

It is directly — and *primarily* — to remedy this funding problem that Congress massively overhauled the Indian Self-Determination Act in 1988.

In winding up his remarks at the hearings on those amendments, then Chairman Inouye put the problem well:

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. 1 703 Before the Senate Select Committee on Indian Affairs, 100th Cong., 1st Sess. 55 (Sept. 21, 1987).

And, Congress did change that. In 1988, and again in 1994, Congress enacted massive amendments to the funding provisions of section 106 of the Act, to the shortfall and supplemental appropriations reporting provisions of section 106, to the model contract provisions of section 108, and to the critical court remedies established in section 110.

Along the way, Congress by statute declared that tribes are “entitled” to be paid contract support costs, that these costs are “required to be paid,” that the agencies “shall add [these costs] to the contract,” and that the amount a tribe is entitled to be paid “shall not be less than the amount determined” under the Act.

Today, the world is different. Although the agencies' shortcomings in the appropriations process have not changed, thanks to these amendments the courts have come in to fill the void. They have consistently awarded damages against the agencies, just as Congress intended. And so

it is that the Interior Board of Contract Appeals (which possesses recognized expertise in this area) has ruled, under simple contract law, that “the Government's obligation to fund these indirect costs in accordance with the [self-determination] contract remains intact, despite the dollar ceiling in the applicable appropriations act.” *Appeals of Alamo Navajo School Board and Miccosukee Corp.*, 1997 WL 759411 (Dec. 4, 1997) (slip op. at 45). Similarly, the federal courts have ruled that “regardless of agency appropriations, [nothing in the Act] limit[s] [the agencies’] obligation to fully fund self-determination contracts.” *Shoshone-Bannock Tribes v. Shalala*, __ F. Supp. __, 1999 WL 562715 (July 22, 1999) (slip op. at 7). The courts and the Board have awarded damages, and additional damages are still awaiting assessment in other suits now pending against both agencies.²

This is the legal framework in which the tribal witnesses today come before this distinguished Committee and respectfully urge that the funding mechanism for contract support costs be improved to square with the Act, and with the tribes’ rights as government contractors. After all, we are not here dealing with discretionary activities; but with federal government contracts being carried out on behalf of the United States for the Indian beneficiaries of those contracted federal programs.

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 must not be dependent on the politics of the budget process, competing demands

²The courts and contract appeals boards have been universal in their enforcement of tribal contracting rights to contract support costs associated with self-determination contracts. See, e.g., Ramah Navajo School Board v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996) (invalidating a BIA contract support policy of cutting some tribal contract support costs by 50%); Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997) (awarding damages arising out of the BIA's unlawful practice of diluting its own responsibility to pay full contract support costs associated with its self-determination contracts); Shoshone-Bannock v. Shalala, 988 F. Supp. 1306 (D. Or. 1997) (Shoshone-Bannock I) and 999 F. Supp. 1395 (D. Or. 1998) (Shoshone-Bannock II) (awarding damages for the unlawful IHS practice of placing tribes on a multi-year waiting list under an agency policy of limiting the amounts available for contract support out of the agency's lump sum appropriation) pending on appeal No. 98- __ (9th Cir.); Appeals of Alamo Navajo School Bd. and Miccosukee Corp., 1997 WL 75944 (IBCA Dec. 4, 1997) (awarding damages for the BIA's failure to pay full contract support costs both in lump sum years and in a capped earmark year), pending on appeal sub nom. Babbitt v. Miccosukee, No. 981457 (Fed. Cir.) (appeal limited to FY1994 “capped” appropriation); Appeals of Cherokee Nation of Oklahoma, 1999 WL 440047 (IBCA June 30, 1999) (sustaining liability for damages for contract support costs payable out of lump sum appropriations), pending on appeal sub nom. United States v. Cherokee, No. 99- __ (Fed. Cir.). See also Cherokee Nation and Shoshone-Paiute Tribes v. United States, No. 99-092-S (E.D. Okla.) (complaint filed March 1999).

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 testify this morning. I am available to answer the Committee's questions.