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CONTRACT SUPPORT FUNDING AND THE FEDERAL POLICY OF INDIAN TRIBAL SELF- DETERMINATION

S. Bobo Dean* and Joseph H. Webster**

INTRODUCTION

The federal policy of Indian tribal self-determination is now 30 years old. It was initiated by President Richard Nixon in his Message on Indian Affairs to Congress in 1970¹ and implemented through the enactment of the Indian Self-Determination and Education Assistance Act (the "ISDEAA"), five years later.² In many respects the policy has been remarkably successful. Its achievements certainly compare favorably with prior federal Indian policies for humaneness of intention (extermination, allotment, assimilation, and termination), as well as for practical impact and durability (the pronouncement of the Supreme Court on tribal autonomy in *Worcester v. Georgia*³ in 1832 and its affirmation of tribal self-government in *Ex Parte Crow Dog*⁴ in 1883).

The General Accounting Office reports that approximately \$1 billion of Bureau of Indian Affairs ("BIA") programs (or 64 percent of the BIA budget in fiscal year 1997) and \$892 million of the health programs funded by the Indian Health Service (or 45 percent of the IHS program in fiscal year 1998) are administered by tribal governments, tribal consortia, or tribal agencies under the

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1. See Special Message to the Congress on Indian Affairs, PUB. PAPERS 564, 567 (July 8, 1970).

2. 25 U.S.C. §§ 450 *et seq.* (1975).

3. 31 U.S. (1 Pet.) 515 (1832); See also GRANT FORMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES 229, 294 (University of Oklahoma Press 1945) (The *Worcester* decision was followed a few years later by the deportation of most of the Cherokee people from their "nation").

4. 109 U.S. 556 (1883). After *Ex Parte Crow Dog*, Congress enacted a federal criminal law applicable to Indians in the "Indian country."

ISDEAA, in place of the federal government.⁵ The self-determination policy has been described “as the most successful Indian policy [ever] adopted by the United States.”⁶

The ISDEAA directed the Department of the Interior (“DOI”) and the Department of Health and Human Services (“DHHS”) to contract with tribes to operate programs for the benefit of their members.⁷ While the agencies could decline to contract, they could only do so based on three statutory criteria and by providing the tribal applicant with an “opportunity for appeal on the objections raised.”⁸ Contracts were to be in general conformity with federal procurement laws except that DOI and DHHS were granted the authority to waive inconsistent contracting laws and regulations.⁹ Other provisions included, but were not limited to the following: advance payments and the right to retain interest on advances; contract terms for up to three years; the right of tribes to retrocede contracts to the agencies; the use of federal facilities by federal contractors; and that funding should not be less than the federal agency had available to operate the program.¹⁰

Contracts could be rescinded and programs reassumed by the federal agencies, but only for “violation of the rights or endangerment of the health, safety or welfare of any person” or “gross negligence or mismanagement in the handling or use of funds”¹¹ The ISDEAA also provided that it was not to be interpreted “as (1) affecting, modifying, diminishing or otherwise impairing the sovereign immunity from suit enjoined by an Indian tribe; or (2) authorizing or requiring the termination of any existing trust responsibility with respect to the Indian people.”¹²

Fundamentally, the ISDEAA remains very much as it was when enacted originally in 1975. However, major overhauls occurred in 1988, 1994, and 2000.¹³ These changes focused primarily on strengthening the leverage of tribes to exercise self-determination rights. Important changes in the ISDEAA include the following:

- in 1988 the provision of “contract support” funding as an addition to program funds under ISDEAA contracts was put on a statutory basis by the enactment of section 106(a)(2)¹⁴;
- limitations were enacted in 1988 on the right of the federal agency to

5. See Indian Self Determination Act: Shortfalls in Indian Contract Support Costs Need to be Addressed, GAORCED 99-150 at 37 (June 1999)(hereinafter “GAO Report”).

6. Miccosukee Tribe of Indians of Florida, Chairman Billy Cypress, Prepared Statement Before the House Resource Committee (Aug. 3, 1999).

7. See 25 U.S.C. §§ 450f, 450g (1983).

8. *Id.* §§ 450f(b), 450g(b).

9. *Id.* § 450j(a).

10. *Id.* § 450j(b)-(e), (l).

11. *Id.* § 450m.

12. *Id.* § 450n.

13. Indian Self-determination and Education Assistance Act Amendments of 1989, Pub. L. No. 100-472, 102 Stat. 2285; ISDEAA Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250; ISDEAA Amendments of 2000, Pub. L. No. 106-260.

14. ISDEAA Amendments of 1988, Pub. L. No. 100-42, 102 Stat. 2285 (codified as amended at 25 U.S.C. § 450j-1(a)(2) (2000)).

reduce funding levels either in the current or future years¹⁵;

- the Federal Tort Claims Act was extended to suits against tribal contractors based on tort claims arising out of the performance of an ISDEAA contract for both medical malpractice (1987) and other tort claims (1990), the requirement to obtain liability insurance was eliminated and the DOI and DHHS were directed to provide for insurance coverage for all ISDEAA contractors¹⁶;

- two additional declination criteria were added in 1994:

- (1) if the funding level requested exceeded the amount available and (2) if the proposed contract activity was beyond the scope of the Act because the activity would be illegal¹⁷;

- tribal rights to appeal declination or other agency decisions affecting tribal rights under the contract or the statute either administratively or directly to federal court have been strengthened¹⁸;

- the requirement to comply with federal procurement laws (except to a limited extent in construction contracts) were eliminated in 1994 and a series of laws, regulations and executive orders were expressly waived¹⁹;

- special cost principles deviating in some ways from those approved by the office of Management and Budget (OMB) were included in the ISDEAA Amendments in 1994²⁰;

- the Secretaries were required in 1994 to develop regulations under the Act by negotiated rulemaking and a mandatory contract clause generally supportive of tribal self-determination were prescribed by law.²¹

In 1988 a model demonstration “tribal self-governance project” was enacted under which tribes were given greater authority to redesign programs funded by DOI and IHS and special provision was made for accessing funds from Area and Central offices.²² In 1994 a new title was added to make the self-governance project permanent with respect to DOI programs.²³ This year, a new Title V provided for a permanent self-governance program at IHS.²⁴

15. 25 U.S.C. § 450j(b) (2000).

16. ISDEAA Amendments of 1990, Pub. L. No. 101-644, 104 Stat. 466 (codified as amended at 25 U.S.C. § 450f (2000)); Pub. L. No. 100-202, 101 Stat. 1329 (1987); Pub. L. No. 101-512, § 314, 104 Stat. 1923 (1990).

17. ISDEAA Amendments of 1994, Pub. L. No. 108-413, 108 Stat. 4250 (codified as amended at 25 U.S.C. §§ 450f(a)(2)(D) & (E) (2000)).

18. 25 U.S.C. § 450m-1 (2000).

19. *Id.* § 450j(a).

20. *Id.* § 450j(j).

21. *Id.* §§ 450k, 450l.

22. *Id.* § 450f Note.

23. Tribal Self-governance Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4270 (codified as amended at 25 U.S.C. §§ 458aa-458hh (2000)). Curiously, in 1994 when the self-governance project was made permanent for DOI, many of the shortcomings of the old Title I contracting program were corrected by some of the amendments noted above and it became clear that in some respects tribes had more leverage under Title I than under the self-governance titles. As a result, the ISDEAA was amended in 1996 to allow any tribe entering into a self-governance agreement to elect to include any provision of Title I. 25 U.S.C. § 458(c). Thus, the distinction between Titles I, III, and IV became complex in the sense that these are not necessarily discrete programs with sharply distinguished requirements.

24. Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711 (2000).

Notwithstanding these repeated reaffirmations of the policy, many challenges remain. Many tribes have so far chosen not to take advantage of the opportunities for tribal self-government available under the ISDEAA. Deficiencies in program funding (as distinct from contract support) discourage tribes from taking over responsibility for federally funded Indian service programs.²⁵ As Assistant Secretary for Indian Affairs Kevin Gover has pointed out: "The problem is there is simply not enough money appropriated by Congress to provide the tribes with the resources they need to fix the problems in Indian country."²⁶

This Article focuses on a major unresolved issue that presently impairs the effectiveness of the self-determination policy. The ISDEAA, as amended in 1988, provides that tribes are to receive no less than the federal agency would have otherwise had to operate a program plus an additional increment to cover costs which the federal government does not incur, or which it covers from some source not under contract.²⁷ However, it has been held that the congressional directive is subject to available appropriations,²⁸ and Congress has not usually provided sufficient funds to meet this negotiated obligation.²⁹ This issue has continuously surfaced throughout the entire history of the policy, and led Congress in 1999 to impose a one-year moratorium on any new self-determination contracts. This Article reviews how this problem arose and suggests how it can be addressed in a manner which furthers, rather than hinders, the movement toward tribal self-government.

A. Background.

In 1987, the Senate Committee on Indian Affairs identified the inability of

25. See *A Study of Contract Support Costs in the Bureau of Indian Affairs and Recommendations for Reform, Report of the BIATribal Workgroup on Tribal Needs Assessment*, at Executive Summary 9 (June 1999) ("While tribes continued to contract and compact Bureau programs, the trend has not increased significantly in recent years, most of which are attributable to contract support shortfalls and limitations in direct program funds").

26. Statement of Assistant Secretary Kevin Gover to the National Congress of American Indians, at 5 (Oct. 7, 1999).

27. 25 U.S.C. § 450j-1(a)(2) provides:

There shall be added . . . 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, but which (A) normally are not carried on by the respective Secretary in his direct operation of the program; or (B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

28. See *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't.*, 194 F.3d 1374 (Fed. Cir. 1999).

29. See *The Tribal Contract Support Cost: Hearing on H.R. 4148 Before the House Comm. On Resources*, 106th Cong. (May 16, 2000) (testimony of W. Ron Allen, Vice President, National Congress of American Indians).

Chief among [the problems in implementing the ISDEAA], as long recognized by this Committee, has been the consistent failure of the BIA and IHS to fully fund the contract support costs required to carry out these federal programs. That failure has penalized Native American communities — the real and ultimate victims of the shortfall — by forcing reductions in tribal programs in order to cover the federal government's responsibilities.

many tribal contractors to obtain adequate reimbursement for the required administrative/overhead costs associated with operating federal programs under the ISDEAA as “the single most serious problem with implementation of the Indian self-determination policy”³⁰ The inability to recover these largely fixed costs (called “contract support costs” under the ISDEAA) has imposed a financial penalty on tribal contractors, forcing tribes to divert scarce program funds to cover the shortfalls, thereby reducing the level of services provided to tribal members. As noted in a 1999 report by the General Accounting Office:

Shortfalls in funding for contract support costs have adversely affected tribes in various ways, depending on the number and type of methods the tribes used to compensate for such shortfalls For example, in addition to cutting back on their indirect expenditures as much as possible, they have also had to dip into tribal resources and program resources to compensate for the shortfalls. As a result of such measures, the tribes’ administrative infrastructures (e.g., personnel, computer systems, and accounting systems) have deteriorated; opportunities to improve the tribes’ economic conditions have been lost; and program services have been diminished.³¹

The imposition of such a penalty on tribes who exercise their self-determination rights³² is inconsistent with Congress’ commitment 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 [reservations].”³³

As explained below, the importance of contract support to the policy of Indian self-determination remains recognized by the BIA and the IHS, as well as the Congress. Nevertheless, administrative and statutory barriers have prevented tribal contractors from fully recovering such costs. The three most significant barriers are: (1) inadequate appropriations, (2) the failure of other federal agencies to honor negotiated indirect cost rates, and (3) refusal of the BIA to pay direct contract support costs (i.e., costs which are not based on the negotiation of an indirect cost rate but qualify as “contract support” as defined in the ISDEAA).³⁴

30. S. REP. NO. 100-274, at 8 (1987), reprinted in 1987 U.S.C.A.N. 2620, 2627.

31. GAO Report, *supra* note 5, at 39.

32. The impact of such shortfalls on the Gila River Indian Community is illustrative:

We estimate our unfunded contract support need from fiscal year 1996 to the present at between \$9 million and \$11 million. As concluded by GAO, NCAI and others, we can affirm that these unfunded contract support costs further jeopardize our underfunded health care program. (By IHS statistics, our Community’s federal health program is funded at only 54% of need).

Gila River Indian Community Lieutenant Governor Richard P. Narcia, Prepared Testimony Before the House Resources Committee (May 16, 2000).

33. Tribal Self-Governance Amendments of 2000 (codified as amended at 25 U.S.C. § 450a(b) (2000)).

34. 25 U.S.C. § 450j-1(a)(2) (2000).

*B. Both the BIA and the IHS Have Recognized That Contract Support is Critical to the Successful Implementation of the Indian Self-Determination Policy.*³⁵

1. Early BIA Efforts to Address the Need for Contract Support.

In 1976 the Bureau began providing contractors with contract support funding on Indian Self-Determination Act contracts from a budget item entitled "Contract Support Funds" ("CSF"). The Bureau explained the basis on which it had decided to allocate to tribal contractors additional funds beyond the amount that the Secretary would have had at the local level to operate a contracted program in its "Procedural Guidelines on 25 CFR 271" issued in April 1977.³⁶ In Chapter 6 of the guidelines, the BIA stated that "contract support" funds would be provided to cover the *additional* administrative costs incurred as a result of tribal organizations contracting to operate Bureau programs. It made clear that these funds were provided "to prevent program deterioration, [and] not for program enhancement [or expansion]."³⁷

In the guidelines, the BIA also stipulated that normal contract support funds would be provided based on a negotiated indirect cost rate. In only certain special circumstances would such funds be provided based on a lump sum negotiation (small contracts where no indirect cost rate has been negotiated).³⁸ The BIA also stated that all allowable indirect costs could be paid from the contract support item in the BIA budget "[b]ecause of their 'administrative' nature . . ."³⁹

35. An earlier version of this section was included as Chapter 1 of the *Final Report of the National Congress of American Indians National Policy Work Group on Contract Support Costs* (July 1999), which the authors assisted in drafting (hereinafter "NCAI Report").

36. Procedural Guidelines on 25 C.F.R. § 271: Indian Self Determination and Education Assistance Act (April 1977).

37. *Id.* at 6-1.

38. *Id.* at 6-4. IHS Circular 2000-01 explains the difference between lump-sum and indirect cost negotiations. These descriptions are equally applicable to the BIA.

(i) *Awardees With Negotiated IDC Rates.* The amount of IDC expected to be incurred by awardees utilizing rates negotiated with the cognizant Federal agency, will be determined by applying the negotiated rate(s) to the appropriate direct cost base amount . . .

(ii) *Awardees Without Negotiated IDC Rates (Guidelines for Agency Negotiators).* A lump sum amount for "indirect types of costs" may be computed for awardees that do not have formally negotiated agreements with their cognizant Federal agency for reimbursement under an IDC rate. This annual lump sum amount may be calculated by negotiating a fixed amount for "indirect types of costs." Categories of costs most often considered "overhead" or "indirect type" are generally in the categories of Management and Administration, Facilities and Equipment, and General Services and Expenses.

IHS Circular 2000-01, § 5(A)(2)(c). *See also* OMB Circular No. A-87, Attachments A and E, 60 Fed. Reg. 26484, 26492, 26504-07 (1995); JAMES M. SIZEMORE, DETERMINING THE TRUE COST OF CONTINUING FEDERAL PROGRAMS FOR INDIAN TRIBES 14-15 (2d ed. 1997), RONALD MILLER, COST ACCOUNTING STANDARDS 38-41 (1985), and COST PRINCIPLES AND PROCEDURES FOR DEVELOPING COST ALLOCATION PLANS AND INDIRECT COST RATES FOR AGREEMENTS WITH THE FEDERAL GOVERNMENT - A GUIDE FOR STATE, LOCAL, AND INDIAN TRIBAL GOVERNMENTS, U.S. Department of Health and Human Services, ASMB-C-10 (1997) (concerning the negotiation of indirect costs).

39. Procedural Guidelines on 25 C.F.R. § 271: Indian Self-Determination and Education Act, at 6-4. In its annual budget requests to Congress the Bureau has further explained its position that the original statute required the allocation of contract support funds. For example, in the fiscal year 1986

In its fiscal year 1986 budget request the BIA responded to inquiries from the Congressional committees about increases in contract support costs of self-determination contracts by stating:

The principal function of contract support has been to pay tribes the incremental costs they incur as a result of entering into Public Law 93-638 contracts. Since the inception of tribal contracting there has been a steady yearly increase in the dollar volume and program scope of tribal contracting. In 1976 approximately 198 tribal contractors conducted 679 contracts with total value of \$68,390,300. In fiscal year 1984 some 400 tribal contractors entered into 1,400 separate contracts for a total of approximately \$245,000,000.⁴⁰

The concerns to which the BIA responded in its fiscal year 1986 budget request go back at least as far as 1980 when the Senate Appropriations Committee directed the BIA to work with the DOI Office of Inspector General to develop a system which would prevent shortfalls in the indirect costs it had agreed to pay to tribal self-determination contractors. The resulting study in 1981 concluded that shortfalls were due to the lack of contract support funds to cover actual costs, and that the problem was accentuated by the failure of federal agencies other than BIA and IHS to honor negotiated indirect cost rates and pay their share of indirect costs.⁴¹

No legislative proposals were sent to Congress to address the "shortfall" as a result of the 1981 BIA study. However, on July 13, 1983, the DOI Inspector General, after analyzing the administrative costs of eighty-one tribes over a five-year period, concluded that there were two major factors responsible for the forty-seven percent increase in the amount of negotiated indirect costs between 1979 and 1983: "First, Indian tribes have been trying to improve their administration and comply with Federal requirements. This costs more money. Second, administrative costs tend to be more fixed than variable."⁴²

Thus, the Inspector General did not find the increases to be unreasonable. Moreover, the Inspector General recognized that administrative costs are generally fixed, which means that a reduction in a program does not necessarily lead to a proportionate reduction in the required administrative costs.⁴³

While making no recommendations, the Inspector General predicted that:

Department of Interior Budget Justifications, the Bureau relied on the provisions of then section 106(h) which mandated that the amount of funds provided under self-determination contracts "shall not be less than the Bureau would have otherwise provided for his direct operation of the program." FY 1986 DOI Budget Justifications, at BIA-104. The Bureau thus interpreted this statutory requirement to mean that funding for services should not be reduced by requiring tribes to spend such funds for administrative activities that the agencies had not been required to perform or which they had funded from other sources.

40. F.Y. 1986 BIA Budget Justifications, at BIA-103.

41. *Report to the Senate Committee on Appropriations: Bureau of Indian Affairs Contract Support Delivery Process* 11-12, 16-17 (Feb. 1981).

42. *Trend Analysis Using Data Available from the Indirect Cost Negotiation Process*, DOI Inspector General (July 15, 1983).

43. *Id.*

"Indirect costs will continue to increase," and that "those tribes predominantly dependent on the Federal government will experience great difficulty unless some fundamental changes are made in the financing process."⁴⁴ The Inspector General predicted that "the more affluent tribes will be able to operate without difficulty by using their own resources for administration."⁴⁵ Thus the Inspector General recognized that the effect of under-funding negotiated indirect costs would be to impose a financial penalty on those tribes able to afford it for the exercise of their self-determination rights under the ISDEAA, while most tribes would be required to dip into program funds or do without essential management functions.⁴⁶

On November 3, 1983, the DOI Inspector General followed up on this report with a letter to the Office of Management and Budget in which he reported the BIA decision to "grandfather" indirect cost dollars into a tribe's recurring base so that after the first year of a contract, indirect costs would be paid off the top of the total contract amount.⁴⁷ While the Inspector General expected that this approach would be useful in encouraging tribes to develop "more efficient administrative systems" (i.e., less costly administration) he also stated: "The heavy and inconsistent requirements of the federal bureaucracy are jeopardizing the ability of Indian Tribes to handle federal programs, particularly those tribes with limited resources of their own."⁴⁸

The Inspector General requested OMB's assistance to consider the following options: (1) provide generally for lump sum rather than indirect cost rate negotiations; (2) lift administrative restrictions to permit other federal agencies to fund negotiated indirect costs in full; and most significantly, (3) "a legislative remedy vesting the Secretary with the authority to promulgate appropriate regulations . . . to eliminate inconsistencies."⁴⁹ While the problems identified by the Inspector General in the 1983 report and letter remain, none of the three options proposed in the letter have been implemented.

Beginning in fiscal year 1985, the Bureau adopted a policy of "grandfathering" contract support. Under this policy, contractors would receive a one-time increment of funding in the first year of a self-determination contract. This one-time increment would be included in the tribe's recurring base, and the tribal contractor would be expected to take indirect costs off the top of the recurring base in later years. The Bureau explained this new approach in a letter to Tribal Leaders stating that it would "allow tribal contractors to receive total funding from program sources to meet both the direct and indirect costs of their contracts."⁵⁰ As a result of this mandate, the BIA received \$37,032,000 in contract

44. *Id.*

45. *Id.*

46. *Id.*

47. Letter from Richard Mulberry, DOI Inspector General, to Deputy Director, OMB, (Nov. 3, 1983).

48. *Id.*

49. *Id.*

50. F.Y. 1985 Budget Justifications, at BIA 103-107; "Dear Tribal Leader" Letter from Assistant Secretary, Indian Affairs, to Tribal Leaders (Jan. 13, 1984); Memorandum from Acting Deputy

support for ongoing contracts (to be merged with program funds in the tribal recurring base) and \$1,666,000 that would be available to provide contract support funds for new contracts in fiscal year 1984 and 1985.⁵¹

For fiscal year 1985, the Bureau also addressed two recommendations of the American Indian Law Center. The first of the recommendations was that contract support should be used to pay the BIA's overhead costs to tribal contractors (ignoring activities which a contractor must perform, and the federal agency is not required to perform). The second recommendation was that the overall BIA overhead rate of 15.5 % should be the rate used for each new contractor.⁵²

The Bureau eventually rejected this approach, explaining: "To use a single uniform rate for all contracts simply cannot take into consideration a number of variables such as programmatic differences, large and small tribe factors, geographic locations and a number of distinguishing elements which vary from contract to contract."⁵³ The Bureau decided to base its request for new contract support funds on the 15.5% rate, but to distribute the funds based on indirect cost negotiations so as to reflect the specific reasonable need of each contractor. Under this new system, each contractor would be required to absorb increases based on program expansions or other changes, resulting in increases in negotiated indirect costs for ongoing contracts after the first year of the contract.

The "grandfathering" innovation implemented by the BIA in fiscal year 1985 did not resolve the contract support shortfall problem. There were many reasons for this. Conceptually, the approach was flawed as shown by BIA's statement that "grandfathering" would allow tribes to receive "total funding from program sources to meet both direct and indirect costs of their contracts."⁵⁴ "Grandfathering" would simply authorize tribes to take increases in their negotiated indirect costs from program funds. Tribes recognized a considerable risk in the new approach because increases in negotiated indirect costs in future years occurred for reasons beyond tribal control. Additionally, tribes discovered that the amount actually "grandfathered" was \$5,000,000 less than the full amount required to fund negotiated indirect costs for the first year.⁵⁵ In its request for fiscal year 1987, BIA admitted that it had underestimated the amount of new contracts in fiscal year 1986 by \$10,000,000.⁵⁶ Based on the "grandfathering" approach, the BIA announced that "no additional contract support funds will be requested for such [new fiscal year 1985] contracts."⁵⁷

The "grandfathering" approach was abandoned for fiscal year 1988, and the Bureau proposed to fund every contractor at a "flat rate" of fifteen percent.

Assistant Secretary, Indian Affairs (Operations) to Area Directors (May 21, 1984).

51. F.Y. 1986 BIA Budget Justifications, at BIA-103.

52. *Development of P.L. 93-638 106(h) Distribution Formulas*, American Indian Law Center (Sept. 1983).

53. Letter from Assistant Secretary of Indian Affairs to Tribal Leaders, at 2 (Jan. 13, 1984).

54. F.Y. 1986 BIA Budget Justifications, at BIA-103.

55. F.Y. 1987 BIA Budget Justifications, at BIA-95.

56. *Id.*

57. *Id.*

However, this flat rate was administered without regard to the varying circumstances that caused different contractors to have significantly differing indirect cost rates.⁵⁸ When it was urged to the Assistant Secretary of Indian Affairs that a small Indian-controlled school located in an extremely remote location (Black Mesa) could not possibly operate on a fifteen percent administrative cost rate, he responded: "Well, your client shouldn't be in business."⁵⁹ The flat rate approach was struck down by the Interior Board of Contract appeals,⁶⁰ and the BIA abandoned it even before it was implemented.⁶¹

Congress heard objections to the imposition of a flat rate and other deficiencies in the allocation of contract support funding during hearings held in 1986 on House bill, H.R. 4174, amending the ISDEAA. Specifically, these included the failure to honor negotiated indirect cost rates, under-funding of the amounts required to fund BIA negotiated overhead costs, and the problem presented by "theoretical over-recovery."⁶² The bill reported by the House Committee on Interior and Insular Affairs also addressed theoretical over-recovery and required federal agencies other than BIA and IHS to honor negotiated overhead agreements with tribes. The bill also rejected the flat rate approach by requiring annual negotiations of the amount of contract support costs to be added to BIA and IHS program funding. Further, the bill made clear that funding level issues were subject to tribal appeal rights, which the agencies had denied.

In addition to the studies and approaches noted above, the Assistant Secretary for Indian Affairs and the DOI Assistant Inspector General for Audit issued a significant report on tribal indirect costs and contract support on September 30, 1987, which was prompted by an initiative by the President's Council on Integrity and Efficiency. The Assistant Inspector General concluded that tribes had been underfunded in fiscal year 1985 in the amount of \$14 million and made specific recommendations to address the problem. These included:

- (1) removing the restrictions preventing non-BIA and non-IHS agencies from fully reimbursing negotiated indirect costs;
- (2) authorizing the BIA to negotiate lump sum agreements to fund all indirect costs on federal grants and contracts; and
- (3) budgeting and providing full funding to BIA for negotiated lump sum agreements.⁶³

58. F.Y. 1988 BIA Budget Justifications, at BIA-27 and BIA-96.

59. Correspondence and meeting with Ross Swimmer, Assistant Secretary, Indian Affairs (October 24, 1986) (on file with authors).

60. *Appeal of Alamo Navajo Sch. Bd.*, 25 IBCA 114 (Feb. 24, 1988).

61. F.Y. 1989 BIA Budget Justifications, at BIA-104.

62. *Hearing on H.R. 4174 Before the House Comm. on Interior and Insular Affairs*, 99th Cong. (1986). The OIG had been assuming that tribes collected the full amount of indirect costs from federal agencies, even when these agencies refused to honor the rates, thus creating a "theoretical" or, more properly, a fictitious over-recovery which tribes were required to pay back.

63. *Audit of Methods for Reimbursing Indian Organizations for Indirect Costs Incurred*, President's Council on Integrity and Efficiency (1987). These 1987 recommendations address the issues raised in *Ramah Navajo Chapter v. Babbitt*, 112 F.3d 1455 (10th Cir. 1997), a class action in which the BIA was

The Assistant Inspector General identified the reason for the contract support shortfall to be the fact that “the budget request submitted by the Bureau of Indian Affairs to Congress did not include sufficient funds to cover the anticipated indirect costs.”⁶⁴ It should be noted that the BIA supported the idea of eliminating restrictions on other agencies paying their fair share of indirect costs, but said that the OMB should take the lead in reaching this result, not the BIA.

2. Early IHS Efforts.

While the ISDEAA applies equally to BIA and IHS, the two agencies have interpreted the requirements to pay “contract support” and “indirect costs” differently under both the original legislation and the subsequent amendments (discussed below). Initially, the IHS did not establish a budget line item for “contract support.” Instead, the IHS allocated funds on a recurring basis to Area Offices to address the additional funding needs of contracting tribes. In some instances, tribal organizations were required to institute litigation to assure that such additional funding was provided.⁶⁵

In its report on the fiscal year 1984 appropriation bill, the House Appropriations Committee stated:

The Committee is concerned about other difficulties encountered by tribal contractors, particularly with regard to the provision of indirect costs. The Committee requests IHS to review its procedures to determine if changes are needed in those procedures. A particular issue that should be addressed is whether a specific line item should be established to provide indirect costs for new tribal contracts. The Committee understands IHS currently has no mechanism for providing these costs, with the result that newly contracted programs must be reduced if required indirect or support costs are to be provided.⁶⁶

While the IHS filed a report with Congress in response to its contract support concerns, it did not separately identify contract support as an item in its fiscal year 1985 budget request. Although it did separately identify tribal management funds that tribes had used to prepare for contracting, the budget request simply confirmed that Public Law No. 93-638 was yielding gratifying results in Indian self-determination and described the usefulness of tribal management funding in assisting tribes to contract. Then it proposed the elimination of the tribal management fund for fiscal year 1985 in an effort to focus IHS resources on key medical care services.⁶⁷

However, in its fiscal year 1986 budget request IHS stated its policy to pay indirect costs “based on the indirect cost rates established by the cognizant agency, not by IHS” and requested \$5,000,000 for the administrative costs of new

held liable for the payment of such other-agency indirect costs.

64. *Id.*

65. See *Tanana Chiefs Conf. Inc., v. Heckler*, No. 84-1756, 11 ILR 3093 (D.D.C. 1984) (mem.).

66. H.R. REP. NO. 98-253, at 96 (1983).

67. F.Y. 1985 IHS Budget Justifications, at IHS-26.

self-determination contracts.⁶⁸ In subsequent years, IHS has generally identified a separate amount to pay "contract support" costs for new contracts.

C. Congressional Recognition of the Need for Contract Support Funding in 1988 and 1994.

Enactment of the 1988 Amendments to the ISDA. The Senate Indian Affairs Committee undertook a major review of the contract support issue following an oversight hearing held on April 22, 1987. During the hearing, numerous tribal representatives pointed out the adverse impact on tribal self-determination of the failure to fund the full negotiated indirect costs of self-determination contracts. In Senate Report No. 100-274, the Committee laid out in detail its conclusions based on this review. As already noted, it described the failure of the BIA and the IHS to provide funding for tribal indirect costs as "perhaps the most serious problem with the implementation of the Indian self-determination policy."⁶⁹ It objected to tribes being forced to subsidize the operation of federal programs in order to exercise their rights under the ISDEAA. The Committee had requested the BIA to produce any evidence of the improper manipulation of indirect costs described in the 1983 AILC study, but the Bureau was "unable to substantiate these charges."⁷⁰ The DOI Inspector General had ascribed the increase in indirect costs to the entirely appropriate efforts of tribes "to improve their administration and comply with federal requirements."⁷¹

The Senate determined not to employ the term "contract support," previously used in BIA guidelines and budget requests, but instead to require the BIA and the IHS "to comply with the requirement of the Act that indirect costs be added to the amount available for direct program costs." The Senate Report was reluctant to use the term "contract support" because it had not been operationally defined; whereas "indirect costs" was a term well understood and defined in OMB guidelines governing the negotiations of indirect cost agreements. While the Senate Committee clearly intended to address the "shortfall" by mandating full funding of the costs termed "contract support costs", its adoption of the term "indirect costs" to calculate the amount of funding which should be added to program costs for self-determination contracts would have left several issues unresolved.⁷²

In accordance with procedures established by OMB, the Senate bill defined "indirect costs" as costs which are incurred for a common or joint purpose or not readily assignable to specific contract objectives, and it mandated that these costs, together with direct costs, should be fully funded.⁷³ The system incorporated into the Senate bill was consistent with BIA's initial determination in the 1977

68. F.Y. 1986 IHS Budget Justifications, at IHS-37.

69. S. REP. NO. 100-274, at 8 (1987).

70. *Id.* at 10.

71. *Id.* at 11.

72. *See id.* at 8-13.

73. S. REP. NO. 100-274, at 33 (1987).

guidelines that all indirect costs would be funded from contract support funds because they were administrative in nature. However, the OMB system for allocating direct and indirect costs had not been developed for establishing a contractual right to additional funding; it was developed for the purpose of allocating a fixed amount of funding awarded to a contractor or grantee between direct costs chargeable to the particular funding source and indirect costs to be paid from a pool to which multiple funding sources contribute.⁷⁴

Theoretically, this could mean that a cost not considered “contract support” could be funded as an indirect cost and paid from contract support funds, although the Committee’s review had concluded that this kind of “manipulation” had not taken place. In addition, the Senate bill would have barred contractors from receiving additional funds for items of cost which were clearly within the definition of “contract support” (costs for activities which the federal agency did not perform or for which funding was provided from another source) but which did not meet the definition of “indirect costs” under the OMB guidelines.

Since the House bill (H.R. 1223) to amend the ISDEAA, like its predecessor, H.R. 4174, included a statutory definition of “contract support costs” and required that such costs be added to the amount the Secretary would otherwise have provided for his direct operation of the program, it was necessary for the two different approaches to be reconciled in Public Law 100-474, the 1988 amendments to the ISDEAA. The House definition of “contract support costs” (which reflected the definition of contract support in the principles laid down in Chapter 6 of the 1977 BIA Procedural Guidelines) was included in the final language of the amendment in section 106(a)(2) which requires that “contract support costs” shall be added to the Secretarial funding level stated in section 106(a)(2). As amended in 1988, however, the Act incorporated the Senate bill’s definitions of “direct costs” and “indirect costs” and included a directive to add “indirect costs” to the direct program costs, paralleling the directive to add “contract support.” In 1994 the specific “indirect costs” directive was eliminated.⁷⁵

Thus the Act, as amended in 1988, barred the agencies from adopting a flat rate for indirect costs, perpetuated the original BIA policy of using indirect cost negotiations as the method for establishing the additional funding which a tribal contractor should receive over and above the program funds being contracted, and raised an issue as to the funding of an item of cost qualifying as “contract support,” but not meeting the definition of “indirect costs.” Most significantly, however, it directed the Secretary to add “contract support” and “indirect costs” to the Secretarial funding level of any contract program.

1. The 1994 Amendments.

Congress further amended the ISDEAA in 1994 to provide additional support for the tribal effort to obtain full funding of contract support. An

74. See *supra* note 38.

75. See *id.* §§ 450j-1(a)(2), 450b(f), 450b(g), 450j-1(c)(2), and 450j-1 (2000).

additional declination criterion was added to section 102 of the Act to make clear that a disagreement over the amount of funds to be awarded was subject to the same declination appeal and hearing rights as any other ground advanced by the federal agency for declining to contract (overruling an IHS view that a contract proposal is not being declined if the agency is willing to approve it at a lesser funding level than the tribe proposed).⁷⁶ A further amendment clarified the right of a tribe to go forward with performance of a contract while taking a declination appeal on discrete issues as to which agreement had not been reached. The burden of proof in declination appeals was placed on the federal agency and final decisions rendered by a Department official higher than the BIA, IHS, or by an administrative judge, thus assuring meaningful appeals.

In addition, the funding level provisions of section 106 were modified to provide a statutory basis for the recovery of contract support funding as "direct costs," (as long recommended by the DOI Inspector General) and the rights of Indian tribes to negotiate contract support on an annual basis (thus barring a mandatory "grandfathering" approach) was confirmed by amendment. A provision was added which required that start-up costs on a one time basis must be included in the negotiated amount of contract support. Finally, a provision was also added giving the federal district courts the authority to provide injunctive relief to reverse a declination finding and to compel the federal agencies to award and fund an approved self-determination contract. All contract disputes under self-determination contracts would go to the Interior Board of Contract Appeals, including appeals from IHS decisions.⁷⁷

These amendments enacted by the Congress in 1988 and 1994 strengthened significantly the tribal ability to challenge the underfunding of negotiated contract support costs. However, the continued growth in self-determination contracting and the failure of the Congress to appropriate sufficient funds to cover anticipated contract support costs led to a continuation of the contract support controversy.

D. IHS and BIA Policy After the "Contract Support" Amendments.

Following the enactment of the 1988 amendments to the ISDEAA, IHS developed new policy guidelines governing the award of contract support funds, which were issued as Indian Self-Determination Memorandum No. 92-2 ("ISDM 92-2") on February 27, 1992. The IHS guidelines followed BIA in providing for the use of contract support appropriations to pay for all negotiated indirect costs. IHS distributed the amount it had available to meet each contractor's ongoing indirect cost requirements based on an annually negotiated rate and established an Indian Self-Determination Fund ("ISD Fund") which would be used to provide contract support funding in the first year of a tribal contract. However, IHS also authorized the use of contract support funds to pay "direct costs" which qualified

76. See, e.g., *Appeal of the Southeast Alaska Regional Health Corporation*, IHS Contract Proposal Declaration Appeals Board, May 15, 1985.

77. 25 U.S.C. §§ 450j-1(a)(3)(A), 450j-1(a)(3)(B), 450j-1(a)(5), and 450m-1 (2000).

under the contract support definition in section 106(a)(2). IHS officials recognized that the law now required the addition of “contract support” whether or not the costs qualified as indirect costs under federal procedures governing the negotiation of indirect cost rates.

The IHS also departed from BIA policy by not distributing all contract support funding pro rata, but as the shortfall increased year by year, establishing the principle that requests for funding for new or expanded contracts would be approved based on the earliest receipt date. In the subsequent revision, which produced IHS Circular 96-04, the IHS established more formal procedures for contract support funding on a first come first serve basis, including a list of unfunded contract support requests, which became known as the “queue” list.

In contrast, the BIA did not develop a formal policy on contract support. Instead, the BIA continued to issue annual guidance to govern the distribution of contract support funds appropriated by Congress. Under annual guidance, the BIA practice has been to distribute all contract support funds on a pro-rata basis, except funds for new and expanded contracts, which (like the IHS practice under ISDM 92-2 and IHS Circular 96-04) are paid from an ISD Fund on a first-come, first-serve basis. As discussed below, the BIA has also refused to pay direct contract support, despite the clear language of the 1994 Amendments.⁷⁸

In another aborted move to reform the contract support mechanism, the BIA twice announced a plan to divest the Inspector General of the responsibility for negotiating indirect costs for ISDEAA contracts and transfer that responsibility to the Office of the Secretary.⁷⁹ The BIA indicated that the Office of the Secretary would employ “reasonableness” as a criterion in establishing such rates. It was not explained what expertise existed in the Office of the Secretary to negotiate indirect costs. This plan was never implemented.⁸⁰

E. Barriers to Recovery of Contract Support Costs.

1. Insufficient Appropriations.

Insufficient contract support funding has been a reality for tribal contractors since the ISDEAA was enacted in 1975. However, the shortfalls in contract support funding became particularly acute in the 1990s, due primarily to the failure of Congress and the Administration to fund contract support associated with the increase in contracting that was the intended result of the 1988 and 1994 amendments.⁸¹

Indeed, what ensued appeared to constitute a duel between the authorizing committees and the appropriations committees over this issue. For fiscal year 1994 the Congress earmarked a specific sum for BIA contract support

78. 65 Fed. Reg. 10,100 (Feb. 25, 2000).

79. F.Y. 1989 BIA Budget Justifications, at BIA-81; F.Y. 1990 BIA Budget Justifications, at BIA-84.

80. F.Y. 1991 BIA Budget Justifications, at BIA-89.

81. See GAO Report, *supra* note 5, at 25-26.

(\$91,223,000) and established a cap.⁸² Previously the BIA had been able to reprogram other unused funds (which would have been returned to the Treasury if not expended) to make up for shortfalls in the contract support budget term.⁸³

The shortfall for BIA programs increased dramatically from nine percent in fiscal year 1994 to twenty-three percent in fiscal year 1997 (a shortfall of \$26.5 million).⁸⁴ Similarly, contract support shortfalls for IHS programs were relatively modest before fiscal year 1995. However, beginning in fiscal year 1996 "rapid growth in self-determination contracting activities, coupled with static appropriations for the IHS's Indian Self-Determination Fund and no increases for inflation, led to sharp increases in contract support shortfalls."⁸⁵ By fiscal year 1997, the backlog of requests for contract support funding for new and expanded contracts from the IHS' ISD Fund had reached over \$35 million,⁸⁶ with a shortfall of \$15 million for ongoing contracts (not including inflation and other mandatory increases).⁸⁷

The Administration attempted to address these dramatic shortfalls in its budget request for fiscal year 1997. It requested an increase of \$46.1 million in contract support funding for IHS programs (\$12 million for the ISD Fund, \$1.5 million for inflationary increases, and \$32.5 million for ongoing shortfall)⁸⁸ and \$19.8 million for BIA programs.⁸⁹ While these increases would have reduced the contract support shortfalls for IHS and BIA programs, Congress refused to appropriate the amounts requested. Instead, Congress appropriated \$7.5 million for the IHS' ISD Fund and \$5 million for the BIA's ISD Fund, but nothing for the shortfall for ongoing contracts.⁹⁰

Congress' unwillingness to grant the increases requested by the Administration appeared to be, at least partially, the result of concern that the increases were due to higher indirect cost rates (presumably due to contractor inefficiencies) and not to greater legitimate need. As stated in the House Appropriations Committee Report for fiscal year 1997:

The Committee again expects IHS to work with the tribes, the BIA and the Inspector General and the Department of the Interior to contain the cost escalation in contract support costs. In today's constrained budget climate the contract support cost activity must receive its fair share of administrative streamlining and procurement reform funding reductions as well as lower inflation allowances

82. Pub. L. No. 103-138, 107 Stat. 1391 (1993).

83. H.R. REP. NO. 102-505, at 16 (1996).

84. National Congress of American Indians: National Policy Work Group on Contract Support Costs, at 63 (July 1999) (hereinafter "NCAI Report").

85. *Id.*

86. *Report to Congress On Contract Support Cost Funding in Indian Self-Determination Contracts and Compacts*, at 4-5 (IHS May 1997).

87. *Id.* at 6-7.

88. F.Y. 1997 IHS Budget Justifications, at IHS-120.

89. F.Y. 1997 BIA Budget Justifications, at BIA-48.

90. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009-192; 3212-13 (1997).

provided for all other programs within IHS.⁹¹

To respond to this directive, the IHS convened its Contract Support Cost Workgroup (“CSCWG”) in late 1996 to study the reasons for the escalation in the need for contract support funding. In May 1997, the IHS submitted the report of the CSCWG to Congress. According to the report, indirect cost rates had been relatively stable.⁹² The main reason for the increasing need for contract support funding was more contracting by tribes:

The directive from the Congress to the IHS suggests Congress believes that the reason for the rapid growth in the need for CSC has been from increases in the negotiated IDC rates of the tribes (the contractors), and the tribal IDC rates increase in response to increases in appropriations of contract support funding. This is not the case. *More than any other factor, this rapid growth in appropriations and unmet need in CSC is the result of the tribes’ contracting additional PSFAs under P.L. 93-638.*

[There has been] . . . a modest rate of increase in CSC funding compared to the rate of increase in IHS PSFAs transferred to tribes through self-determination contracts and self-governance compacts. Implementation of the recent amendments to the ISDA facilitated the contracting process and clarified the right of tribes to assume PSFAs carried out at IHS Headquarters and Area Offices. Since 1993, the number of assumptions of IHS PFSA and the amount of funding transferred through contracts and compacts has increased at an accelerated rate.⁹³

While tribal contractors might have thought this report would lead to significantly more funding to address the huge shortfalls,⁹⁴ the response by the Administration and Congress was disappointing. The Administration reversed course from the previous year and only requested modest increases for fiscal year 1998 - \$12 million for the IHS’ ISD Fund (but no funds for ongoing shortfall)⁹⁵ and \$15 million for BIA contracts (\$5 million for ISD Fund and \$10 million for ongoing shortfall).⁹⁶

Congress also refused to address the mounting shortfalls. For IHS programs, Congress only funded \$7.5 million of the Administration’s request for the ISD Fund.⁹⁷ For BIA programs Congress provided the amount requested for BIA

91. H.R. REP. NO. 104-173, at 91 (1996) (The “constrained budget environment” cited by the Committee likely referred the more stringent appropriation limits then in place). *See, e.g.*, Balanced Budget Act of 1997, Pub. L. No. 105-33 (1997) (Thus, increased appropriations for contract support generally had to come at the expense of the funding for another program subject to the jurisdiction of the Interior Appropriations Subcommittees).

92. In the course of its work, the CSWG discovered a GAO report that the average indirect cost rate average for 118 universities receiving grants for scientific research was 50.5% in 1995, far above the average rate for ISDEAA contracts with IHS. *U.S. General Accounting Office, University Research: Effect of Indirect Costs Revisions and Options for Future Changes*, GAORCED 95-74, at 3 (1995).

93. *Report to Congress On Contract Support Cost Funding in Indian Self-Determination Contracts and Compacts*, at 4 (IHS May 1997) (emphasis in original).

94. *See* GAO Report, *supra* note 5, at 25 (By fiscal year 1998, the contract support shortfalls had reached crisis proportions - \$70 million for IHS and \$25 million for BIA).

95. F.Y. 1998 IHS Budget Justifications, at IHS-115-16.

96. F.Y. 1998 BIA Budget Justifications, at BIA-49.

97. Department of the Interior and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-

programs.⁹⁸ However, this still left a shortfall of nearly twenty percent.

By early 1999, the projected IHS shortfall had increased dramatically. According to a report to Congress by the NCAI, the shortfall for ongoing IHS contracts was \$27 million and \$59.9 million for new and expanded contracts.⁹⁹ The shortfall for ongoing BIA contracts was still projected at nearly twenty percent (about \$24 million).¹⁰⁰

With contract support shortfalls so enormous (especially for IHS programs and at least in comparison with previous years), the entire policy of Indian Self-Determination was at risk. Nevertheless, the Administration requested *no* increase for contract support for IHS programs in its fiscal year 1999 budget request.¹⁰¹ The failure to request any funds¹⁰² was especially disturbing since the budget request expressly noted that the increased need for contract support was due to more contracting and not to excessively high indirect cost rates:

Amounts available have been inadequate to meet the demand of [sic] which has resulted from the additional contracting related to the passage of the 1994 ISDA amendments

In 1997, the Congress directed the IHS to "work with Tribes, the Bureau of Indian Affairs and the Inspector General at the Department of the Interior to contain the escalation in contract support costs." In response to this directive, the IHS developed a "Report to Congress on Contract Support Cost Funding in Indian Self-Determination Contracts and Compacts." The preliminary findings of the report, based on analysis of tribal indirect cost rates, indicated that rates have remained relatively stable and have not unreasonably escalated. The report further indicated that the continued increase in contract support cost need is due primarily to the increased assumption by tribes of new programs, services, functions and activities from the IHS. The Office of the Inspector General within the Department of Interior reached a similar conclusion as a result of an analysis it conducted of a sample of tribes over an eight-year period.¹⁰³

Against this bleak backdrop, the National Congress of American Indians ("NCAI") mounted a greatly intensified effort during the fiscal year 1999 budget process to focus Administration and Congressional attention on the crisis facing Indian Tribal Self-Determination as a result of the worsening contract support shortfalls. This effort met with mixed results.

First, for fiscal year 1999, Congress appropriated an unprecedented increase in contract support funding for IHS programs of \$35 million.¹⁰⁴ While this was a

83, 111 Stat. 1543.

98. Pub. L. No. 105-83.

99. NCAI Report, *supra* note 84, at 5.

100. *Id.* at 4.

101. See F.Y. 1999 IHS Budget Justifications, at IHS-118.

102. The Administration did request a \$9 million increase for BIA contract support (\$5 million for the ISD Fund and \$4 million for shortfall). See F.Y. 1999 BIA Budget Justifications, at BIA-11.

103. F.Y. 1999 IHS Budget Justifications, at IHS-119.

104. Senator Ted Stevens, Chairman of the Senate Appropriations Committee, provided critical support for this increase in a letter to Senator Slade Gorton, Chairman of the Senate Interior Appropriations Subcommittee. He urged that "No pro rata distribution of contract support costs for

significant victory, the amount provided was still less than the total shortfall which was estimated at nearly \$93.4 million.¹⁰⁵ Moreover, Congress only increased contract support funding for BIA programs by \$4 million.¹⁰⁶

At the same time, Congress imposed a high price for these increases. Most significantly, Congress took the unprecedented step of imposing a moratorium for fiscal year 1999 on new contracting and compacting of both IHS and BIA programs. For the first time in twenty-five years, the policy of Indian tribal self-determination was brought to a halt.¹⁰⁷

Further, report language was added that urged the IHS to change its system for distributing contract support to correct perceived "inequities." According to the Conference Report:

The conference agreement does not include statutory language mandating a pro rata distribution of contract support costs across all Service self-determination contracts and self-governance compacts. This language was included in both the House and Senate bills but has been dropped because of concerns expressed by tribal organizations and many individual tribes. The Committees remain convinced that the current distribution methodology employed by the Service for contract support costs is inequitable and fiscally unsound. The Committees' proposal for a pro-rata distribution, in combination with a one-year moratorium on new contracts and compacts and additional funding for existing contracts and compacts, would have provided a permanent solution to the problem.

The Committees have added more than \$35 million to the Administration's budget request to address the inequity in the distribution of contract support cost funding in fiscal year 1999. The Committees direct the Service, in cooperation with the tribes, to remedy this inequity in the fiscal year 2000 budget request. *The remedy cannot be a large infusion of additional funding for contract support costs at the expense of either critical health programs or critical construction needs of the Service.* Further, the Committees note that the one-year moratorium on new contracts and compacts cannot be extended indefinitely. The Committees believe strongly that an acceptable permanent solution to the contract support cost distribution inequity must be a party of the fiscal year 2000 budget request from the Administration.¹⁰⁸

This language was the result of concern by some in Congress that the IHS system was unfair because IHS awarded contract support funds for new and expanded contracts based on the date of request. Thus, some contractors were receiving all or most of their contract support requirements (such as those whose

Indian Health programs which would take funds away from existing programs" due to the severe impact on existing health programs which a redistribution of contract support would have. He also touched on a key theme in the history of contract support: "I believe it is important to maintain good relations with the authorizers in this area." See Letter from Senator Ted Stevens to Senator Slade Gorton (Nov. 8, 1998).

105. *Indian Health Service Contract Support Cost Data Presentation to House Subcommittee on Interior Appropriations*, at 2 (Jan. 22, 1999).

106. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

107. See *id.*

108. H.R. REP. NO. 105-825, at 1233-34 (1999) (emphasis added).

queue requests had already been paid) while others received little or no contract support funding (particularly new contractors that had not yet reached the top of the queue list).

The Procrustean¹⁰⁹ solution to “solve” this problem noted in the Conference Report was to distribute all contract support funding on a pro-rata basis, as is done by the BIA for its ongoing contracts.¹¹⁰ However, this proposal was uniformly opposed by tribal leaders because it would have been very damaging to many existing programs, some of which would have lost nearly twenty percent of their contract support funding under a pro-rata allocation. It was also seen by many tribal leaders as fundamentally unfair for the United States to pay its contract support obligation to one group of contractors by taking funds from another group of contractors, many of whom were also underfunded.¹¹¹

While the effort to impose a pro-rata distribution was defeated, the IHS decided to address the concern about “inequity” by distributing the \$35 million increase for fiscal year 1999 in a new manner that was inconsistent with the queue system under its existing policy.¹¹² Instead of giving priority by date of request to those tribal contractors that had been waiting on the queue list for years, the IHS distributed the \$35 million based on the overall shortfall (queue request and ongoing) of all tribal contractors.¹¹³ Based on the percentage of shortfall of each tribal contractor, the funds were distributed so as to bring the floor level of funding to the highest possible level. As a result of this distribution, all tribal contractors were funded at no less than eighty percent of need.¹¹⁴ However, some contractors that had reached the top of the queue list did not receive any additional funding since their *overall* funding level was above the floor percentage, even when IHS had contractually obligated itself to pay specific amounts on the queue when funds became available.

109. Procrustes was a figure in ancient Greece who invented the Procrustean bed to establish equality by decapitating tall people and stretching short people. Theseus, founder of Athens, slew him by the same method. 1 PLUTARCH, *THE LIVES OF NOBLE GRECIANS AND ROMANS*, at 6 (Modern Library 1992); *THE OXFORD ENGLISH DICTIONARY*, VIII, 1414 (1933).

110. Interestingly, the BIA also uses the queue system for new and expanded contracts. However, the amount of funding provided for the BIA's ISD Fund has generally been sufficient to pay all pending requests, so a backlog of requests has never developed.

111. See Statement of Phillip Martin, Chief, Mississippi Band of Choctaw Indians on H.R. 4148 before the House Resources Committee, 2 (May 16, 2000). As stated by Chief Martin:

We are aware that the self-determination and self-governance efforts of many tribes have been undermined by the failure of both BIA and IHS to fully fund negotiated contract support costs. We have never seen the sense of IHS negotiating the “reasonable amount” of these costs (as section 106(a)(2) requires) and then paying some lesser percentage of that amount to a tribe. We appreciate the widespread support provided by tribes across the country which have opposed efforts to transfer contract support funding from some tribes to other tribes in order to meet the obligation of the United States under the ISDEAA to fund these costs in full.

Id.

112. See IHS Circular 2000-01, *supra* note 38. (In fact, IHS Circular 96-04 remained in effect throughout FY 1999 and was not superceded by IHS Circular 2000-01 until January 20, 2000).

113. See Letter from Dr. Michael Trujillo, IHS Assistant Surgeon General, to Tribal Leader (Oct. 8, 1999) (hereinafter Trujillo letter).

114. F.Y. 2001 IHS Budget Justifications, at IHS-127.

The distribution method utilized by the IHS did accomplish the goal of eliminating the vast differences in funding levels between contractors. However, the total shortfalls were still at crisis levels. As Congress was considering the fiscal year 2000 appropriation bills three significant reports on contract support were completed. The first report, by the General Accounting Office (“GAO”), certified again that the need for more contract support was due to more contracting and not higher indirect cost rates. According to the GAO:

Over the past decade, increases in indirect costs have been responsible for the majority of the increase in funding for contract support costs. The need for indirect cost funding has increased due to increases in the dollar amounts contracted from BIA and IHS coupled with increases in tribes’ indirect cost pools. Across all the indirect cost rates negotiated by [the Department of] Interior’s Office of Inspector General, the aggregate indirect cost rate has remained relatively stable over the past 10 years at just under 25 percent. However, appropriations have not been sufficient to reimburse tribes for their costs of administering BIA’s and IHS’ programs.¹¹⁵

The second report was issued by the National Congress of American Indians: National Policy Work Group on Contract Support Costs the following month. This report, which the authors assisted in drafting, detailed the history of contract support under the ISDEAA and made 16 recommendations to improve the contract support system. Many of these recommendations have been incorporated into a legislative proposal to amend the ISDEAA discussed below. The report urged that the moratorium should be ended and that “Congress must not retreat from its commitment in 1975, repeated and strengthened in 1988 and again in 1994, to provide full funding for contract support costs.”¹¹⁶

In June 1999, the BIA contract support report developed in cooperation with Tribal representatives reached the same general conclusions as the NCAI study. It concluded that contract support problems resulted from “insufficient annual appropriations; and administrative and statutory limitations imposed by other funding sources” It urged “increasing contract support funding to meet the Bureau’s full funding obligations under section 106(a)(2) of the Act.”¹¹⁷

For fiscal year 2000, NCAI once again led the effort to increase funding for contract support and to end the moratorium; both of these efforts were successful. With Administration support, Congress agreed to increase contract support funding for the IHS by \$25 million (of which the IHS allocated \$10 million for the ISD Fund and \$15 for ongoing shortfall) and for the BIA by \$5.3 million (of which \$5 million was for the ISD Fund).¹¹⁸ In addition, a renewed attempt to impose pro-rata distribution of IHS contract support funding was also defeated.

After extensive tribal consultation, the IHS adopted a new contract support

115. GAO Report, *supra* note 5, at 25.

116. NCAI Report, *supra* note 84, at 16-18.

117. Report of the BIA Tribal Workgroup on Tribal Needs Assessment: A Study of Contract Support Costs in the Bureau of Indian Affairs and Recommendations for Reform, Executive Summary, at 9 (June 1999).

118. See F.Y. 2001 BIA Budget Justifications, at BIA-51.

policy (IHS Circular 2000-01) on January 20, 2000, to supercede IHS Circular 96-04. Under the new policy, all contractors with new and expanded programs for that fiscal year are considered for funding from the ISD Fund based upon their overall level of shortfall. As was the case in fiscal year 1999, the funding is distributed to the requests so as to bring the floor funding level to the highest possible percentage. Any amount not paid from the ISD Fund is added to that contractor's ongoing shortfall. Any shortfall funds are distributed so that all contractors that are underfunded have an equal percentage of their shortfall funded.¹¹⁹ For example, if there are sufficient funds to pay 50% of the total shortfall for all tribal contractors, then a contractor funded as 98% would receive an additional 1% (50% of two) while a contractor at 60% would receive an additional 20% (50% of 40).

The \$25 million increase for fiscal year 2000 was distributed pursuant to the terms of IHS Circular 2000-01. According to IHS, no IHS contractor received less than 90% funding in fiscal year 2000.¹²⁰ For BIA, all contractors were funded at 88.55% in fiscal year 2000.¹²¹ For fiscal year 2001, the specter of a freeze on contracting again reared its head, this time on the House side. However, the House recommendation for a moratorium was rejected in conference. Instead, the Congress provided a \$20 million increase, of which \$10 million was earmarked for new and expanded contracts. The conference report also urged the Office of Management and Budget to work with BIA and IHS to eliminate inconsistencies between the BIA and the IHS methods of calculating and distributing contract support. The Congress continued the caps on contract support for both BIA and IHS which were upheld in the Oglala Sioux and Miccosukee cases by the Court of Appeals for the Federal Circuit. Language which the federal agencies have argued prohibits the use of current appropriations to pay contract support obligations from past years was also continued.

For the BIA side the Congress provided \$3.25 million less than the Administration requested in ongoing contract support notwithstanding the Administration's estimate of a 12% shortfall (or \$16.9 million). However, \$5 million was provided for contract support for new or expanded contracts. Language was continued permitting the tribes to dip into program funds to pay indirect costs which contract support funding is insufficient.

The fiscal year 2001 legislation also includes a provision adopted on the Senate floor which expresses the sense of the Senate that the cost of the Ramah Class judgment should be borne by the programs which failed to provide indirect costs in full to the plaintiffs in the period covered by the judgment, rather than by the Indian programs of the BIA or the IHS.

While the increases in fiscal years 1999, 2000, and 2001 have eased the crisis

119. See IHS Circular 2000-01, *supra* note 38, § 41B(3).

120. IHS presentation at a meeting of the IHS Contract Support Workgroup held in San Diego, California (June 14, 2000).

121. *Update 2000 FINAL OIP Contract Support, BIA Office of Self-Governance* (Headline News, Aug. 22, 2000).

facing the Indian self-determination policy due to inadequate contract support funding, the future is unclear. First, it is plainly unreasonable for the agencies to determine “an amount for the reasonable costs” of contract support required by a contractor to administer a federal program, but then pay the contractor some amount less than what is reasonable.¹²² Whether the shortfall is five percent or 25%, the end result is a penalty on contracting that results in the diversion of program funds to pay required administrative/overhead costs, or a penalty for contracting which tribes must make up out of tribal funds.

For the long term, the Committee report language in fiscal year 1999, rejecting the idea of large increases in contract support funding, does not bode well for the future of Indian self-determination (because the process of transferring operation of IHS and BIA programs to tribes is far from complete). According to the GAO, as of fiscal year 1997, sixty-four percent of BIA programs are under contract, while only forty-five percent of IHS programs are tribally operated.¹²³ The GAO roughly projects that if tribes contract the remaining programs, the need for contract support could increase by \$375 million.¹²⁴

Certainly, there are minor changes that could be made to improve the process for determining the amount of contract support required by a contractor with greater precision, and to possibly improve contractor efficiency. Such changes, which might increase or decrease the amount of contract support required, should be made. However, the only long-term solution to contract support shortfalls that is consistent with the federal policy of Indian self-determination is for Congress to fully fund the amount of contract support that is required to avoid imposing a financial penalty for contracting. If these amounts are not funded, the likely result is that many tribes will determine that the price in diminished services extracted for exercising their right to contract under the ISDEAA is simply too high. In short, the success of the federal policy of encouraging tribal self-determination for all tribes will be significantly postponed.

Thus, in deciding whether to fully fund contract support, the critical question is whether the United States desires Indian programs to be administered by federal bureaucrats, or whether it truly intends to “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.”¹²⁵

2. The failure of the BIA to Comply With the ISDEAA Requirement to Pay Direct Contract Support.

Since the 1970's both BIA and IHS have utilized the negotiation of indirect cost rates as the principal method of determining the amount which should be

122. See 25 U.S.C. § 450j-1(a)(2) (1994) (under this section, a tribal contractor is to receive “an amount for the reasonable costs of expenses that meet the definition of contract support”).

123. GAO Report, *supra* note 5, at 37.

124. *Id.*

125. 25 U.S.C. § 450a(b) (1995).

added to a self-determination contract under section 106(a)(2) as “contract support costs” notwithstanding the fact that the two terms are not coextensive. One of the problems resulting from the identification of contract support costs with indirect costs is that costs clearly qualifying as contract support may not be allowable as indirect costs because they are considered “readily assignable to the cost objective specifically benefited without disproportionate effort.”

The 1994 ISDEAA Amendments specify that “contract support costs” may be either direct or indirect,¹²⁶ but the BIA has refused to follow the statute.¹²⁷ The BIA’s failure to pay direct contract support is also inconsistent with the applicable regulations.¹²⁸ As noted by the GAO: “Despite BIA’s position on direct contract support costs, the joint regulations require that contract proposals contain “an identification of the amount of direct support costs . . . [C]onfusion still exists because BIA has not changed its position on direct contract support costs to follow the new regulations.”¹²⁹

Although during hearings last year on Capitol Hill Assistant Secretary Gover indicated that he was willing to reconsider the policy of refusing to pay contract support funds to cover direct costs, the BIA has continued to refuse to do so.¹³⁰ The result of the BIA policy is that tribes may be underfunded for contract support because the OIG will not put a contract support item in the indirect cost pool, and the BIA will not use contract support funds to pay it unless it is in the pool. This inconsistency between statutory law and the policies of the OIG and the BIA exacerbates the funding shortfalls noted above.¹³¹

Recently, a class action lawsuit was filed against the BIA to force it to comply with statute.¹³² For purposes of mediation, this case has been consolidated with the ongoing *Ramah Navajo Chapter* class action, which could greatly speed resolution of this issue. It is estimated that the direct contract support costs for

126. 25 U.S.C. § 450j-1(a)(3)(A) (1995).

127. The IHS instituted a policy of allowing contract support funding to be provided for direct costs in the late 1980s, which is retained in the present IHS policy on the payment of contract support. See IHS Circular 2000-01, *supra* note 38.

128. See 25 C.F.R. § 900.8(h)(2) (2000) (noting that contract proposals should identify “the amount of direct contract support costs”).

129. GAO Report, *supra* note 5, at 47. The GAO further noted that the BIA has been inconsistent in its position:

In a 1993 memorandum to all BIA area directors, contract officers, and budget officers, the acting Deputy Commissioner of Indian Affairs stated that the payment of certain direct contract support costs could be justified under the Indian Self-Determination Act, but that BIA did not have sufficient contract support funding to pay for these costs.

Id. at 47.

130. See 65 Fed. Reg. 10,100 (2000); GAO Report, *supra* note 5, at 47-48. (“[O]n February 24, 1999, in testimony before the U.S. House of Representatives’ Committee on Resources, the Assistant Secretary for Indian Affairs stated that BIA is reexamining its position on direct contract support costs and ‘will evaluate tribal requests for payment of certain direct costs’”).

131. In other words, a twenty percent shortfall noted by the BIA actually means that the contractor is receiving less than eighty percent of its true contract support requirements, since the BIA has not included direct contract support in its shortfall calculation.

132. *Pueblo of Zuni v. United States*, Civ. No. 00-0365 LH-WWD (D.N.M.) (2000).

BIA programs are between \$10 and \$30 million per year.¹³³

While the *Pueblo of Zuni* case could force the BIA to begin paying direct contract support, it is nothing short of outrageous for the BIA to require tribes to expend their scarce resources to file litigation to force it to comply with the plain language of the ISDEAA and the regulations.¹³⁴ The fact that the BIA does not currently have sufficient resources to fund direct contract support costs in full does not justify the BIA's efforts to pretend that these costs somehow do not exist. Only by accurately identifying these costs can Congress know the true amount of shortfall and thus the amount that is required to avoid penalizing tribes for electing to contract under the ISDEAA.

3. Administrative and Statutory Barriers That Prevent Other Federal Agencies From Honoring Indirect Cost Rates.

For many years the BIA and IHS (through the Department of the Interior Office of the Inspector General and the Department of Health and Human Services Division of Cost Allocation) have calculated indirect cost rates in a manner that assumes that all federal agencies with funds in a contractor's indirect cost base will honor the negotiated indirect cost rate. The reality, however, is that many federal agencies (such as the Department of Labor and Department of Education) severely limit or prohibit the use of grant funds to pay administrative costs.¹³⁵ Nevertheless, by including funds from these agencies in the base, the BIA and IHS have artificially deflated the applicable indirect cost rate and thus their own contract support obligations.

In other words, if there is \$500,000 in the base and the indirect cost pool is \$100,000, then the contractor needs a rate of 20% to fully recover its indirect costs (20% times \$500,000 equals \$100,000). If an additional \$100,000 is added to the base from another federal agency, the \$100,000 for the indirect cost pool (which is largely inelastic) could be generated by applying a rate of 16.7% to the \$600,000 base—the BIA would pay \$83,500 (16.7% times \$500,000) and the other federal agency would pay \$16,700 (16.7% times \$100,000). If the 16.7% rate is applied but the other federal agency does not honor it due to an administrative or statutory bar, the BIA will have reduced the amount of contract support it pays the contractor by \$16,700, but the contractor will have no way to recover this amount from the other federal agency. As a result, the contractor will have to make up this shortfall, usually by diverting BIA program funds.

This practice was found to be illegal in the class action case of *Ramah Navajo Chapter v. Lujan*.¹³⁶ According to the Court:

133. See GAO Report, *supra* note 5, at 48. For the current status of the Ramah Chapter and Zuni litigation, see *supra* note 138.

134. See *supra* notes 122 and 124.

135. See *A Study of Contract Support Costs in the Bureau of Indian Affairs and Recommendations for Reform*, Report of the BIATribal Workgroup on Tribal Needs Assessment, Chapter 4 at 16-17 (June 1999) (providing a partial list of such limitations).

136. 112 F.3d 1455 (10th Cir. 1997).

[D]efendants included in the direct costs base the funds plaintiff received from the United States Department of Justice (via the State of New Mexico) for criminal justice and juvenile offender restitution programs. Although inclusion of these funds in the direct costs base would have been proper if those programs included funding for their apportioned share of the indirect costs pool, the uncontroverted facts indicate they did not. *By including the Department of Justice funds in the direct costs base, defendants effectively and knowingly reduced the amount of funding they would provide to plaintiff to cover the indirect costs pool and thereby deprived plaintiff of full indirect costs funding for fiscal year 1989.*¹³⁷

Claims for fiscal year 1989 – 1993 were settled by the parties for \$76 million (plus pre-judgment interest).¹³⁸ The parties are currently discussing settlement of the equitable portion of the claim, so as to conform the method for calculating indirect costs to the law of the case. A possible settlement under consideration would require the BIA to pay a portion of the shortfall roughly proportional to the amount of BIA funds in the contractor's indirect cost base. This settlement proposal recognizes that contract support costs are not completely inelastic, as well as the fact that Congress has recently amended the ISDEAA to prohibit the use of BIA and IHS contract support funds to pay the contract support requirements generated by other federal agencies.¹³⁹

While this settlement would help to generate a more accurate picture of the contract support needs of tribal contractors, it would not directly generate any additional funds. Thus, it will be up to the Administration and Congress to address the more accurate shortfall, which will appear to be significantly larger than before (although the need existed all along).

More problematic, however, is the fact that this settlement would only identify a portion of the shortfall created by other federal agencies that do not honor negotiated indirect cost rates. As noted above, the indirect cost rate applicable to the BIA would only be increased in proportion to the percentage of BIA funds in the indirect cost base. Thus, tribal contractors that have relatively less federal funds in their indirect cost base would see less benefit from this settlement, even if Congress funds the newly identified shortfall.

This larger problem can only be addressed through legislation because many other federal agencies are prohibited by statute from paying more than a modest level (if any) of administrative costs. From a political standpoint, it will be difficult to obtain legislation to force every federal agency that provides funds to tribes to honor negotiated indirect cost rates and add this amount to the amount of program funds that would otherwise be provided to the tribe. These agencies

137. *Id.* at 1463 (emphasis added).

138. *See* 63 Fed. Reg. 57,700 (1998). Resolution of the claims for 1994 through the present requires interpretation of appropriation language that Congress began adding in fiscal year 1994, which the BIA argues caps the amount of funds available for contract support for those years as well as its liability for any underpayment (whatever the reason). The most recent development in this case is that the parties have agreed to mediation and former Senator George Mitchell has agreed to serve as mediator. Mediation began on November 21, 2000. Interview with Patti Jamison, Attorney-Advisor, DOI Office of Inspector General (Nov. 21, 2000).

139. *See* 25 U.S.C. §§ 450j-2, j-3 (1999).

are under the jurisdiction of many separate Congressional committees with competing interests.

One way to ensure that all tribal contractors that operate non-BIA and non-IHS programs have their contract support costs fully funded is for Congress to designate the BIA (or the IHS if the contractor is not operating BIA programs) as the entity through which the contractor is to recover all of its contract support requirements that result from the operation of other federal programs (to the extent not provided by those other federal agencies). Of course, this would significantly increase the contract support requirement for the BIA (and the IHS). At the same time, the need is already there and to the extent that tribes are not permitted to recover their costs from other federal agencies, they often must divert BIA and IHS program funds for this purpose. Thus, providing these funds is necessary if the policy of the United States is truly to prevent tribes from being penalized for contracting under the ISDEAA.

E. A Legislative Solution.

On March 30, 2000, Congressman Don Young of Alaska and Congressman J.D. Hayworth of Arizona introduced H.R. 4148, the first legislative attempt to address head-on the divergence between the self-determination legislation developed by the authorizing committees and enacted by the Congress and the annual appropriations legislation coming out of the appropriations committees and enacted by the same Congress.¹⁴⁰ The sponsors agreed that: "Despite its successes, the policy of self determination has been consistently plagued by problems, with the most severe being the failure of the IHS and BIA to fully pay contract support costs associated with carrying out these federal government programs under duly executed contracts."¹⁴¹ They accepted the Congressional obligation to pay contract support. Congressman Young described the present posture of the contract support issue as "a cruel hoax" on the Native American people being served under these contracts.

The tribal contractors Alaska . . . [sic] know that when they enter into a contract to operate a federal program locally, they will only be receiving a meager amount to meet the overwhelming needs of their communities. But what has made the situation much worse for these courageous tribal contractors, is that the agencies have forced the contractors to absorb the administrative costs of operating the Federal Government's own programs. The net effect is that there is even less

140. Although litigation has succeeded in forcing some improvements to the contract support system, the only viable long-term fix is legislation. As noted by Chad Smith, Principal Chief of the Cherokee Nation, which is actively litigating contract support issues:

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 Tribal Contract Support Cost: Hearing on H.R. 4148 Before the House Comm. On Resources, 106th Cong. 2 (2000) (testimony of Chad Smith, Principal Chief of the Cherokee Nation).

141. 146 CONG. REC. E462-463 (daily ed. March 30, 2000) (statement of Congressman J.D. Hayworth).

available in these woefully underfunded programs to meet local needs.¹⁴²

The new proposal essentially asserts that “shall add” in section 106(a)(2) of the ISDEAA means “shall add.” It proceeds on the assumption that it makes no sense for the federal government to have a mechanism to determine the “reasonable amount” of contract support costs to assure that tribes do not pay a financial penalty for exercising self-determination rights, legislate that the DOI and the DHSS shall add that amount to self-determination agreements, and then in annual appropriations mandate that only some lesser percentage of the “reasonable amount” of such costs shall be paid.

The key provision of the bill makes clear that the federal commitment to fund negotiated contract support costs is not subject to annual determinations made by Congress in the appropriation process. Instead, the bill provides a permanent indefinite appropriation to assure that funds are available to pay the “reasonable amount” of such costs as negotiated. Language subjecting the commitment to pay contract support to the availability of appropriations would be eliminated. As reported by the House Resources Committee on June 28, 2000, the bill (although modified in some other respects) retained this key language. Enactment of these provisions would assure the fulfillment of the commitment, which the federal government apparently made to Indian tribes when it amended the ISDEAA in 1988 to add subsection 106(a)(2).¹⁴³ While it would not solve all the problems associated with the delivery of services to Indian people, such as remoteness of location, divergences in cultural values, and the underfunding of the programs themselves, it would at least make clear that programs operated by the tribes under the ISDEAA stand on a level playing field with programs provided directly by the federal bureaucrats.¹⁴⁴

The bill as reported also addressed a number of other contract support

142. 146 CONG. REC. E462 (daily ed. March 30, 2000) (statement of Congressman Don Young).

143. See *The Tribal Contract Support Cost: Hearing on H.R. 4148 Before the House Comm. on Resources*, 106th Cong. 2-4 (2000) (testimony of Gene Peltola, President and Chief Executive Officer of the Yukon-Kuskokwim Health Corporation).

I cannot emphasize enough how critically important Section 3 is to the success of the Self-Determination policy this country has carried out for over one-quarter of a century. That policy cannot work if the government is to turn over its trust programs to Alaska Native and American Indian Tribes, and then pull a fast one, turn around and force the tribes to pay for those programs themselves. That only cheats the tribes and punishes the people being served. It's not how the country deals with other government contractors, be it General Electric or Boeing, and it is not the way the country should deal with Indian Tribes and the recipients of federal trust services.

Id. at 2.

144. See *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1383 (Fed. Cir. 1999) (Gajarsa, J., additional views). It has been suggested that the failure by Congress to provide sufficient funds to reimburse tribes for their contract support costs might amount to a breach of trust by the United States:

If the federal government is to carry out its trust responsibility, it is incumbent upon the Secretary to seek and request the necessary funds in the appropriation process and for the Congress to appropriate those funds. Failure to do so by the Secretary and the Congress, in and of itself, may be considered a breach of the federal government's fiduciary obligation to carry out its trust responsibility.

Id.

issues. It authorizes negotiated rulemaking on the allowability of costs under the ISDEAA. This provision addresses the position of the DOI Inspector General that section 106(j) special rules on allowable costs do not apply to an indirect cost pool which includes non-ISDEAA funds, as well as ISDEAA funds. The bill also includes a provision to remove present limits on the ability of tribal contractors to recover legal costs in administrative appeals under the ISDEAA. Further, the bill clarifies that contractors are entitled to recover pre-award and start-up costs incurred in previous years, despite the IHS' position that the annual appropriations cap on contract support bars recovery.¹⁴⁵

The need for legislation assuring fair and equitable funding of reasonable contract support costs will be required so long as significant portions of BIA and IHS programs continue to be administered directly by the federal agencies.¹⁴⁶ In some respects, the bill, as originally introduced and reported, can be refined to address peripheral contract support issues, but the centerpiece of a permanent appropriation should not be dropped. The bill should also include the administrative costs of BIA-funded grant schools as recommended by several Indian witnesses since such costs stand in the same relationship to tribally operated schools as contract support costs due to non-educational BIA and IHS funded tribal programs.¹⁴⁷ A form of "grandfathering" was included in the bill by provisions to consolidate contract support funding with program funding after the first year. This provision allows adjustments for inflation, transfers of federal employees, and permits deconsolidation based on increases of program funds exceeding twenty percent. It has substantial tribal support. However, in our view this approach should be optional for tribes in the light of the impact on indirect costs of changing circumstances over which tribes have no control.¹⁴⁸

Perhaps the most serious refinement that needs to be made if the

145. See *The Tribal Contract Support Cost: Hearing on H.R. 4148 Before the House Comm. on Resources*, 106th Cong. 3-4 (2000) (testimony of Richard P. Narcia, Lieutenant Governor Gila River Indian Community). On October 18, 2000 the House passed H.R. 4148 but made significant changes. As passed by the House, it would not establish a permanent indefinite appropriation but would address several present contract support problems including:

- (1) allowing tribes to recover their full indirect costs from non-638 federal agencies unless prohibited by statute;
- (2) apply the special cost principles in § 106(K) to all federal agencies;
- (3) transfer responsibility for contract support matters at IHS to the Office of Tribal Programs;
- (4) require payment of pre-award and start-up costs in previous years.

Since no action was taken by the Senate, a legislative approach to contract support remains on the agenda for 2001. 145 Cong. Rec. H10026-H10028, (Oct. 17, 2000); 145 Cong. Rec. H10082 (Oct. 18, 2000).

146. For example, a recent analysis by the IHS shows that while some Areas are almost entirely contracted (such as the Alaska Area at 98.2%) others have seen very little contracting (such as the Tucson Area at 13% and the Navajo Area at 10.4%). *Percentage of IHS Areas under P.L. 93-638: IHS Spreadsheet for Contract Support Workgroup* (July 19, 2000).

147. See *Statement to the House Resources Committee Regarding the Impact of H.R. 4148, Tribal Contract Support Cost Technical Amendments of 2000, On Tribally-Operated Schools*, Submitted Jointly by the Mississippi Band of Choctaw Indians and eight other tribal entities that operate BIA-funded schools (May 16, 2000).

148. See, e.g., *The Tribal Contract Support Cost: Hearing on H.R. 4148 Before the House Comm. on Resources*, 106th Cong. 3-5 (2000) (testimony of Ron Allen, Vice President, NCAI and testimony of Richard P. Narcia, Lieutenant Governor Gila Giver Indian Community).

“entitlement” provision is retained is language to assure that the payment of contract support as required by the bill is not offset by reductions in programs funds. Such an offset would, of course, have the diametrically opposite effect from that intended by the bill’s entitlement provisions. Both BIA and IHS submitted testimony indicating opposition to the bill based on this concern which is why the provision was dropped by the House.¹⁴⁹ While there can be no absolute guarantee with respect to Congressional appropriation actions in future years, the bill should include a provision making clear that contract support funds awarded to tribes are meant to supplement and not replace program funds provided under section 106(a)(1) of the Act. The bill should also prohibit the Office of Management and Budget from making estimates under section 252(d) of the Balanced Budget and Emergency Deficit Control Act of 1985.¹⁵⁰

Notwithstanding these concerns, the bill’s sponsors and the House Resources Committee should be commended for this serious effort to address a deficiency in federal tribal self-determination policy that has been around for twenty-five years.¹⁵¹ If Congress acts on this legislative proposal in the next session, the result may clear the decks for the forward movement of tribal self-determination and self-governance, and the more rapid elimination of the old system under which local government issues in the Indian country remain in the hands of federal bureaucrats appointed by and subject to the whims of the Department of the Interior and the Department of Health and Human Services, rather than being democratically elected by the Indian and Alaska Native communities being governed.

CONCLUSION

In addressing the National Congress of American Indians in 1999, Assistant Secretary Gover reminded Indian tribes of how their political influence has increased. “The 2000 election may mark the first time when the major parties really compete for Indian votes and endorsements. We have friends on both sides of the aisle. We are at a strong starting point.”¹⁵² Tribes have indeed come a long

149. See *The Tribal Contract Support Cost: Hearing on H.R. 4148 Before the House Comm. on Resources*, 106th Cong. 3 (2000) (testimony of Michael H. Trujillo, M.D., M.P.H., M.S. Assistant Surgeon General Director, Indian Health Service) (“We are concerned that funding for this entitlement would have to come from existing or future appropriated IHS funds and supercede the other critical priorities for budget increases for tribal health programs . . .”). Kevin Gover, Assistant Secretary of Indian Affairs, stated the following in his testimony:

The bill’s language could be construed to compel federal agencies to redirect program funds from other recipients or operations to meet the full contract support payments of Indian tribes and tribal organizations. We do not believe that the Committee intends this consequence since it would be disruptive to so many federally-supported state and local government services.

Id. at 2.

150. See *id.* at 4 (testimony of Phillip Martin, Chief, Mississippi Band of Choctaw Indians).

151. As noted by Chief Smith:

H.R. 4148 remedies almost all of 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.

Id. at 3 (testimony of Honorable Chad Smith, Principal Chief of Cherokee Nation).

152. Statement of Assistant Secretary Kevin Gover to the National Congress of American Indians:

way since the National Congress of American Indians was organized to fight termination in the 1950's.

Significantly, on June 27, 2000, commemorating the thirtieth anniversary of the federal policy of Indian tribal self-determination, the Senate of the United States passed Senate Resolution No. 277 sponsored by Senators Campbell, Johnson, McCain, Inouye, Domenici, Inhofe, Wellstone and Dorgan. The resolution passed unanimously. The resolution, like Chairman Cypress of the Miccosukee Tribe, described the policy as "the most successful policy of the United States in dealing with the Indian tribes." The resolution praised the policy because "it rejects the failed policies of termination and paternalism... recognizing that cultural pluralism is a source of strength." It praised the vision and leadership of President Nixon in initiating the policy and of every succeeding President in fostering it.¹⁵³

In view of the broad bipartisan support for tribal self-determination and self-governance in the United States Senate, Indian tribes may reasonably expect that the critical issue of contract support funding will be addressed by the Senate in the next session of the Congress and that a companion Senate bill to House Report 4148 will be introduced and move forward in the Senate. There is, therefore, a chance that this longstanding impediment to a fully successful tribal self-determination policy could be removed and that the present impasse between the authorizing committees on the one hand, and the appropriations committees on the other, can be definitively resolved. Such action by the Congress would conform to the principle so eloquently stated in dissent by Justice Hugo Black: "Great nations, like great men, should keep their word."¹⁵⁴

"From Fear to Hope" (October 7, 1999).

153. See S. Res. 106-277, 106th Cong. (2000).

154. *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting).
