

**HOUSE COMMITTEE ON APPROPRIATIONS  
SUBCOMMITTEE ON INTERIOR, ENVIRONMENT, AND RELATED  
AGENCIES**

**CONCERNING THE FISCAL YEAR 2025 BUDGET FOR THE INDIAN HEALTH  
SERVICE AND THE BUREAU OF INDIAN AFFAIRS**

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The National Tribal Contract Support Cost Coalition is a voluntary organization of 21 Tribes and inter-tribal organizations located across 13 States, which collectively operate over one billion dollars in Indian Health Service (IHS) and Bureau of Indian Affairs (BIA) programs on behalf of over 250 Native American Tribes.<sup>1</sup>

The Coalition was launched in 1996 to press Congress and the agencies to honor the Government’s legal obligation to add contract support cost funding to every contract and compact awarded under the Indian Self-Determination Act (ISDA). During this same period, Tribes across the country launched massive litigation that eventually led to two Supreme Court victories cementing the Government’s duty to pay contract support costs in full: *Cherokee Nation v. Leavitt* (2005) and *Salazar v. Ramah Navajo Chapter* (2012). In the wake of those victories, this Committee adjusted the appropriations process going forward to recognize the mandatory nature of these contract payments, based upon agency reports on the amounts required to fully reimburse the Tribes.

But IHS understated the amounts required to fully reimburse the Tribes and it continued to underpay them, leading to a third round of litigation culminating in *San Carlos Apache Tribe v. Becerra*, now pending before the Supreme Court. I will address this case today because a Court decision against IHS in the *San Carlos* case will require a significant adjustment to tribal contract support cost payments going forward, and because IHS has to date failed to advise this Committee about the true magnitude of its contract support cost obligations to the Tribes.

The core issue presented in the *San Carlos* case is whether Congress in the ISDA required IHS to reimburse tribal overhead costs for running the entire “Federal program” that IHS turns over to tribal operation, including the portion of that program that IHS (and now Tribes) fund with “program income”—principally third-party revenues that IHS and Tribes

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<sup>1</sup> The Coalition members are the Alaska Native Tribal Health Consortium (AK), Arctic Slope Native Association (AK), Central Council of Tlingit & Haida Indian Tribes (AK), Cherokee Nation (OK), Chickasaw Nation (OK), Choctaw Nation (OK), Citizen Potawatomi Nation (OK), Confederated Salish and Kootenai Tribes (MT), Copper River Native Association (AK), Forest County Potawatomi Community (WI), Kodiak Area Native Association (AK), Little River Band of Ottawa Indians (MI), Muscogee (Creek) Nation (OK), Pueblo of Zuni (NM), Riverside-San Bernardino County Indian Health (CA), Shoshone Bannock Tribes (ID), Shoshone-Paiute Tribes (ID, NV), Southeast Alaska Regional Health Consortium (AK), Spirit Lake Tribe (ND), Tanana Chiefs Conference (AK), Yukon-Kuskokwim Health Corporation (AK), Northwest Portland Area Indian Health Board (43 Tribes in ID, WA, OR), and the Ysleta del Sur Pueblo (TX).

generate from providing services to patients eligible for Medicare, Medicaid and private insurance. As IHS has frequently told this Subcommittee, in some IHS service units third-party revenues fund over 60 percent of healthcare operations (with agency appropriations funding the balance), and tribally operated service units equally rely on these same collections to sustain the contracted Federal programs.

Contrary to the ISDA (as we see it), IHS has been unlawfully reducing its CSC reimbursements to ensure no overhead is paid to support the third-party revenue-funded portion of each contracted program. At the same time, since third-party revenues are a large part of IHS's own operations, IHS's overhead, including its HR and IT operations, supports all of its third-party funded personnel and expenditures. IHS has been wrong to treat Tribes differently by excluding from its CSC reimbursements the portion of tribal overhead costs associated with spending third-party collections.

In the *San Carlos* litigation, IHS irresponsibly asserted that the total additional cost of covering overhead associated with program income spending would be between \$800 million and \$2 billion. But in March, government counsel was forced to admit before the Supreme Court that this estimate was overstated, and that IHS had no reliable estimate of the amount of its annual underpayment to the Tribes. It also mixed up the issue of annual CSC reimbursements (which this committee will address) with damage awards for past underpayments (which Treasury will address through the Judgment Fund). This Committee needs an honest assessment of the added costs needed to fully fund tribal contract support costs going forward. We therefore respectfully request that the Committee direct IHS, on an urgent and immediate basis, to engage in tribal consultation on this issue over the next 90 days. We also respectfully suggest that the Committee ask the General Accountability Office to undertake a stratified statistical sampling to facilitate this process.

Other issues also remain which warrant this Committee's attention.

### **Mandatory Appropriation**

The Coalition renews its request that all contract support cost and section 105(J) lease accounts be moved to the mandatory side of the budget to ensure these vital funds remain available and are timely paid. Language to accomplish this result has been shared with the Committee.

### **The Reconciliation Process and Difficulties with Current Bill Language**

As we noted last year, current bill language concerning contract support cost significantly differs for the BIA and IHS. Bill language for the BIA (but not IHS) states that CSC appropriations shall only be "available for obligation" during the current fiscal year, impeding the BIA's ability to access the appropriation to reimburse additional audited amounts found due after the fiscal year has closed. The BIA language on this score should match the IHS language.

Conversely, bill language for IHS (but not the BIA) states that unspent funds "shall be applied to contract support costs due" in "subsequent years"—necessitating an additional process

to determine exactly how much is available to cover a future year’s CSC obligation. This language may be responsible for the fact that IHS (but not the BIA) has built up a massive post-fiscal year “reconciliation” process that leaves the books open on every tribal contract until audits and indirect cost rate agreements for each year are completed. Many tribal overhead costs therefore go unreimbursed for up to six years, leading to additional tribal claims against IHS.

The IHS reconciliation process is contrary to standard practice for calculating and paying contract support costs. Both agencies calculate and pay contract support costs—mostly indirect costs—based on an indirect cost rate that can be up to 3 years old. This provides flexibility in case audits are late, or—as has often been the case in recent years—the rate-making agencies are late. Either way, the goal should be to pay contract support costs based upon the best available data, and to then move on to the next year. IHS’s “reconciliation” practice does not facilitate tribal self-determination and self-governance, and each year it costs millions of dollars in man-hours for the agency and the Tribes combined. It also complicates tribal accounting and indirect cost negotiations as adjustments are made years after the books are already closed. Similarly (and as also mentioned earlier), the BIA’s practice of recalculating “direct” contract support costs every year differs from IHS practice and should be discontinued because it leads to recurring and unacceptable delays on contract payments.

Attached to this testimony is suggested bill language that would make the CSC provisions uniform and eliminate the need for any reconciliation process.

### **Payment Delays**

The BIA and the DOI Office of Self-Governance consistently fail to timely disburse contract funds to contracting and compacting Tribes. Unlike other government contractors, Tribes are left to wait months, some years, before they receive payment. Last year we noted that one Region failed to make any CSC payments to its Tribes. Meanwhile, OSG holds back what should be recurring contract payments until late in the fiscal year, then threatens Tribes with no payment if information demanded in August is not promptly provided.

These are government contracts, and forcing Tribes to file claims in order to be paid is unacceptable. A number of Tribes have called for penalties on agency personnel who fail to make timely payments.

### **IHS Misconduct in Reducing CSC Payments**

Last year we noted that IHS had unlawfully reduced contract payments to a Navajo ISDA hospital contractor based upon a flawed case known as *Cook Inlet Tribal Council v. Dotomain*, 10 F.4th 892 (D.C. Cir. 2021). Although this misconduct was quickly remedied in *Fort Defiance Indian Health Board v. Becerra*, 604 F.Supp.3d 118 (D. NM 2022)—and after the agency’s own hearing officer also ruled against the agency—a better answer would be enactment of H.R. 409.

H.R. 409 would not require IHS to pay any sums that IHS does not already pay, and the flaw in the *Cook Inlet* decision is this: the D.C. Circuit Court of Appeals concluded that costs which IHS “normally” incurs in its direct operation of a program are not eligible for

reimbursement as contract support costs. But IHS has for decades reimbursed tribal costs that IHS “normally” incurs too, like human resource (HR) costs and costs to cover management and planning, utilities, financial management, housekeeping and janitorial services, building and grounds maintenance expenses, general support services, property management repairs and maintenance, records management, data processing (information technology, or IT) and office services. Requiring that IHS continue to reimburse these costs precisely as it has in the past will not cause any increase in outlays, which is why H.R. 409 is a reasonable and measured response to the flawed *Cook Inlet* decision.

### **Remaining Issues**

Two other important issues warrant brief comment.

- **Untimely CSC Reporting.** Neither agency is honoring its duty to timely report to Congress on the execution of its contract support cost obligations. *See* 25 U.S.C. § 5325(c). IHS and BIA reports are several years behind.

Reporting assures accountability. The Coalition requests that the Committee reinforce the agencies’ CSC reporting obligations.

- **IHS replacement of contracts with grants.** The IHS practice of awarding new Indian healthcare funds as grants instead of adding them to existing contracts and compacts bypasses the ISDA’s CSC obligation while also adding unnecessary grants management overhead costs. The practice needs to end.

Prior to FY 2012, IHS transferred earmarked domestic violence and methamphetamine and suicide prevention (behavioral health initiative) funds through compacts and contracts. But a few months after the 2012 Supreme Court decision in *Ramah*, then-Director Roubideaux reversed course and demanded that grant instruments be used. Without CSC reimbursements, Tribes were then compelled to divert program funds to cover overhead costs, while also incurring new overhead costs to comply with special and different grant management rules.

Six years ago this Committee pressed IHS to return to the pre-2012 practice of transferring these and similar funds through compacts and contracts. IHS launched, stalled, then relaunched a tribal consultation on the matter, only to let the matter die.

The Coalition respectfully requests that the Committee add bill language for FY 2025 mandating the transfer of substance abuse, opioid, domestic violence, suicide prevention, and other targeted funds to Tribes through their ISDA contracts and compacts.

Thank you for the opportunity to offer this testimony on behalf of the National Tribal Contract Support Cost Coalition.