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CONTRACT SUPPORT COSTS AND SEQUESTRATION: FISCAL CRISIS IN INDIAN COUNTRY

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

NOVEMBER 14, 2013

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CONTRACT SUPPORT COSTS AND SEQUESTRATION: FISCAL CRISIS IN INDIAN COUNTRY

THURSDAY, NOVEMBER 14, 2013

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

The Committee met, pursuant to notice, at 2:30 p.m. in room 628, Dirksen Senate Office Building, Hon. Maria Cantwell, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

The CHAIRWOMAN. Good afternoon. The Senate Indian Affairs Committee will come to order.

This is an oversight hearing on testimony about contract support costs and the fiscal impacts of sequestration in Indian Country.

Some of my colleagues may have noticed that we did give notice originally to an executive session on several bills. It turns out that some of those bills needed further work, and so they will hopefully be on the next session and markup. I just encourage all those that are involved with all those bills to continue to resolve any outstanding issues, so we can move forward on them.

With that, this afternoon we are holding a hearing on the oversight issues that have serious consequences for Indian Country, sequestration and shortfalls in contract support costs. The trust relationship that exists between the United States and tribe is a relationship built through the United States Constitution, treaties, Federal statutes and a Supreme Court decision. Ideally, we would be able to fully fund tribal governments based on this relationship. But if that were really possible, we wouldn't be having this hearing today.

The Committee staff has held a listening session earlier on these issues, and the Committee heard from trial leaders that sequestration is having an incredibly negative impact on Indian programs. However, it is not just sequestration alone. There are other issues that we need to address. I know my staff has some charts, but I am going to forego them at this moment. What is really clear is that our Country's financial troubles are not really stemming from our obligations to Indian Country. In fact, we are not really doing a good job in fulfilling the obligations that we have to Indian Country.

So today's session is really about hearing from those individuals about these impacts and what we can do to strive to make sure that Indian Country is considered as Congress makes budgetary decisions going forward.

The second issue we will address today is contract support costs. Today over 90 percent of tribes throughout the Country participate in programs which have allowed tribes to take over functions previously performed by the Federal Government. However, funding of the administrative costs incurred by tribes in taking over these functions has not kept pace with the growth of the program. So in effect, tribes are not being fully funded for the work they perform.

Tribes have been litigating this issue for over a decade. The Supreme Court has in two separate decisions upheld the rights of tribes to receive full funding. So why are we here? Because we need to make more progress in resolving this issue.

It has been 18 months since the court ruled in this case that tribes are owed full contract support costs. Since then, the Indian Health Service has only resolved 16 claims out of an estimated 1,600. The Department of Interior has not yet resolved any of these claims either, but is at least treating all the claims together with hopes of settling them at once or within the next year.

So my colleagues and I have heard from dozens of tribes on this very important topic. I look forward to hearing from the witnesses today on how we are going to get this issue resolved.

I would just add a footnote to this. I think that one, to really wrap their minds around this issue, needs to look at how big Indian Country's economic footprint is in various communities. So from the perspective of the State of Alaska, we are talking about a major aspect of the way of life of Alaskans. So this is not a small issue. This isn't one of those things where it is just resolving a few things on the side procedurally. This is having a major, major impact in Indian Country.

So with that, I am going to turn to the Vice Chairman of the Committee, Senator Barrasso, for his opening statement.

STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM WYOMING

Senator BARRASSO. Thank you, Madam Chairwoman. I appreciate your holding this hearing this afternoon, and I appreciate your leadership in signaling the need for greater fiscal responsibility.

As you know, members on both sides of the aisle agree that the spiraling Federal deficit and increased Government spending needed to be addressed. That is why Congress, both Democrats and Republicans, passed the bipartisan Budget Control Act, which included sequestration. In light of widely shared concerns over the Federal deficit, all agencies have been called upon to control spending.

We have also recognized that the Federal Government has important responsibilities in Indian Country. So it is even more important that we examine agency decisions or priorities and efficient use of taxpayer funds. To that end I welcome our witnesses, and look forward to their testimony.

I would like to take a second, Madam Chairwoman, just to recognize Darwin St. Clair, who is here joining us. He is representing the Eastern Shoshone Tribe in Wyoming, and he is Chairman of the Shoshone Business Council. Welcome, Chairman St. Clair.

Thank you, Madam Chairwoman.

The CHAIRWOMAN. Thank you. Thank you, Senator Barrasso.

Are there other opening statements? Senator Franken.

STATEMENT OF HON. AL FRANKEN,
U.S. SENATOR FROM MINNESOTA

Senator FRANKEN. Madam Chair, thank you. Thank you, Chairwoman Cantwell, for holding this very important hearing. And thank you to the witnesses for coming here today, especially Chairwoman Karen Diver from the Fond du Lac Band of the Chippewa.

The timing of this hearing to discuss the impact of sequestration on Indian Country couldn't come at a better time, because if we are going to end sequestration, the opportunity is coming up in the next few weeks. I asked tribal leaders in Minnesota to join me at a roundtable three weeks ago. The stories of the consequences of the sequester profoundly affected me. I have been meeting with a number of Minnesota's tribal leaders this week in Washington. I know Chairwoman Diver will share some of her tribe's experiences.

I would like to share one other from the roundtable. One that hit me particularly hard was from the Red Lake Band of the Ojibwe. It illustrates the real effects of this sequester very powerfully. Recent departures left two vacancies for mental health counselors at Red Lake Schools, left two vacancies. But because of the sequestration, the school couldn't afford to fill those vacancies this year. What happened in the absence of those counselors, I am sad to say, is that two 14 year old students committed suicide. If sequestration is allowed to continue into next year, the remaining six mental health counselors will be let go.

You may all recall that Red Lake was the site of a school shooting in 2005, when a mentally disturbed teen shot and killed a security guard, a teacher and five students. The representative from the roundtable from Red Lake, at the roundtable I held, told me that after that shooting, the shooting back in 2005, President Bush promised Red Lake that they would not be forgotten. Given the recent deaths at the school, he feels that promise has been broken, and it has been broken because of sequestration.

Sequestration is a policy that was never meant to go into effect. It was meant to be so extreme that it would force a tough compromise. Yet it did go into effect, and some may say that it hasn't been that bad and that we should just allow the cuts to stay in place. I challenge those voices to visit Red Lake or any of the hundreds of tribal communities that have been hit so hard by these cuts. We will hear testimony about that today.

It is just as extreme as it was intended to be. It is something that we have to stop.

Thank you, Chairman Cantwell, and thank you to all our witnesses today.

The CHAIRWOMAN. Senator Udall?

STATEMENT OF HON. TOM UDALL,
U.S. SENATOR FROM NEW MEXICO

Senator UDALL. Thank you, Chairwoman Cantwell, and Vice Chairman Barrasso, for paying attention to this issue and also for focusing this hearing on what I think is an extremely important issue.

Senator Franken, what you said, the same is true in New Mexico. We have communities that have suicides and they need help. And sequestration has damaged them. So people should know, across the Country this is having a big, big impact.

Sequestration and contract support costs are pressing issues for Indian Country, two issues I have been hearing consistently from the tribes over the past year. I would like to echo the sentiment heard here today and across Indian Country that tribal programs should be exempted from sequestration, especially the Indian Health Service. It is shameful that IHS is the only direct Federal medical service agency not exempted in some way from sequestration. In negotiating sequestration, Congress hoped to protect the most vulnerable individuals in our Nation. In Indian Country, we fell woefully short.

Let's just remember, over and over it was said sequestration was going to protect the vulnerable. We did not do that when it came to the Nation's tribes.

This hearing is an important opportunity for tribal leaders to make Congress aware of the impact of sequestration on their constituents and on already chronically under-funded programs. Contract support costs are a vital part of tribal self-determination and self-governance. I think everyone here today can confidently acknowledge the positive outcomes that have resulted from tribes having the option to contract and carry out their own services.

Unfortunately, funding for contract support costs has consistently fallen short. This injustice to tribes has been acknowledged on multiple occasions by the Supreme Court, most recently the Ramah Navajo decision, which came out of New Mexico and which Michael Gross and several other attorneys worked on for many years. It clearly is a time for Congress, the Administration and tribal leaders to identify a clear new path forward, one that will allow the success of tribal contracting to continue in a more just manner.

I look forward to buckling down with my colleagues on this Committee to help resolve this longstanding issue. I strongly encourage the Administration to seriously engage tribal leaders on this issue and to work with Congress and Indian Country to identify a mutually beneficial way forward.

Thank you, Madam Chair. I very much appreciate the opportunity here.

The CHAIRWOMAN. Any other opening statements? Senator Schatz, do you have an opening statement you want to make?

STATEMENT OF HON. BRIAN SCHATZ,
U.S. SENATOR FROM HAWAII

Senator SCHATZ. Thank you, Chairwoman Cantwell and Vice Chair Barrasso, for holding this important hearing.

We are all familiar with the health and education disparities, unemployment, substandard housing conditions and homelessness that our American Indian, Alaska Native and Native Hawaiian communities face. The United States has a duty to uphold its trust responsibilities to Native people in good times and in challenging times. Yet as today's testimony will illustrate, there is a large gulf between promises made and promises kept. The failure to fully pay for contract support costs is creating a fiscal and human crisis in Indian Country. That is why I oppose capping contract support cost accounts, because inadequate reimbursement threatens the ability of tribal governments to maintain already underfunded safety net programs. These programs are vital to the everyday lives of tribal members. And the blunt sequestration cuts are already devastating Native communities.

At the Tribal Nations conference yesterday, Secretary Sebelius said that under the sequester, 3,000 fewer Indian Health Service patients would be admitted to hospitals. Hospitals would have to turn away close to 800,000 IHS patients from important procedures like diabetes and cancer screenings, primary care visits and vaccinations for well-baby visits for Native Children. When people talk about the sequester, we need to fully understand the human price that this policy is exacting in Native communities. We cannot allow them to bear a disproportionate burden because of cuts that were never supposed to go into effect in the first place. We need to work to ensure that the trust relationship between the United States and all Native Americans is strong and that this relationship is guided by the policies of self-determination and self-governance.

So I look forward to hearing from our witnesses, and we can work together on a solution to this.

The CHAIRWOMAN. Senator Tester?

STATEMENT OF HON. JON TESTER,
U.S. SENATOR FROM MONTANA

Senator TESTER. Thank you, Madam Chair. My comments will be brief, because I think most of them have been covered by previous speakers, yourself included. I do want to thank the Chair and the ranking Member for having this hearing. And I want to thank the folks who traveled such a great distance to be here today. I very much appreciate that. I want to thank the folks from the Administration for being here to talk about the impacts and delays and cuts of fulfilling contract support costs. In addition, the impacts of sequestration.

The stories have been told in Minnesota, New Mexico, they are probably not much different anywhere else in the Country, including Montana. They have been draconian in nature. The only thing I would like to point out is that the Supreme Court has ruled that the Federal Government must fulfill its trust responsibility to our tribal nations. We need to take that ruling seriously as we move forward. Sequestration didn't work out the way people had intended, as Senator Franken had said, these cuts were so bad that we were hoping the Supercommittee could come up with a better solution. Unfortunately the rules of the field weren't explained before this bill was voted on.

With that, I look forward to hearing from the witnesses. Thank you, Madam Chair.

The CHAIRWOMAN. Thank you. Does anybody else have an opening statement? Yes, Senator Murkowski.

STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. Very briefly, Madam Chairman. And I appreciate the comments that my colleagues from Montana just made, reminding us of not only the contractual responsibility that we have with contract support costs, but with the Supreme Court decision coming out in Ramah, it is clear, it is unequivocal, it is just right there. The fact that we are continuing to bring this up before members of the Administration I find very, very frustrating. I have had an opportunity to express that to both Dr. Roubideaux and Mr. Washburn. I think you certainly know where Alaskans are coming from on this. They have made it very, very clear.

I listened very intently yesterday at the tribal summit when the President spoke. I went there specifically to hear what he was going to say on the issue of contract support costs. What I heard him say is, we have heard you loud and clear, but we are still working to find the answers. I don't think we need to work to find any answers. I think that the court laid it out very, very clearly. It said that full reimbursement will be provided. So we have to make that happen within that budget. We have to make that priority.

I too have stories for the record about the impact of sequestration on tribal programs in my State. The regional health provider in Juneau had to close its alcohol treatment facility. Up in the YK Delta, the regional health provider laid off 20 employees, permanently closed 40 vacant positions. They reduced services for elders. The impacts of sequestration means that tribes will not be able to reduce waiting times at emergency rooms, outpatient, dental clinics.

The impact, I think we recognize, has been significant. I would ask, Madam Chairman, that I be able to submit for the record comments that we have received from Tribes around the State as well as from the Association of Village Council Presidents and stories from the Kawerak Region on the impacts of sequestration of tribal programs. I will look forward to the comments not only from Mr. Washburn and Dr. Roubideaux, but the panel later this afternoon. Thank you for the hearing.

The CHAIRWOMAN. Thank you. Without objection, we will add that to the record.

Now we will turn to our witnesses. Thank you for being here today. I know it has been a busy week. Assistant Secretary Washburn, for the U.S. Department of Interior and Acting Director of the Indian Health Service, Yvette Roubideaux, thank you both for being here and we look forward to your testimony.

STATEMENT OF HON. KEVIN WASHBURN, ASSISTANT SECRETARY—INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Mr. WASHBURN. Thank you, Madam Chair and Mr. Vice Chair, and the rest of the Committee, thank you for having us here. We

did have the tribal nations conference yesterday and Senator Murkowski and Senator Heitkamp were both there. It was good to see them. We really appreciate the support from Capitol Hill.

Thirteen cabinet secretaries were also there hearing from tribes, and 300 plus tribal leaders, I believe, was the final count, something like that. We did hear loud and clear from tribes on numerous issues. Certainly contract support costs were one of the issues that we heard a lot about. My boss, Secretary Sally Jewell, said from the podium that she heard loud and clear that tribes want full funding of contract support costs. I think I probably don't need to say too much more about that, because that is what we heard. We will be working further to address those issues.

We did not consult with tribes before we came up with the approach that we put in the Green Book this year. That is not the way we should be doing business, so we have been scurrying around working to consult afterward. We have heard from tribes, they don't like the approach that was used in the Green Book. So we are regrouping and trying to figure out how to go forward. We have had very productive conversations with tribal leaders, and we have reinstituted our contract support costs work group, and we have had a consultation session and have had a lot of informal conversations. We are grateful for that. We certainly got a conversation going and we need to figure out a better way through this, obviously.

So let me turn to sequestration. Sequestration really is getting to be a serious problem. Tribes are now, I think when sequestration first hit, several months ago, we didn't really know what the outcomes were going to be. But now we are really starting to feel them, as tribes have had to live with these cuts for a while now. It was $119 million less from our budget that was split about evenly between direct service tribes and self-governance tribes. And on your panel, you have five tribes that are self-governance tribes, and the sixth, Mississippi Band of Choctaw, actually does a lot of their own work, too. They do self-determination contracts and have tribally-controlled schools. So they are in essence in the same boat, they have a lot of contracts with the Federal Government.

So for all these tribes that are going to be represented, they have all seen a cut of 5 percent in their budgets, their appropriations. And we face a looming cut of another 2.2 percent on January 15 if there isn't something done under the Budget Control Act. So that will be a total of $170 million cut that we have had to deal with over the course of a year.

And that sounds scary. The only thing scarier is the House-proposed budget, because it would cut Indian Affairs' budget more than $200 million. So that really terrifies us, because we aren't doing the job we need to do with what has happened already.

So we really hope that the Conference Committee will come up with a good proposal. We appreciate the Senate's leadership, because the Senate's budget is much better for Indian Country. We hope that you negotiate well on behalf of Indian tribes in the Conference Committee. And we will be in a much better place.

Let me just tell you that the House budget, what it would do is, it fully funds school construction, which I know Senator Franken will be happy about. And it fully funds contract support costs,

which many people will be happy about. But with the overall $200 million cut, it does all of that with a 19 percent across the board cut to virtually every other line in our budget. Nineteen percent. We just dealt with a 5 percent cut, and it was debilitating. As Senator Udall and Senator Franken and Senator Tester said, we just can't live with a cut that is four times that amount. That is what would happen if the House budget became the law. Just to give you a sense, it would cut $60 million from law enforcement.

So we are in a terrible time. We are grateful for the leadership. I know that each of the people on this Committee are advocates for Indian Country. We are grateful for that, because we really need it right now.

So why don't I stop there, and I am happy to answer questions, any questions you have about the budget or about contract support costs. Thank you.

[The prepared statement of Mr. Washburn follows:]

PREPARED STATEMENT OF HON. KEVIN WASHBURN, ASSISTANT SECRETARY—INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Good afternoon, Chairwoman Cantwell, Vice Chairman Barrasso, and Members of the Committee. Thank you for the opportunity to provide a statement on behalf of the Department of the Interior (Department) at this oversight hearing on "Contract Support Costs and Sequestration: Fiscal Crisis in Indian Country."

As the Assistant Secretary for Indian Affairs, I have the responsibility to oversee the numerous programs within the Bureau of Indian Affairs (BIA) and the Bureau of Indian Education (BIE), along with other programs within the immediate Office of the Assistant Secretary for Indian Affairs. The Office of the Assistant Secretary for Indian Affairs, BIA, and BIE programs expend over 90 percent of appropriated funds at the local level. Of this amount, over 62 percent of the appropriations are provided directly to Tribes and tribal organizations through grants, contracts, and compacts for Tribes to operate government programs and schools. Indian Affairs' programs serve the more than 1.7 million American Indians and Alaska Natives living on or near Indian reservations.

Earlier this year I testified on the President's FY 2014 Budget Request for Indian Affairs programs at the Department of the Interior. In that Budget Request, the Administration proposed that the FY 2014 budget for contract support costs (CSC) be funded at $231.0 million, and also proposed to fund contract support in an account separate from the Operation of Indian Programs account. We stated that this would be an increase of $9.8 million over 2012 and would strengthen the capacity of Tribes to manage Indian Affairs programs for which they contract. As a result of the Salazar v. Ramah Navajo Chapter Supreme Court decision in 2012, the Budget also proposed an interim measure requesting that Congress appropriate CSC funding to Tribes on a contract-by-contract basis, which was consistent with one of the options for Congress identified by the Court. To ensure as much clarity as possible regarding the level of contract support funding, the Administration provided Congress a contract-by-contract funding table for incorporation into the appropriations act on June 14, 2013.

After releasing the President's Budget Request for FY 2014, we have heard a great deal of feedback from Indian Tribes. Indian Affairs held a CSC consultation session at the National Congress of American Indians conference in Reno, Nevada, on June 25, 2013. We have also heard on several occasions from Tribes at the Tribal Interior Budget Council meetings, which are formal meetings for consulting with Tribes on proposed budgets, and at the Self-Governance Advisory Committee meetings. In addition, Indian Affairs, together with the BIA, also reconstituted the BIA's CSC Workgroup. This group is composed of tribal leaders and technical experts who are working to improve Indian Affairs policy and practice around these issues. That group met in August and had productive meetings. In each of these forums, the Administration has heard from tribal leaders. The Administration also hosted the Tribal Nations Conference this week, where additional outreach efforts were made.

Currently, the Administration is engaged in the important work of preparing the FY 2015 Budget Request. It is our intention to continue to work to find a responsible solution to the CSC issue. Our discussions with Tribes will continue, and the views we hear from Tribes will inform our path forward.

We are also dealing with the effects of sequestration on Indian Affairs programs, which in FY 2013 cut five percent from every program, project and activity and is having lasting effects on Indian programs. Our current budget for FY 2014 is funded by a continuing resolution that extends through January 15, 2014 and continues the 2013 post-sequester funding level. This operating level for FY 2014 is $174 million or 6.8 percent below the 2014 budget request and does not address the additional funds we requested for contract support or other important program needs. We await the outcome with regard to full year appropriation for Fiscal Year 2014 and we are working with the Tribes to prudently plan. Our planning scenarios include the potential for budget reductions and sequestration. In the meantime, we are challenged to undertake the programs we are responsible to execute as we await congressional action. We urge Congress to enact a budget that more adequately funds Indian programs.

The effects of sequestration are beginning to be felt more and more, as the cuts had immediate impacts in FY 2013 with reductions in hiring, delays and cancellation of travel and training, and cuts in contracts for maintenance and other needs. The impacts will continue to be felt for some time, as the reductions erode capacity in direct services programs and in tribally operating programs. Reduced hiring and training undercuts the capacity needed and results in significant skills gaps in areas including child welfare, early learning programs, energy development, welfare and others. The long term effects including erosion of our workforce and, cut backs in educational programs and investments in economic development and other areas are becoming more apparent, as other witnesses will likely explain.

Because Indian people are often among the poorest communities in the United States, reductions to the budget caused by sequestration has undermined the health and safety of some of the most vulnerable segments of society with particular effects on children, the elderly, and families.

Sequestration has undermined the efforts of the BIA and BIE and other federal agencies to provide services to meet our trust responsibility to Indian Tribes and Indian people. Our employee ranks have thinned substantially as hundreds of staff positions have opened through retirement and other forms of attrition and cannot be easily filled in the current fiscal scenario.

This effect has been mirrored for Tribal governments in Indian Country. The sequestration reductions have reduced payments to Tribes to perform important federal services, undermining tribal self-determination and self-governance and severely handicapping the ability of Tribes to implement treaty rights and various resource management programs to maintain and restore natural resources in Indian Country. Imposing automatic across the board cuts to reduce spending across all tribal activities has had immeasurable impacts in the denial of opportunities for a self-reliant people.

In conclusion, I hope the Congress will be able to successfully complete the negotiations being conducted for resolution of the budget situation so we can return to regular order, avoid sequestration, and have certainty in a budget that will adequately address needs in Indian Country.

The CHAIRWOMAN. Thank you.

Director Roubideaux, thank you for being here.

STATEMENT OF HON. YVETTE ROUBIDEAUX, M.D., M.P.H., ACTING DIRECTOR, INDIAN HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Dr. ROUBIDEAUX. Thank you, Madam Chairwoman and Vice Chairman Barrasso and members of the Senate Committee on Indian Affairs. I am Dr. Yvette Roubideaux, the Acting Director of the Indian Health Service. I am very pleased to testify today on contract support costs and sequestration.

I want to start by saying that I am deeply concerned about the current fiscal situation and I am very anxious to work with all of you on solutions. The impact of sequestration in fiscal year 2013 was significant for the Indian Health Service. Overall, it was a $220 million reduction in IHS's budget authority. It was estimated that that would result in, as Secretary Sebelius mentioned, and as

Senator Schatz mentioned, the reduction of 3,000 inpatient admissions and 804,000 outpatient visits for our patients

In fiscal year 2013, IHS had to make significant reductions in administrative costs, travel, we had to delay hires, delay purchasing, we had to delay planned renovations that were needed in order to focus on trying to preserve the IHS mission. Even with all these challenges, I want to continue to be a strong advocate for the Indian Health Service budget, and I am anxious to work with you on this. I have advocated very strongly within the Administration to continue to keep the Indian Health Service to be a priority.

We need to get the Indian Health Service back on track. We did have a series of increases over the last four years. I know that tribes are deeply concerned that we are going backwards. I am so grateful that the tribes get to tell their story today and have told you their story about the budget situation.

I also want you to know that I have heard your concern about contract support costs, and have heard the concerns of tribes. We have heard loud and clear that people want solutions. We are here and want to work with you on solutions to these issues. Related to the appropriations, we have actually increased contract support costs 67 percent since fiscal year 2008 and our President's budget includes an increase for contract support costs for fiscal year 2014.

It also includes increases for other tribal budget priorities, including medical inflation, staff and operating costs for newly constructed facilities and contract health service for referrals. It reflects the challenge of funding all our identified needs and funding priorities, especially in this difficult fiscal climate that we face.

I want you to know I have also heard the input that tribes want more consultation and more discussion about solutions for contract support costs. We are discussing it in our current area budget formulation process, and I sent a letter last month to tribes that included an update and initiated a discussion on contract support costs to look at the estimates of CSC in the pre-award and negotiations phase.

I have met with the IHS tribal self-governance advisory committee. I have also met with the IHS direct service tribes advisory committee. They have agreed to move forward with this discussion. And I have agreed with them to convene the CSC work group to make recommendations on this topic.

I appreciate all the input we have received from tribal leadership on working to continue progress on this issue.

In terms of the past claims, we have heard your input that you want us to do everything we can to increase the pace of settlement. We have a joint management plan with the tribal lawyers. We have instituted a new fast-track alternative process to get offers on the table quicker for tribes. I have also recently committed resources to increase the number of staff and resources to increase the rate of generating initial settlement offers.

So in summary, I am very deeply concerned about the fiscal situation and sequestration. We have heard from tribes on the significant challenges that they are facing and that we are facing as a system as well. The President's budget for fiscal year 2014 as a whole replaces sequestration and reduces discretionary spending

limits while providing funding consistent with the limits agreed to in the bipartisan majority's and the Budget Control Act of 2011.

IHS budget in particular would be increased above the sequester level and allow IHS to continue to make improvements in health care access to quality for American Indian and Alaska Native patients.

I am anxious to work with you to find solutions to this budget situation and I know that I want us all to work together so we can honor our responsibility to provide health services for American Indians and Alaska Natives that they need and they deserve.

Thank you, and I am happy to answer questions.

[The prepared statement of Ms. Roubideaux follows:]

PREPARED STATEMENT OF HON. YVETTE ROUBIDEAUX, M.D., M.P.H., ACTING DIRECTOR, INDIAN HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Thank you, Madam Chairwoman, Vice Chairman Barrasso, and Members of the Senate Committee on Indian Affairs (Committee). I am Dr. Yvette Roubideaux, the Acting Director of the Indian Health Service (IHS). I am pleased to provide testimony on Contract Support Costs and Sequestration.

The IHS is an agency within the Department of Health and Human Services (HHS) that provides a comprehensive health service delivery system for approximately 2 million American Indians and Alaska Natives from 566 federally-recognized Tribes in 35 states. The IHS system consists of 12 Area offices, which are further divided into 168 Service Units that provide care at the local level. Health services are provided directly by the IHS, through tribally-contracted and operated health programs, through services purchased from private providers, and through urban Indian health programs. The IHS fiscal year (FY) 2013 discretionary appropriations were $4.1 billion, with approximately $2.028 billion of the IHS appropriations transferred to Indian Tribes and Tribal Organizations (T/TO) through agreements entered under the Indian Self-Determination and Education Assistance Act (ISDEAA).

The impact of sequestration in FY 2013 was significant for IHS; overall, the $220 million reduction in IHS' budget authority for FY 2013 was estimated to result in a reduction of 3,000 inpatient admissions and 804,000 outpatient visits for American Indians and Alaska Natives (AI/ANs). In FY 2013, IHS made significant reductions in administrative costs, travel, and delayed hires, purchasing and planned renovations to focus on preserving the IHS mission.

Contract Support Costs

As authorized in 1975, the ISDEAA provides T/TO the authority to contract with the Federal Government to operate programs serving eligible persons and to receive not less than the amount of funding that the Secretary would have otherwise provided for her direct operation of the program (also known as the "Secretarial amount"). The 1988 amendments to that law added Contract Support Costs (CSC) as a second category of funding to ISDEAA agreements. CSC covers additional activities that T/TOs must perform in support of the programs, services, functions, and activities (PSFAs) administered under their ISDEAA agreements which the Government did not perform or did not otherwise fund through the Secretarial amount. 25 U.S.C. ◖ 450j-1(a)(2). CSC is not a simple indirect rate or percentage of funding received, though the calculation of one category of CSC—indirect CSC—can rely, in part, on the T/TO's negotiated indirect cost rate agreement. The ISDEAA does not establish the methodology for calculating CSC; but, the statute is clear that CSC must be reasonable, non-duplicative, prudent and necessary to carrying out the PSFAs in the ISDEAA agreement.

The IHS administers CSC funding under a policy established in 1992. The policy was developed through extensive consultation with and participation by Tribes and has been amended based on that consultation, most recently in 2007. In FY 2011 and FY 2012, IHS made significant improvements to the IHS business practices associated with the CSC policy to ensure fair and consistent application of the CSC policy across all Tribes, including Tribal data verification.

Contract Support Cost Funding

The IHS paid about $447.8 million in CSC to T/TO in FY 2013, which is a 67 percent increase over the FY 2008 funding level. The President's Budget request for FY 2014 provides about $477.2 million for CSC, including $500,000 for new and expanded ISDEAA agreements. The FY 2014 President's Budget also requests increases for other Tribal budget priorities including medical inflation, staff and operating costs for newly constructed facilities, and Contract Health Service, and reflects the challenge of funding all identified needs and funding priorities, especially in the difficult fiscal climate we currently face.

The FY 2014 President's Budget request also proposed adopting a new approach to funding CSC in light of the Supreme Court's decision in *Salazar v. Ramah Navajo Chapter* in 2012. Consistent with one of the options identified by the Supreme Court, the President's request proposes new appropriations language that creates a line-item appropriation with a maximum amount of CSC funding available for each ISDEAA agreement. Three of the other options identified by the Supreme Court involve amending the ISDEAA.

Tribes have expressed concerns about the approach proposed in the FY 2014 President's Budget and have emphasized that full funding of CSC is their desired result. The Administration considers the FY 2014 budget proposal to be an interim measure, and has been consulting with Tribes on a long-term solution and requesting input through several forums and communications. And, as the President stated at the Tribal Nation's Conference, he hears the frustration of the Tribes and will work with Tribes on a solution.

More specifically, each IHS Area Office has been requested to submit recommendations from the Tribes participating in the FY 2016 IHS Tribal Budget Formulation sessions occurring this fall.

On September 9, 2013, I sent a letter to Tribes that included an update on CSC and initiated a discussion on calculation of estimates of CSC in the pre-award or negotiations context. As planned, I have met with the Tribal leadership in the IHS Tribal Self-Governance Advisory Committee and the IHS Direct Service Tribal Advisory Committee, and we had productive discussions on the topic of CSC and agreed to move forward with a charge to the IHS CSC Workgroup to make recommendations on this topic. We are hopeful that greater agreement on how to calculate estimates of CSC in the pre-award context will help with more efficiency in all other phases of the CSC process. I appreciate all the input we have received from Tribal leadership, and we are working to continue progress on this issue.

Contract Disputes Act Claims for CSC in Past Years

In terms of Contract Disputes Act (CDA) claims for unpaid CSC in past years, the IHS continues to make progress and to prioritize the resolution of claims presented to the agency in the most efficient manner and through settlement wherever possible. We have moved forward with a joint case management plan, agreed upon by both IHS and the T/TOs, for exploring settlement of all CSC claims on appeal to the Civilian Board of Contract Appeals. In response to input from Tribes, the IHS also announced in June 2013 two procedural options for resolving claims for unpaid CSC in past years:

- Traditional procedure. Under this option, the IHS and the Tribe will have in-depth discussions of the Tribe's claims and share documentation in an effort to reach agreement on a final amount of unpaid CSC. The benefit of this option is that the mutual exchange of information and documentation ensures the highest level of confidence in the final agreed-upon amount.
- Alternative procedure. Under this option, a Tribe can request that the IHS perform the same costs-incurred analysis based on the agency's documentation and then make a one-time, non-negotiable offer to settle the Tribe's claim(s). The Tribe may choose to settle for the offered amount and resolve the claim(s). The Tribe may also choose to reject the offer and instead return to the traditional in-depth option. The benefit of this option is it is less time-consuming for Tribes.

Regardless of the process selected, the IHS will seek to ensure the agency consistently determines the appropriate CSC amount for each claim. IHS also recently committed more resources to the claims process to increase the rate of generating initial settlement offers. Currently, there are approximately 60 settlement offers on the table in both informal and formal settlement discussions, and many more in progress.

Sequestration

At this time, IHS faces uncertainty about its funding level for FY 2014 as we await full-year FY 2014 appropriations. The impact of sequestration in FY 2013 was

significant for IHS; overall, the $220 million reduction in IHS' budget authority for FY 2013 was estimated to result in a reduction of 3,000 inpatient admissions and 804,000 outpatient visits for American Indians and Alaska Natives (AI/ANs). In FY 2013, IHS made significant reductions in administrative costs, travel, and delayed hires, purchasing and planned renovations to focus on preserving the IHS mission.

One of the most significant challenges we face is the potential future impact of reductions to the discretionary spending limits and sequestration on IHS. Tribes have expressed their concern and disappointment that our recent progress on increases to the IHS budget is being reduced by having to absorb the cuts from sequestration. The FY 2014 President's Budget proposal as a whole replaces sequestration and reductions to the discretionary spending limits, while providing funding consistent with the discretionary spending limits agreed to by bipartisan majorities in the Budget Control Act of 2011. The IHS budget in particular would be increased above the sequestered level in FY 2013, and allow the IHS to continue making improvements to health care access and quality for our AI/AN patients.

IHS has the solemn responsibility to honor the federal trust responsibility and to carry out health care programs for AI/ANs, including through ISDEAA agreements, and remains committed to ensuring that our AI/AN patients and communities receive the quality health care that they need and deserve.

Thank you and I am happy to answer questions.

The CHAIRWOMAN. Thank you, and again, we appreciate both the witnesses being here.

My first question is to both of you. I know that you might think Director Roubideaux needs to answer this, but why do we have sequestration that protects Medicaid and Medicare but not Indian Health Service?

Dr. ROUBIDEAUX. I don't know the answer to that.

The CHAIRWOMAN. So in the Administration budget, are you talking about proposing a change to that for next year?

Dr. ROUBIDEAUX. Well, I have heard that there are proposals to protect the Indian Health Service, to exempt them from sequestration. Those proposals are being discussed in Congress and the tribes have indicated their support for them.

The CHAIRWOMAN. What does the Administration think?

Dr. ROUBIDEAUX. The Administration's approach is that we think sequestration is a bad idea and we want it to be eliminated. So we are willing to work with you on this issue.

The CHAIRWOMAN. What I would appreciate is an answer from whether the Administration supports protecting Indian Health Services the same way they protect Medicaid and Medicare. So if you could get us an answer yes or no on that, that would be very helpful.

Dr. ROUBIDEAUX. The Administration supports eliminating sequestration for the Indian Health Service as well as all other tribal programs and all of their programs.

The CHAIRWOMAN. While we are doing sequestration, does the Administration believe you need to protect Indian Health Services just like we protect health care under Medicaid and Medicare?

Dr. ROUBIDEAUX. I guess I have not asked that question to them. I will and I will bring that back to you.

The CHAIRWOMAN. Thank you. Assistant Secretary Washburn, do you have any comments about that question?

Mr. WASHBURN. I also don't have an answer for you. Certainly I think that it is true that what sequestration did is, in some respects the Budget Control Act attempted to protect the most vulnerable, and it did not do that in Indian Country, that is for sure.

That would seem to be inconsistent with what was said at that time, as Senator Udall said.

The CHAIRWOMAN. Okay. Back to the contract support costs. What do you think the estimate is that the Department of Interior owes tribes?

Mr. WASHBURN. As far as past claims?

The CHAIRWOMAN. Yes.

Mr. WASHBURN. I don't know what that answer is. And frankly, I am not sure that anyone knows what that is for sure. That really is the key question because liability was determined in the Ramah case. The liability is clear, the fact of liability. The question is how much. That is the golden number, that is the number we need to know to know how much to settle for.

The CHAIRWOMAN. Let's ask this. Are we talking about millions or billions here?

Mr. WASHBURN. It is at least in the hundreds of millions, I would venture to guess. But again, it is an estimate. The way we are going about it, and when I say we, I mean the plaintiffs and the Federal Government are working together on a sampling method so that they don't have to prove up every single actual cost that the tribes bore, but that they can come up with a method for estimating what the costs would be. As you noted in your opening statement, we have one large class action encompassing essentially every tribe that has a contract. And we are working with the plaintiffs to determine if there is a formula that we can use to estimate.

I am confident that it is in the hundreds of millions and it may well exceed a billion dollars.

The CHAIRWOMAN. I definitely think it exceeds a billion dollars from estimates that I have seen. So I don't think it is in the hundreds of millions. We probably wouldn't have everybody sitting here as members frustrated over the lack of progress on contract support if it really was in the hundreds of millions. I think we have a lot of people paying attention because it is a larger number.

But I am trying to get your viewpoint on whether these claims can be paid out of the judgment fund that exists.

Mr. WASHBURN. Well, let me say this. And I didn't mean to be lowballing or anything, I just don't know. And I don't want to be presuming anything. I view this as the same scale as *Cobell*. And *Cobell* was a multi-billion dollar settlement. I think this is just as important as *Cobell*, and the principles also are very important. It is my understanding that for past claims, the judgment fund is available for these claims. And that is the assumption I have been bringing to everything I have been hearing about this. There is a question about how the judgment fund works going forward. I think that is why the, well, there is the interest in the Administration to come up with a solution that doesn't create yawning liability indefinitely in the future.

So there is, I guess that is the reason, one of the reasons for the Administration's approach that it took in this case.

The CHAIRWOMAN. My time is running out. I want to get to my colleagues. But I guess the way I look at it is, liability, as you said, has been determined. You and I may be quibbling about the amount, but my guess is that at least it is that billion dollar mark. You are saying it can come out of the judgment fund, which has

funds. So now it is really just the process of determining how to get that done. I personally believe something like a special master would get it done faster than what we are doing and get some serious expertise on how to settle these claims in the process. But we will leave that to another round of questioning and I will turn to my colleague, the Vice Chairman.

Senator BARRASSO. Thank you, Madam Chairwoman. I have to agree with you, that was going to be my first question, just to follow your line of questioning. Written testimony from our second panel of witnesses today indicates that there are several thousand contract support cost claims pending with the agencies, close to 9,000 for the Bureau of Indian Affairs claims, nearly 1,600 from the Indian Health Service, with years left to settle them. So we are going to get recommendations that a special master be appointed to handle these contract support cost claims.

The question is, what do you think of this recommendation?

Mr. WASHBURN. Well, let me say this. This is a matter in litigation and I don't intend to dodge. But we didn't have a whole lot of time to prepare for this hearing, because we had so much going on this week. So that question wasn't posed to me and I didn't talk about it with anybody else. So my answer wouldn't be very useful to you, because it hasn't been vetted with anyone else in the Administration. We are certainly open to solutions that might help.

I have had regular briefings about the settlement discussions. And my sense is that the class counsel and my team have been making productive progress. So again, we are open to solutions, if they don't believe that is true.

Senator BARRASSO. In spite of the concerns that you didn't have enough time to deal with that, I would like to leave this as a written question to you as you go back and get that answer and get back to me as a direct follow-up, not waiting for another hearing but a direct follow-up.

Dr. Roubideaux, according to the National Congress of American Indians, both BIA and the Indian Health Service are essentially reevaluating these contracts and court cost claims. Since both agencies are required to report on these claims each year to Congress, presumably you already know what the claims are and for what amounts. Can you explain the need for reassessment of the claims?

Dr. ROUBIDEAUX. Well, I think you may know that the claims and the amount are a topic of the litigation. So I am not at liberty to discuss that in detail. But we have heard the input from the tribe about the claim estimates and all the other numbers, and we are discussing those.

Senator BARRASSO. You have testified on several occasions before this committee regarding the need for tribal consultation. In written testimony, Jefferson Keel, and he is here with us, indicates that the Indian Health Service seems inclined to raise the Federal Advisory Committee Act as an impediment to robust consultation. Can you explain how, in your opinion, the Federal Advisory Committee applies in tribal consultation?

Dr. ROUBIDEAUX. I am sorry Mr. Keel feels that way. The Federal Advisory Committee Act has an intergovernmental exception, which allows for groups of governmental officials to have deliberations that are not open to the public. We do like to preserve that

ability to have frank and honest and open discussions with tribes. So I would not want anybody to think that we were trying to impede conversation around that. What happens is that if you don't follow the rules of the intergovernmental exception, the deliberations and recommendations from the committee, as my lawyers tell me, could be challenged in court. We wouldn't want those deliberations to have problems in the future.

So it was really wanting to make sure that those recommendations would stand the test of time.

Senator BARRASSO. So then does the Indian Health Service, are you inclined to raise the Federal Advisory Committee Act as an impediment to robust consultation, regardless of how he feels about it? Is that what the inclination would be at the Indian Health Service?

Dr. ROUBIDEAUX. No, not at all. That is not our intention at all. We just want to make sure that the recommendations stand the test of time. That is why we want to make sure that we have all the documentation in place, so that these are intergovernmental representatives. And now that I have been able to explain that to tribes, the committees have told me that they understand it.

Senator BARRASSO. Thank you. Thank you, Madam Chairwoman.

The CHAIRWOMAN. Thank you, Senator Barrasso. Senator Tester?

Senator TESTER. Thank you, Madam Chair.

Just for the record, and this can be for either one of you, who made the determination to put caps on contract support costs? Was that done by the Department? Was that done by the Secretary of Interior? Was that done by somebody outside the Department?

Mr. WASHBURN. Senator Tester, you put us in a very awkward position when you ask questions like that, which I know you don't mind doing.

[Laughter.]

Mr. WASHBURN. I have to own that decision, and I will take responsibility for that decision, because I am the one who is testifying for the Administration.

Senator TESTER. Could you tell me why you made that decision? There must be a reason for it.

Mr. WASHBURN. Well, it is a difficult decision. It is not something that makes a lot of sense, in many respects, for either agency. We have hundreds of contracts with Indian tribes, and having to figure out even a cap amount for each one of them is a nearly herculean task. We have accountants who we would rather be using for much more productive work.

But I gather that the concern is with sort of the indefinite liability going forward that the Ramah case creates. Again, it was done without any consultation, and that is not usually the way we do business, especially at Interior. So we know that we have a consultation policy when we are making important decisions like this. We are doing our best to go ahead and proceed with the consultation.

Senator TESTER. That is fine.

Mr. Assistant Secretary, probably nobody in this room knows trust responsibility better than you, truthfully. And don't let me put words in your mouth, but I think you guys have been dealing with a continuing resolution at Interior for how many years?

Mr. WASHBURN. Well, the better part of 10 years, I would say.

Senator TESTER. The better part of 10 years. And then we have put sequestration on top of that, correct?

Mr. WASHBURN. That is correct.

Senator TESTER. And that is kind of forced you into this situation, right?

Mr. WASHBURN. I think it is fair to say that that is certainly part of it. There is not enough money to go around, absolutely.

Senator TESTER. That is right. And the fact of the matter is that because of the dysfunction in the Senate now, with filibustering every little issue that comes down the pipe, we are not able to do our job in a way that meets the needs for Indian Country. Would you say that is fairly correct? I don't want to get you into too much trouble with the Senate. But you can just say yes or no.

[Laughter.]

Mr. WASHBURN. I wouldn't want to leave the House out.

[Laughter.]

Senator TESTER. We will let that stand in the record.

I appreciate that. I will tell you that I think each one of us up here has our own difficulties, and you guys have your own difficulties. But we have got to be able to appropriate adequate dollars for you guys, or you are going to fail every time and you are going be in front of this Committee and we are going to be stomping our feet and throwing our fists on the table, saying why didn't you get this job done, when in fact you start out in a hole. Truthfully. Your head is nodding.

The question is, I have to ask myself, what can the Administration do differently. And has the Administration, has Secretary Jewell, has the President of the United States allowed you to advocate for the programs you feel are important to the extent you need to advocate for them? And I don't want to get you in trouble with your bosses, but the truth is that we need to hear from you guys on dollar amounts that meet the need. We don't want to lowball dollar amounts, we don't want to highball dollar amounts. We want enough money so you can do things like meet the needs of contract support services, meet the needs of Indian Health Service, meet the needs of housing, meet the needs of education. The list goes on and on. Have you been given the reins, so to speak, to be able to advocate for what you really believe in? Because I know where your heart is.

Mr. WASHBURN. Well, we don't get the budget we dream about, we get the budget that we can afford. There is not enough money to go around to do all the things that the United States should do, in Indian Country or frankly anywhere else, probably.

Senator TESTER. But they are in a little different boat with the trust responsibility.

Mr. WASHBURN. They certainly are, and the responsibility, the duty to Indian Country is far greater. I frequently say, somewhat in jest, that until we are willing to give North America back, we have certain obligations we need to pay. I truly believe that to be true. As a practical matter, it often turns out to be a political question, though, what the extent of those obligations are.

Senator TESTER. Thank you.

The CHAIRWOMAN. Senator, going back and forth, just to clarify how the rules in this Committee work, as a recognition, it is the time of the gavel, by seniority and back and forth. Senator Murkowski, then followed by Senator Franken.

Senator MURKOWSKI. Thank you, Madam Chair.

Just to kind of follow up on the points that you were making initially, when the Appropriations Committee had its very first hearing with what was happening with sequestration, I made the case at that time with OMB that tribes should be treated like the other Federal health programs that we have for our seniors, for our veterans. And that they be protected.

Obviously, they did not take that into consideration. But I am sending a letter to the budget conferees, asking them to hold harmless from sequestration the IHS and treat with parity the Indian health system as they do with our veterans and Medicare and Medicaid as well. So I look to the trust responsibility we all talk to here on this Committee, and I just don't see how IHS has been kind of shunted off into the corner, when we are talking about the responsibilities that we have from a budgetary perspective.

I would like to direct a question to you, probably, Assistant Secretary Washburn, and maybe this is for both. I have never really received a satisfactory answer, talking about the Ramah decision that came down, then the Administration comes out with a surprise to this Committee, clearly a surprise to Indian Country, by including the budget language capping the amounts of the contract support costs, eliminating the ability of tribes to make future claims, rather than support the full amount of the contract costs. I still am just incredulous that this whole thing took place, and that we are still living through this.

We have been told by the Administration that this was just an interim step. And yet I went to work with my counterpart on the House side, the former Interior Subcommittee chair Mike Simpson, to keep the language out of the current CR, because the Administration was insisting on putting it in. So on the one hand you are saying, well, we understand, we hear you, we are listening, but you still include it within that current CR. I do understand that you have had some consultation with tribes on the matter. You are hearing. But I guess I would ask for confirmation that you are working on solutions with the tribes on the issue of contract support costs. And when I say working on it, I mean to address it now.

We have budgets that we are all dealing with here. I want to know whether or not you are beginning to prepare next year's budget now, what the Administration's plan is going forward, whether you are going to propose the same language you put forward this year in the budget, capping the contract support costs. I would like to understand, I know we are at the tail end of this calendar year. But we are beginning this next fiscal year. Where are we when it comes to the budget, with contract support costs as well as just ensuring that the priorities are there, as well as the consultation?

Dr. ROUBIDEAUX. If I may answer this question. I want to reassure you that we have heard loud and clear the opposition to this proposal. We have heard it in many forums, the tribes don't like it. We have heard your opposition as well. And I can guarantee

you, both Assistant Secretary Washburn and I have used every opportunity during the budget formulation process to make it clear that that is what we are hearing from you and from your colleagues and from the tribes as well.

Senator MURKOWSKI. How is that going to translate?

Dr. ROUBIDEAUX. The fiscal year 2015 budget is still in formulation. So I am not at liberty to discuss the President's budget at this time, and I think it is still in process. So I don't think final decisions have been made. But I can guarantee you that during the discussions we are making sure that the tribes' positions are being discussed. We are making sure that your input is being heard and that it is very clear that people are opposed to this idea.

Senator MURKOWSKI. I was told from our tribal health providers that they have gotten confirmation from OMB that IHS is going to be limited to a 2 percent sequestration cut in fiscal year 2014, if a sequestration proceeds under the BCA. Is that your understanding?

Dr. ROUBIDEAUX. I am still awaiting the determination of what it will be. I think they are waiting for the final appropriations and what happens with Congress and the Budget Committee and so on.

Senator MURKOWSKI. So our tribal health providers actually have more information than you do on this? I am just trying to figure out where we are going forward.

Dr. ROUBIDEAUX. I have not received the official information from OMB yet on what the final determination will be. So the Administration has not given the official information yet. But I will go back and ask for that.

Senator MURKOWSKI. Like I say, I am trying to work with my House counterparts, this is my Appropriations Subcommittee. And we are trying to get a firm direction from the Administration on this. So when I had to fight to keep the language out of the CR that would be detrimental to the tribes when it comes to fulfilling the commitment, the promise of the contract support costs, I feel like I am fighting the Administration. You all are supposed to be working to advance this, you are supposed to be consulting with the tribes on this. You say you are listening. I want to see it translated into advocating with us on the budget. You can't put the monkey on our back unless you are willing to step up and be that advocate with us.

Dr. ROUBIDEAUX. We are absolutely willing to work with you on that. And we do think it is likely to be the 2 percent, but officially I haven't received the Administration's final determination. But I will definitely work with you on that.

Senator MURKOWSKI. Okay, thank you. Thank you, Madam Chair.

The CHAIRWOMAN. Senator Franken. And I just want to say, before Senator Franken, one of the reasons why we are having this hearing today on the larger issue of impacts of sequestration is because of Senator Franken's continued insistence about the importance of this issue. I just want to thank him for that.

Senator FRANKEN. Thank you, Madam Chair.

Assistant Secretary Washburn, testimony submitted by the Red Lake Band points out that over the last decade, the budget for BIA has been growing at a much slower rate than that of other agencies

within the Department of Interior. Now sequestration is just piling on and making it worse. Can you tell me why it seems that Indian Affairs gets the short stick from the Administration? I realize you are not in charge of the Department. But have you made the case to Secretary Jewell that this just can't continue, you are right, I do want to see more school reconstruction. Because it was zeroed out last year. Did I hear that right, that we are going to reverse that and have some money there for that? But did I hear a 19 percent decrease?

Mr. WASHBURN. Yes. The House budget would fund, I believe, $50 million for school construction, so that would take care of three schools that we have on our remaining list that need to be reconstructed. But yes, it would, to get that money and to otherwise reach the cut, it would be a $200 million cut to the Indian Affairs overall budget, including a 19 percent across the board cut.

Senator FRANKEN. We are going to hear testimony from tribal leaders in the next panel. But those kinds of cuts are so devastating, I told you about, Dr. Roubideaux, what happened in Red Lake in terms of their losing a mental health counselor and having two suicides. I have been working on a bill for mental health in the schools, to get more mental health counselors, more psychologists, more social workers in the schools. And to hook up, make sure the kids have access to the community's mental health system.

Can you identify any other funding streams that may be out there to help Red Lake make their schools' mental health department whole?

Dr. ROUBIDEAUX. Yes. In addition to the funding that we provide if the tribe manages the behavioral health program, there are other resources within the Department of Health and Human Services. I would encourage them to contact the SAMHSA to see if there are any grants or special funds that might be available to help them with some of the mental health issues in that community.

We also, in the past, as you know, had sought a deployment for the crisis situation that was there in the past. Sometimes those kinds of things are available for urgent situations. But there may be other funding within the Department of Health and Human Services. I can go back and talk with my colleagues and see if we can identify resources.

Senator FRANKEN. Mr. Washburn, just in general, when we see cuts like this, we see cuts in things like housing. I think Chairwoman Diver is going to be speaking to housing cuts, or she did in her written testimony. In Indian Country, very often there are no shelters, people just move in to some other families' home, maybe a relative's home, and you have maybe 10 people living in a two-bedroom house. And there is in those two families, there is a very high likelihood that there is somebody who has some addiction problem. We are adding problem on top of problem on top of problem. How does a kid do his homework? What are we doing? Can you just speak to how these problems exacerbate each other and they pile on top of one another and it makes it impossible? If we have the sequester, Chairwoman Diver testifies that they are going to lose Head Start slots. A kid is only three years old once.

Mr. WASHBURN. And we will deal with those issues for a lifetime if we lose a kid from Head Start. We are going to lose a generation.

That is what is possible. It really is that bad. And suicides are definitely an outcome of not having the proper personnel to help those children. We also lose the ability to investigate harm happening to children. All these kinds of things, which Senator Heitkamp, I know, is concerned about. Elderly abuse, we don't have a staff to investigate elderly abuse. We pile people into one house together where someone has a dysfunctional problem, it definitely just exacerbates the problem even more. These all do work together and they create a domino effect, absolutely. Any one of these things is bad, but when we take money out of all these different funds, it just has an unbearable effect on the overall problem and creates many more.

Senator FRANKEN. Thank you. Thank you, Madam Chair.

The CHAIRWOMAN. Senator Heitkamp?

STATEMENT OF HON. HEIDI HEITKAMP, U.S. SENATOR FROM NORTH DAKOTA

Senator HEITKAMP. Thank you, Madam Chair, and thank you both for coming today.

It is no secret, I am deeply, deeply concerned about the status of Native American children in particular, and Native American families. This morning I met with some of my tribal council members, heard stories about a one-bedroom, 13 to 15 people sleeping on the floor. They roll the mattresses out, pick them up. This is not uncommon. So we have, especially for direct service tribes, this is so critical.

The story today should be the headline story in the national news. A 19 percent cut is what you are suggesting will happen if they reallocate money to school construction?

Mr. WASHBURN. If the House budget passes, we would get a 19 percent cut across the board for everything. The one upside is that there would be money for school construction, but it would be a cut to virtually everything else. So that is right, that is the House budget I was describing.

Senator HEITKAMP. It is not, and that is the point. The point is that you are robbing from Peter to pay Paul when there is not enough money to do everything. This isn't Cadillac, this is bare subsistence, this is bare existence. These are atrocious, appalling conditions that should not happen in this Country. And we need advocates, beyond this Committee, we need advocates in the Administration. We went, Senator Murkowski and I sat and listened. There was a lot of yes, we hear your concern, yes, we hear your concern. I have heard that for a lot of years, yes, we hear your concern. And nothing happens. We don't improve the conditions. We have to be doing better.

A point that I want to make that is not made by these numbers, which is the growth in population that is being served. Kevin, can you tell us, what do you think? Can you give us a number of people who, the population that has increased as a result of additional births and additional people living on the reservations? So we are trying to take these budget cuts against serving more and more people. What has been the population growth in Indian Country in the United States?

Mr. WASHBURN. I don't have the exact figures on that. But we are a community that has been growing dramatically. I believe it is under 2 million people that we serve. But that is in a very fast-growing community. You are right, the money doesn't stretch. Our budget hasn't been growing as the population has grown.

Senator HEITKAMP. And for Ms. Roubideaux, I am curious about your position on Medicaid. One of the stop-gaps that we might be able to utilize in terms of expanding capacity for enrolled members and tribal members is enrolling more members in Medicaid, which would actually help you, because you are a billable agency. Is that correct?

Dr. ROUBIDEAUX. Yes.

Senator HEITKAMP. So you can bill if people are on Medicaid, plus there is another way to supplement Indian Health Service. So what are you doing to promote increased enrollments into the Medicaid system? Do you believe that is a solution?

Dr. ROUBIDEAUX. You are absolutely right, the Medicaid expansion that is happening in many States, and getting more American Indians to enroll in Medicaid in general is critical for our facilities. Some of our facilities, approximately half of their budget is third party resources. If we can get more of our patients enrolled, it means more revenue.

Senator HEITKAMP. So you agree with me that this could be an expansion that we need to get parity for Native Americans who are within the Indian health system. But my question is, what are you doing to encourage those enrollments?

Dr. ROUBIDEAUX. We are doing everything we can. We did training with our business office staff to make sure they understand how to help with enrollment. We are doing weekly question and answer telephone calls to make sure they understand.

Senator HEITKAMP. Have we seen an increase in the number of enrollments?

Dr. ROUBIDEAUX. I don't have that information right now, but I will get that to you as soon as I can.

Senator HEITKAMP. That would be something that I think would be very helpful, because it is a way beyond our budget problems right now to expand capacity to provide service plus the ability to seek health care beyond the Indian health system, if you are living in, let's say, Fargo, and need to see a doctor, being on Medicaid will facilitate that. We won't get into the system of reimbursement from Indian Health, which is incredibly frustrating for my providers.

So I am just really interested in both of you thinking beyond the box on how we can expand capacity. Because even if we double these numbers, we still will have people underserved. And so this is crisis, and we need to make that point

The CHAIRWOMAN. Thank you. I want to thank both of our witnesses. I think what you hear today is bipartisan support to fix both of these problems. Hopefully you will take that back, and we will also get Administration support for fixing those and we can all work together. So thank you. Thank you both for being here.

We are now going to turn to our second panel to continue discussion on both of these issues. We would like to welcome to the witness table the Honorable Brian Cladoosby, President of the National Congress of American Indians; the Honorable Karen Diver,

Chairwoman, Fond du Lac of the Lake Superior Chippewa Tribe from Minnesota; the Honorable "Bud" Lane, Vice Chairman, Confederated Tribes of Siletz Indians in Oregon; the Honorable Phyliss Anderson, who is the Chief of the Mississippi Band of Choctaw Indians; the Honorable Jefferson Keel, Lieutenant Governor from the Chickasaw Nation; and the Honorable Aaron Payment, Chairman of the Sault Ste. Marie Tribe of Chippewa Indians in Sault Ste. Marie, Michigan.

Thank you all for being here today. I want to say a special welcome to the new President of the National Congress of American Indians, Brian Cladoosby. We are proud you are a Washingtonian, congratulations on your recent election. And we will start with you, Brian.

STATEMENT OF HON. BRIAN CLADOOSBY, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS

Mr. CLADOOSBY. Thank you, Madam Chairman, members of the Committee. On behalf of the National Congress of American Indians, I would like to thank you for holding this very important hearing on contract support costs and sequestration. As you know, the underpinning of Federal spending in Indian Country is based on the treaties that our ancestors signed with the United States Government. This assistance and goodwill between nations derives from the trust relationship and is ingrained with Article I, Section 8 of the U.S. Constitution. Tribes have shared with NCAI their alarm and objections over one, the sequestration reductions to tribal programs and two, the underfunding of contract support costs.

The current and future sequestration cuts amount to unpaid bills in Indian Country which hurt the people who need these services the most, the poorest of the poor throughout tribal communities. I ask each of you individually, you, the Senate Committee on Indian Affairs and members of the United States Senate, where is my trustee? I have been asking every single Federal employee and person who represents the Federal Government this week, are you my trustee? And you would be surprised by the varied responses I get to that question. Whether you know it or not, when you took the oath of office to uphold the Constitution of the United States, you took on the obligation of a trustee to care for the interests of tribal governments and individual Native Americans and Alaska natives in upmost good faith.

I am disappointed and saddened to report to you that with regard to the two topics of today's hearing, the United States is not meeting its obligation as a trustee. With regard to contract support costs, as the Committee is well aware, the Indian Self-Determination Act requires the Federal Government to contract with tribes to operate BIA and IHS programs. The Self-Determination Act also requires that the contract price must include a negotiated amount to cover the tribe's anticipated fixed overhead costs. Those contract support costs cover everything from the cost of property or liability insurance to the cost of personnel management systems, legal costs and even the cost of the audits Federal law requires us to undertake every year.

Year after year the BIA and the IHS have failed to pay tribal governments what they would have paid to any other Federal con-

tractor. For years, tribes have filed claims against both agencies over their failure to honor the contracts and to pay all of the negotiated contract support costs that were due. There was a class action lawsuit filed in the 1990s on this issue, and in June of 2012, the Supreme Court ruled that the Federal Government was liable for the unpaid costs over those years. The Court directed that the liability be paid out of the permanent judgment fund.

The payment has not happened. In fact, as far as NCAI can see, nothing has happened.

The Committee recently posed several questions to the IHS. The IHS director responded that close to 1,600 claims are currently pending against the agency involving 200 tribes. I am told by the lawyers representing the tribes on this issue that the amount owed is over $2 billion for both IHS and BIA. As you noted, Madam Chair, over the past 16 months, IHS has settled only 16, 16 claims settled in 16 months. One percent of the 1,600 claims. At this rate, it will take 1,600 months to settle them all, well over 130 years.

Even if IHS does it at 10 times that rate, it will still take 13 years to settle all these cases. That pace is totally unacceptable, I believe, to everyone in this room.

Just as the stalled settlement process is contrary to the Indian Self-Determination Act, so too is OMB's effort by the 2014 budget process to cut off tribal contract rights. As this Committee is aware, OMB is now pressing for an anomaly in the continuing resolution that will fund the rest of the fiscal year 2014. The Administration's proposal, first announced last April, is to cap individual contract payments at levels that are lower than the negotiated contract price that is required to carry out these contacts.

The purpose behind OMB's proposal is simply to save money by cheating the tribes. And one note, Madam Chair, on this topic, even the U.S. Chamber of Commerce joins us in objecting to a proposed cap because of the precedent it might set for other government contractors. I call this contract support cost a crisis because that is what it truly is. And I don't use that term lightly. Behind the phrase contract support costs are real services for real people in dire need, services that are being cut off because the agencies have not honored their contract obligations, services that have been reduced because the agencies have treated our contracts as if they were discretionary grants. Services that have suffered because the agencies preferred to protect their own internal bureaucracies, rather than to budget what is due under our contracts.

NCAI appreciates that some things cannot be fixed in the near term, and that some issues may never get the attention that they truly need. But the contract support cost is a crisis, and it is one that needs to be fixed. The Supreme Court has spoken and the time for firm and swift action is now. NCAI respectfully calls upon Congress to do everything in its power to see that these challenges are met and to see that justice is finally done. The time for delay and injustice is over.

With regard to the second topic for today, the impacts of sequestration on Indian Country, and we have had the opportunity this week to meet with Senator Patty Murray and to meet with Representative Paul Ryan, two of the most powerful individuals in both houses of Congress, working on the budget. And our ask of

them both is to get rid of sequestration. Over close to half a billion dollars has been cut last year to our IHS and BIA programs. Restore those. We have asked they restore those numbers. If we are looking at a 2 percent cut this year, we ask them to take that 2 percent cut off the numbers that are being restored, not off the numbers that are already currently being cut. We asked those two individuals to eliminate that cap, eliminate that cap on contract support costs.

And the big one that I ask you to help us with is to pay IHS a year in advance, just like you do with the veterans. There is not a reason, a precedent has been set and there is no reason why this Congress cannot also enact something like that to make sure that IHS is paid for a year in advance.

So with that, I thank you. I have more to say but I see I had better be quiet now so the other panelists have time. If you have any questions, I would be more than happy to answer them. Thank you very much on behalf of NCAI.

[The prepared statement of Mr. Cladoosby follows:]

PREPARED STATEMENT OF HON. BRIAN CLADOOSBY, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS

Introduction

On behalf of the National Congress of American Indians (NCAI), I'd like to thank you for holding this timely and important hearing on contract support costs and sequestration. NCAI is the oldest and largest American Indian organization in the United States. Tribal leaders created NCAI in 1944 as a response to termination and assimilation policies that threatened the existence of American Indian and Alaska Native tribes. Since then, NCAI has fought to preserve the treaty rights and sovereign status of tribal governments, while also ensuring that Native people may fully participate in the political system. As the most representative organization of American Indian tribes, NCAI serves the broad interests of tribal governments across the nation.

The Solemn Agreements

The federal government has trust, treaty and statutory obligations to Indian tribes. The underpinning of federal spending in Indian Country is based in the treaties that tribes' ancestors signed with the US government. This assistance and goodwill between nations derives from the trust relationship, and is engrained within Article I, Section 8, of the US Constitution. The sovereignty of Indian tribes is being compromised in part due to the lack of the federal government's duty to honor all of its obligations to Indian tribes. Many critical governmental services have been historically underfunded and have failed to meet the needs of tribal citizens as documented by the U.S. Commission on Civil Rights in the Quiet Crisis report, Broken Promises report, by Amnesty International's in their Maze of Injustice report, and gap reports from the Bureau of Indian Affairs and Indian Health Service.

Threats to Fulfilling the Agreements

Tribes have shared with NCAI their alarm and objections over 1) ongoing sequester reductions to tribal programs as well as 2) the underfunding of contract support costs (CSC) and proposals to limit or to cut off the right of tribes to be paid their full CSC requirements, including the right to secure compensation for any contract underpayments. The FY 2013 sequester and future sequester cuts amount to unpaid bills in Indian Country, which hurt the people who need these services the most – the poorest of the poor throughout tribal communities. This testimony will outline some of those impacts. Underpayment of CSC results in the same impact in Indian Country: unpaid obligations that hurt not only those who rely on tribal services but also undermine the Indian self-determination policies that this Congress and Administration say they so strongly support.

Contract Support Costs

As the Committee is well aware, the Indian Self-Determination Act requires the government to contract with Tribes to operate BIA and IHS programs, but it also requires that the contract price must include a negotiated amount to cover the tribes' anticipated fixed overhead costs. Those contract support costs cover everything from the cost of property or liability insurance to the costs of personnel management systems, legal costs and even the costs of the audits federal law requires Tribes to perform every year. These are fixed costs, and they are essentially the same thing that other government contractors call "general and administrative costs" (or "G&A costs"). These costs are fixed costs. That means if the BIA or IHS do not pay a Tribe what the contract requires them to pay, then the Tribe has no choice but to take money from somewhere else to cover the costs. Invariably, that means less money to provide the actual services being contracted, whether that be health care or law enforcement or employment and education assistance.

The ISDA system may seem complicated, but it isn't. The Act says that the negotiated contract support costs must be added in full and paid to the Tribe at the beginning of each year. The IHS Manual and a BIA National Policy Memorandum explain the rules for negotiating those costs. The Act then directs that each year the agencies must provide a report to Congress explaining each Tribe's situation and the amount (if any) by which each agency underpaid what was owed to the Tribe. Both agencies' manuals explain how that annual report is to be prepared, who is to certify its accuracy, and how it is to be transmitted to Congress.

For years, Tribes have had claims pending against both agencies over both agencies' failure to honor the contracts and to pay all of the negotiated contract support costs that were due. The Ramah v. Jewell class action lawsuit was filed in 1990, and while two early settlements for over $100 million settled some early claims, for over a decade most claims for fiscal year 1994 and later years have remained in litigation. Then, in June 2012 the Supreme Court ruled that the government was liable for the unpaid costs over those years, and the Court explained that the liability would now have to be paid out of the permanent Judgment Fund. (That is the fund that Congress established long ago in the treasury to cover the payment of successful government contract claims.)

But payment has not happened. In fact, as far as NCAI can see, nothing has happened.
The class action lawyers recently reported to NCAI on the lawyers discussions with the Justice Department. Although they couldn't share much information, they did explain that there are close to 9,000 claim years at issue involving about 500 Tribes and 19 years worth of contracts (1994-2013). The government wants to randomly sample all of those contracts. Then, the government wants to review the audits and books and records of each sampled Tribe, and scrutinize what the Tribe spent. (That assumes the up to 20-year-old records even exist.) Then, the government will figure out the difference between what was spent and what the paid.

This kind of process is guaranteed to take years and years and is simply unacceptable. But just as importantly, it also makes no sense. The Supreme Court looked at just a few of these years (1994-2001). The Court explained that the government and the Tribes agreed that the Tribes had been underpaid by "between 77% and 92% of tribes' aggregate contract support costs" during those years. Ramah, 132 S. Ct. 2181, 2187. Obviously, the Court expected that the remainder of those unpaid amounts would now be paid through the Judgment Fund. That kind of math isn't rocket science, and it doesn't require years and years of trying to sample hundreds of contracts in search of non-existent payment records.

The Supreme Court made it perfectly clear that the issue was what did the BIA fail to pay. And the answer to that question--"between 77% and 92% of tribes' aggregate contract support costs"—has absolutely nothing to do with how the Tribes spent anything else. The government needs to simply step up and accept the Supreme Court decision and secure from the Judgment Fund the remainder of the "between 77% and 92% of tribes' aggregate contract support costs" that the BIA failed to pay. That is what the Supreme Court said.

The situation on the IHS side is even worse, if that is possible. According to the IHS Director's answers to recent questions posed by this Committee, close to 1,600 claim years are currently pending against the agency involving about 200 Tribes and seeking $2 billion. These include hundreds of unsettled claims that had piled up before the June 2012 Supreme Court decision in the Ramah case, plus hundreds more that were filed after the Ramah decision and before September 30, 2012.

NCAI has learned that of all these claims, over the past 16 months IHS has settled only 16. That's 16 claims settled in 16 months, or 1% of the 1,600 claims. (These settlements resolved one or more claims filed by the Arctic Slope, Wampanoag, Colville and Poach Band Tribes.) At this rate, it will take 1,600 months to settle them all—well over 130 years. If IHS goes 10 times faster it will still take over 13 years to settle them all. And if the definition of lunacy is continuing to do something that doesn't work, and just doing it more, this is lunacy.

The IHS Director recently stated in a public meeting that 54 settlement negotiations were underway. I am disappointed to have to report that this is not accurate. Of 20 cases pending in a federal court here in Washington, D.C., only one case is actually headed into a settlement negotiation (next month). The rest are only in the document exchange process. Of 23 cases pending in the U.S. Civilian Board of Contract Appeals, it is true that 19 have been listed by IHS as being in a "settlement" stage, but actual settlement negotiations have only occurred in 6. IHS may have plans to engage in 54 settlement negotiations sometime in the coming year, but nothing close to that volume of negotiations is underway now.

And what about the other 150 Tribes? Are they supposed to wait to 2015? 2016?

Justice delayed truly is justice denied. This kind of obstructionism is justice denied. When the Supreme Court has spoken, not just once but *three* times—in the Cherokee case, the Ramah case, and the Arctic case—then it is time to accept the decision, to deal honestly with the Tribes, and to swiftly wind up the claims.

Just as with the Ramah BIA situation, swift resolution is easily within reach. I say this because IHS and the Secretary have regularly provided the Senate President and this distinguished Committee with IHS-certified and Department-certified data detailing precisely how much of the negotiated contract amounts were, and were not, paid to each Tribe, each year. With the benefit of hindsight, did some of the Tribes negotiate too low? Probably. Did IHS sometimes negotiate too high? Probably. But the amounts were negotiated, and they were negotiated pursuant to IHS's very strict guidelines. A deal is a deal, and those amounts were then reported to this Committee and to Congress in certified reports. They were then used for government budgeting purposes. And, they were in turn used for the actual distribution of contract support cost appropriations the following year. It is far too late in the day for IHS to start retroactively renegotiating these amounts.

The issue here, plain and simple, is what did IHS fail to pay. The issue is not how the tribes spent the lesser amounts that they were paid. After all, ***you cannot spend what you were not paid.*** Both IHS and the BIA seem unable to understand this simple proposition.

But this Committee understands this precise point, because this Committee made it 25 years ago. In 1988 this Committee enacted the contract support cost provisions of current law, and that is when it also added remedies authorizing the Tribes to recover damages from Treasury's Judgment Fund if those contract support cost amounts were not paid. The Committee explained it was doing this because it was "unacceptable" for the BIA to have successfully argued in the past "that since the contractor had not received the funds it was entitled to receive, it had also not spent them and, therefore, had not incurred any costs which could be recovered as an indirect cost under the contract." S. Rep. 100-274 at p. 37 (1987).

What the IHS and the BIA are doing today in the settlement process is directly contrary to what this Committee intended and what Congress wrote in the Indian Self-Determination Act a quarter century ago. As nearly 100 Tribal leaders have stated to the President, it is time that this litigation was brought to a firm, final and prompt conclusion. In far more contested situations, the Administration has settled historic Indian claims, be it the *Cobell* allotment cases, the *Nez Perce* tribal trust cases, or the *Keepseagle* Indian farmer cases. There is no excuse for being less cooperative and more obstructive when the matter has received multiple Supreme Court decisions definitively establishing the government's liability.

Just as the stalled settlement process is contrary to the Indian Self-Determination Act, so too is OMB's effort in the FY 2014 budget process to cut off tribal contract rights. As this Committee is aware, OMB is now pressing for an "anomaly" in the continuing resolution or omnibus measure that will fund the rest of fiscal year 2014. The Administration's proposal, first announced last April, is to cap individual contract payments at levels that are lower than the negotiated contract price that is required to carry out these contracts. The purpose behind OMB's proposal: simply to save money by cheating the Tribes.

This action has infuriated Indian country. Two months ago over 50 Tribal leaders wrote to the Appropriations Committees to urge that this misguided proposal be rejected. Last month, 13 Senators led by Senator Begich called upon OMB to withdraw the proposal. Over 80 Tribes wrote the President two weeks ago making a similar call, as has NCAI by Convention Resolution.

Even the U.S. Chamber of Commerce has objected to OMB's proposal, recognizing the dangerous precedent that would be set if the budget is balanced by underpaying government contractors for services duly rendered the United States. Nothing less than the federal government's full faith and credit is on the line when the government looks to save money by underpaying contractors who are performing services.

The current situation cries out for justice, and it cries out for action from Congress.

1. Congress should direct the appointment of a Special Master to promptly resolve all outstanding claims in the Ramah and IHS cases. Ken Feinberg served effectively as a master in far more complicated and tragic settings, including the September 11 Victims Compensation Fund and the BP Horizon Gulf Oil Spill claims, and he or someone else of his stature should be appointed with the necessary authority to resolve the claims.

2. Congress should direct that all claims will be settled before June 2014, the 2 year anniversary date of the Ramah decision. Last July 31st, a bipartisan group of 8 Senators led by Senator Begich urged that these claims be resolved at once. With little to show since then, Congress needs to make this happen now.

3. Congress should amend the ISDA to remove any possible debate over what Congress said 25 years ago: that the issue in all these cases is the amount agencies failed to pay out of the original negotiated contract price. As it did 25 years ago, Congress should reject the agencies' "unacceptable" argument that if the money wasn't paid, it wasn't spent and is therefore no longer due.

4. Congress should reject OMB's counter-attack on the Tribes. As the U.S. Chamber of Commerce has noted, America is not a place where the government cheats its contractors for services duly performed. American does not default on its international obligations, and it must not default on its obligations to the Tribes either. As 13 Senators noted to Director Burwell on September 30th, these contract caps should be withdrawn at once.

To the contrary, now that the Supreme Court has spoken, and now that the Supreme Court has reiterated that tribal contractors are entitled to be paid in full for the work they do for the United States, appropriations must be provided sufficient to pay them. If underpayments persist, a remedy through the Judgment Fund must remain in place. That is the way it is for other government contractors, and there is no basis in law, policy or morality for treating Indian tribal contractors differently.

5. Congress should direct the BIA and IHS to maintain an open process for addressing contract support cost and related issues with Tribes and tribal representatives and experts. Consultation must be meaningful, open, detailed and accountable. Tribal department heads and experts must be part of the process, just as government experts and manager are part of the process. Tribal government representatives must not be forbidden to speak or participate. And if, as IHS has increasingly claimed, the Federal Advisory Committee Act limits how tribal consultation can occur, this Committee should secure immediate amendments to that Act so that full and open and productive consultation is possible.

I have called the "contract support cost" issue a crisis because that is truly what it is. Behind those three words are real services for real people in dire need—services that are being cut off because the agencies have not honored their contract obligations; services that have been reduced because the agencies have treated our contracts as if they were discretionary grants; services that have suffered because the agencies prefer to protect their own internal bureaucracies (as the Supreme Court noted in the 2005 Cherokee case) than to budget what is due under our contracts. The impact upon the Tribes is even worse when those impacts are added on top of the sequester, and when the sequester represents a cut to what is already only one-half of what is required to meet the health care needs of Indian country, and but a fraction of what is needed to deal with housing, education and law enforcement on Indian lands.

NCAI appreciates that some things cannot be fixed in the near term, and that some issues may never get the attention they need. But the contract support cost crisis is not one of them. The Supreme Court has spoken, and the time for firm and swift action is now. NCAI respectfully calls upon Congress to do everything in its power to see that these challenges are met and to see that justice is finally done. The time for delay and injustice is over.

Common Ground on Sequestration

On Oct. 17, the President signed legislation that avoided a dangerous default and reopened the government after the third-longest government shutdown in history, a shutdown that in itself caused much disruption and pain in Indian Country. The government was funded through Jan. 15, 2014, and the debt limit was extended until Feb. 7, 2014. The law directed negotiators to develop a budget framework by Dec. 13, which would give Congress a month to finish FY 2014 spending bills before government funding authority ends and new sequester cuts take effect on Jan. 15.

Comparing the budget proposals in the House and Senate, both budget resolutions call for changes to the Budget Control Act and to replace sequestration. The House fully replaces the defense cuts, but pays for it by cutting even more deeply from domestic investments. However, the Senate budget replaces all of the sequester cuts. A majority of tribal trust and treaty obligations are funded in the domestic discretionary budget. These treaty and trust investments are throughout the federal budget in the Departments of Interior, Health and Human Services, Housing and Urban Development, Agriculture, Justice, Environmental Protection Agency, and others. Sequestration is handicapping all of these agencies in their ability to fulfill their duties to tribes. In FY 2014, non-defense discretionary funding will be nearly 18 percent below FY 2010 levels adjusted only for inflation as a result of cuts made in the FY 2011 appropriations process and the Budget Control Act, including sequestration.

Tribes urge Congress to replace sequestration and avoid cutting even more deeply from key domestic investments, which include the solemn duty to fund the trust responsibility. If Congress cancels sequestration cuts to defense spending, the same dollar-for-dollar protection must be provided to non-defense discretionary programs. Congress must not simply replace defense sequestration cuts with cuts to non-defense programs. Absent specific exemptions for BIA, IHS, and other tribal programs, Congress must reach a deal to turn off sequestration entirely because it breaks trust and treaty obligations.

The United States should be a nation that meets its promises, not only to veterans and elders, but also to Indian tribes. Tribal programs are not charity or an entitlement: tribes prepaid for these services. Tribes have made some progress in addressing unacceptably inadequate public services that most Americans routinely take for granted, like law enforcement, education, and infrastructure development.

Federal appropriations for Indian Country programs did not create the national debt. Imposing ongoing sequester cuts on tribal programs will not balance the federal budget. What continuing sequester level funding in FY 2014 will do is set back by decades tribal and national goals and objectives for Indian Country to improve health care, public safety, housing, education, infrastructure and economic development.

Loss of Critical Governmental Services

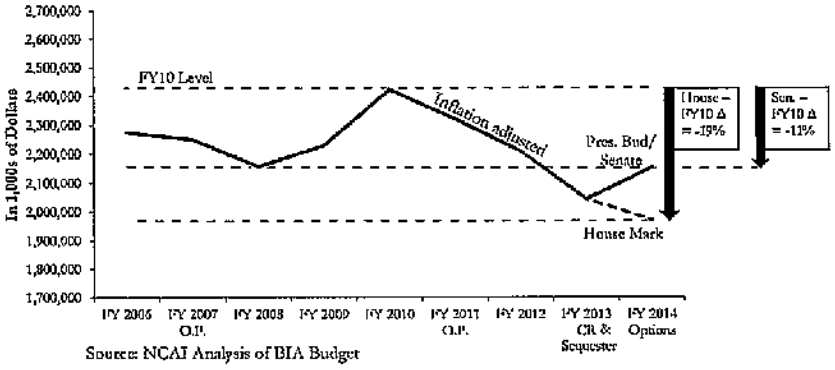
In their role as governments, tribes deliver all the range of services that other governments provide. Tribal governments maintain the power to determine their own governance structures and enforce laws through police departments and tribal courts. Tribes provide social programs, first-responder services, education, workforce development, and natural resource management. They also build and maintain a variety of infrastructure, including roads, bridges, housing, and public buildings. Yet, tribes need adequate resources to exercise their self-determination and serve as effective governments.

A Closer Look at the Bureau of Indian Affairs

The BIA provides funding for core tribal governmental operations. These government funds provide much-needed investments in tribal physical, human, and environmental capital. The amount that was provided for non-defense discretionary programs in the House budget resolution was simply way too low for Congress to invest in Indian Country the way policy makers in the House have said they would like to for FY 2014. The trend in BIA funding is similar for many other agencies that meet trust and treaty obligations to Indian tribes.

Accounting for inflation, the House proposed level would drop critical tribal governmental services to 19 percent below the FY10 level (see figure 1). BIA funding even at the Senate proposed level of the draft FY 2014 Interior appropriations bill would still be lower than the FY 2008 or FY2006 level. Adjusting for inflation, the Senate level is still 11 percent below FY10. ***These reductions completely erase the gains that have been made in the last few years that have been supported by both the Congress and Administration.***

Figure 1. Bureau of Indian Affairs, FY 2006 – FY 2014, House versus Senate



Source: NCAI Analysis of BIA Budget

Sequestration should not be the status quo. The FY 2013 sequester already reduced BIA by $119 million. If the conference committee does not find any agreement, the status quo of a FY2014 full year Continuing Resolution will result in another 2.2 percent reduction to BIA funding beyond the current 5.04 percent cut in FY 2013 (according to BIA projections under a year-long CR in which sequestration is not cancelled or replaced for FY 2014). This means that in FY 2014, BIA would be cut another $52 million on top of the $119 million already cut in FY 2013.

Under the House budget, the FY 2014 House Interior appropriations bill would fully fund contract support costs (which is very strongly supported across Indian Country), and construction would increase. But under the House allocations, those increases come at the expense of a 19 percent across the board cut to all the other BIA programs. This is clearly unacceptable, unsustainable, and unrealistic.

Sequestration and Education

Head Start: Impacts to Indian education are some of the most tragic results of reductions already imposed by FY 2013 sequestration to tribal programs. The Indian Head Start program, which provides education, nutrition, health and parental involvement services, saw cuts of nearly $12 million in FY 2013. Twenty-five thousand Native children from 26 states are experiencing losses in these much-needed services.

The impact on families will be substantial due to the lack of important services provided by Indian Head Start programs across Indian Country. Most of the families served by Head Start meet the income guidelines of being at or below the poverty level. For many children and families, Head Start provides access to resources beyond the educational benefit of being in a learning environment with their three and four year old peers. How each child is doing in all phases of their cognitive, social, emotional, and physical wellbeing, and how well they relate to their overall environment are critical in future success. Head Start also provides preschoolers with breakfast and lunch, and teaches them basic hygiene, such as brushing their teeth.

Sequester Impacts on Indian Head Start

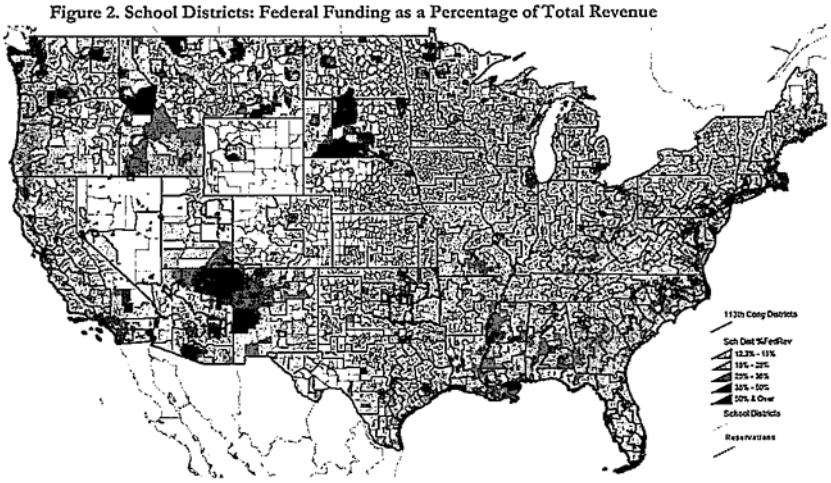
- The September 2013 start date for all Tlingit & Haida Head Start Classrooms will be delayed due to sequestration that went into effect March 1, 2013. The delayed start date will also impact the return to work for all Tlingit & Haida Head Start employees by a total of three weeks. Other options included possibly closing a center, reducing the number of children and families served, or reducing hours worked per week by all employees. All employees are impacted by the cuts including administrative staff who will be taking leave without pay over the summer months and between now and the end of December.
- The budget cuts will reduce classroom days by close to 10 percent. It will also lower hours – and pay – for Tlingit-Haida 55 staffers.
- At the Catawba Indian Nation Head Start in South Carolina, the sequester is devastating their Head Start program. The program is downsizing from five days of service to four days for the summer. The director is concerned about meals. The program serves two meals a day. On Fridays, will the children have a meal? Will they be watched by siblings or adults? Every weekend this summer will be a three-day weekend and we're not sure the children's basic health and safety needs will be met.
- The Confederated Tribes of Siletz Indians Head Start program closed one week early this year and start two days later next, and they will need to cut supplies to classrooms and teacher training dollars. If the cuts continue in FY14, it could impact enrollment.
- Head start is the largest tribal program on the Rosebud Reservation and serves more than 300 children. To cope with a cut of nearly $130,000, the tribe's head start administration will take a two week furlough this summer. Teachers in Rosebud's 16 classrooms will also be on leave for seven days during the 2013-2014 school year.

Impact Aid: Federal dollars help pay for education in Indian Country — a major function that makes up a basic building block of the economy. A majority of Native students attend public schools. During the 2010-11 school year, there were 378,000 AI/AN (alone) students in the U.S. public school system. During the same period, there were 49,152 students in Bureau of Indian Education Schools.

The impact of sequestration will vary district to district and state to state for school districts. Federal revenues vary in proportion for overall school operating budgets. Those districts where the federal

revenues are a larger portion of their overall operating budget will feel a deeper impact. Figure 2 shows a map of school districts nationally and their respective proportions of federal revenue for their school budgets, with the darker blue districts having federal revenues chipping in more than 50 percent of their budgets.

Figure 2. School Districts: Federal Funding as a Percentage of Total Revenue



Across the nation, federal dollars represented 12.3 percent of school revenues in FY10, on average. In most school districts, education is funded largely by state and local governments, with the federal government contributing between 10 to 20 percent. However, schools on Indian reservations and military bases are on tax-exempt land. Unable to raise funds from taxes, Indian reservation and military schools depend more heavily on federal aid. In addition to funds for poor and disabled children, schools on federal land also receive Impact Aid, intended to make up for the lack of property-tax revenue. Nearly the entire top 25 districts nationally who are most reliant on federal funding are on or adjacent to Indian reservations, which is largely due to the funding received through Impact Aid. Unlike other Department of Education programs, Impact Aid is not forward funded, meaning the funding cuts will take effect in the middle of the current 2012-2013 school year. The over $60 million in cuts to Impact Aid will directly affect the operation of 710 schools and the services provided to approximately 115,000 Native students.

Many of these schools are counting on those funds to meet the basic needs of students and to pay teacher salaries this spring, potentially forcing districts to make wrenching, mid-year adjustments. In New Mexico for example, the Gallup McKinley County Public Schools would lose about $2 million of the funds from Impact Aid, which could affect as many as 6,700 students who live on tribal lands. Impact Aid funds make up 35 percent of that district's total budget.

The National Association of Federally Impacted Schools asked the top district recipients of Impact Aid how the FY13 cuts were implemented. The most common effects were deferred maintenance and technology purchases, elimination of instructional and non-instructional staff, increased class sizes, and reduced professional development. Other areas where cutbacks occurred were to academic programs, extra-curricular activities and summer programs, and transportation routes. The Impact Aid program is being reduced for the upcoming school year, but now all other education programs are subject to sequestration, including the cornerstone federal K-12 programs, Title I and the Individuals with Disabilities Education Act (IDEA). Tribes urge Congress to find a better way achieve deficit reduction than on the backs of these schools in tribal communities serving approximately 115,000 Native students.

Impact Aid Cuts in Indian Country

Navajo, Arizona – cutting 65 staff positions

- The Window Rock Unified School District in Arizona gets just under 60 percent of its funding from federal aid. This year it eliminated about 65 staff positions through attrition and cut down its buildings from seven to four. If sequestration continues, it will have to close schools, many of which are in areas of high unemployment and poverty.

Blackfeet Tribe, Montana – No Repairs, May Layoff Teachers

- Heart Butte in Montana, which gets over half of its funding from the federal government, cuts have forced the district to hold off on all repairs this school year. That means that there are leaks, no hot water, roofs that need patching, buses in neglect, and a playground that doesn't comply with regulations. The school needs to install new doors and safety gates, but that is also on hold. If sequestration continues, they may have to lay off teachers.

Fort Belknap, Montana – Vacant Counseling Spots, Cut Paraprofessionals, Secretaries, Cooks

- The Hays/Lodge Pole school district in Montana is unable to fill a counseling spot even as youth suicides are on the rise. It also had to cut paraprofessionals, all secretaries but one, and cooks' helpers. After next year, school officials say there will be nothing left to cut.

Standing Rock Sioux, South Dakota – Staff Cuts and Cuts to Music Program, P.E. and Admin

- The McLaughlin Independent School District in South Dakota, which gets two-thirds of its budget from federal funding, has already implemented changes for the current school year: reducing staff to one teacher per classroom for grades three through five and cuts to the music program, P.E., and administrative positions.
- The school also used to have a bus to take students home after sports practice -- some children live 20-25 miles away -- but that service is now also gone.
- Until last year, the district offered summer school, like so many others do around the country. But McVay just doesn't have the resources to do so anymore, thanks to sequestration, and the program has been eliminated.

Fond du Lac Ojibwe School in MN – staff layoffs, limited salaries, difficult to hire quality teachers

- Even in the best of times, hiring quality employees is difficult because the school is limited in what it can offer for salaries; sequestration is compounding that problem.

Public Safety – Tribal and BIA Law Enforcement

A basic governmental service, public safety and justice, is funded in the Bureau of Indian Affairs. Sequestration is harming the ability of tribes to enforce laws in their communities. The public safety problems that plague tribal communities are the result of decades of gross underfunding for tribal criminal justice systems and a centuries-old failure by the federal government to fulfill its public safety

obligations on tribal lands. Law enforcement infrastructure and basic police protection on tribal lands are a fundamental function of government, and if they are not provided at the highest quality, no one will be willing to invest in tribal economies.

Sequester Impacts on Public Safety

- On Pine Ridge, the reservation often has only nine patrol cars on duty to cover an area the size of Connecticut and the police force absorbed 6 percent in cuts this year, more than a million dollars in cuts.
- On the Cheyenne River Sioux reservation, Chairman Keckler testified: "We have experienced a Hobson's choice with respect to law enforcement and our criminal justice system on the reservation. Faced with a desperate shortage of patrol officers to cover all shifts over our vast land base, our chief of police recently asked the Tribal Council for additional funding to hire three patrol officers. Our 638 contract funding for law enforcement is already insufficient to cover even the current expenses for the remainder of the fiscal year, so the police chief's request was denied. Now what alternative does the Tribe have? Turn away helpless calls for assistance from terrified victims of domestic violence? Tell car accident victims that they are on their own for emergency medical care?" [1]

Federal Bureau of Investigation (FBI)

The federal government plays a major role in prosecuting crimes committed in Indian country, which is a responsibility of the FBI. More than 100 special agents from 20 different field offices investigate cases on over 200 reservations nationwide. The FBI works closely with tribal police and federal agents from the Bureau of Indian Affairs. They are generally responsible for the most serious crimes—such as murder, child sexual and physical abuse, violent assaults, drug trafficking, gaming violations, and public corruption matters. Unless a federal statute has granted the state jurisdiction, the federal government has exclusive jurisdiction to prosecute non-Indians who commit crimes against Indians in Indian country, while the federal government and tribal governments both have jurisdiction to prosecute Indian offenders who commit crimes in Indian country. Federal prosecution also carries the possibility of greater terms of imprisonment, as tribal courts are statutorily limited to a maximum of 3 years imprisonment per offense. Because of such jurisdictional and sentencing limitations, tribal communities rely on the federal government to investigate and prosecute a variety of crimes in Indian country.

Despite the Federal Government's primary enforcement responsibility on Indian reservations, between FY 2005-2009, U.S. Attorneys declined to prosecute nearly 52 percent of violent crimes that occur in Indian country; and of those declined, 67 percent of the cases were sexual abuse related. [2] U.S. Attorney Tim Purdon says federal prosecutors have started to address crime on American Indian reservations in the last few years, but he worries sequestration will slow the progress. The updated 2013 Department of Justice declination report shows that the number Indian Country cases charged in federal court has increased by 54 percent between FY 2009 and 2012, from 1,091 to 1,677 cases. But U.S. Attorney Purdon also reports that the ability of prosecutors to keep building on that work is "being thwarted" by the sequester cuts. [3]

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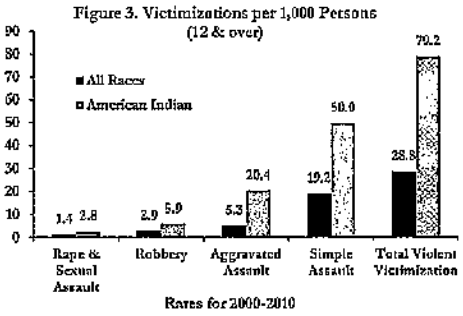
[1] April 24, 2013, U.S. House of Representatives Committee on Appropriations Subcommittee on Interior, Environment and Related Agencies Testimony on American Indian/Alaska Native Programs By Kevin C. Keckler, Tribal Chairman

[2] U.S. Government Accountability Office, U.S. Department of Justice Declinations of Indian Country Criminal Matters, REPORT NO. GAO-11-167R, at 4 (2010).

[3] May 31, 2013, Associated Press, "US Attorney says sequester may hurt Indian safety"

According to updates at the Affiliated Tribes of Northwest Indians in September 2013, the FBI has shut down training of new agents. Generally, new agents staff the rural field offices (which includes Indian Country), then they receive contracts to serve a certain number of years and then receive the office of their choice. Dozens of rural FBI field offices are in Minot, ND and Yuma, AZ and places near Indian country. Basically all of the small rural resident agencies are likely to close. When the existing agents move on, they cannot be replaced – because there are no new agents. This will be terrible for law enforcement in Indian country.



Sequester Impacts on FBI in Indian Country

- Training has stopped for recruits at Quantico and the FBI is not planning on bringing in any new agents next year, all because of sequestration. Moreover, new intelligence investigations are not being opened; criminal cases are being closed; and informants cannot be paid. There is not enough funding for agents to put gas in their cars.
- According to news reports, rationing gas for agents has especially dire consequences in Indian Country. "No gas means cases don't get worked — period," said an agent who investigates crimes on an Indian reservation. "Nothing is close to anything on the reservation. Witnesses and victims don't have phones. We have to drive to them. Fewer guys — fewer cases get worked. That is the cruel truth."[4]

Sequestration and the ongoing lack of resources for tribal and BIA law enforcement exacerbate crime rates that are already disproportionately high. Rates of assault among American Indians and Alaska Natives are roughly twice that of the country as a whole (figure 2). The average violent crime rate from 2000 to 2010 was more than two and a half times the rate for all races.

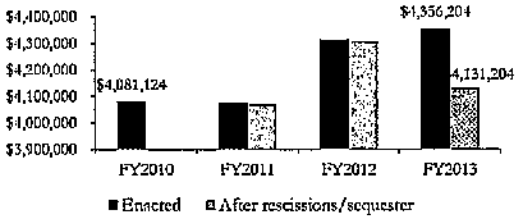
Sequestration and Health Care

In the Indian Health Service, sequestration is estimated to result in about 3,000 fewer inpatient admissions and 804,000 fewer outpatient visits provided in IHS and tribal hospitals and clinics. IHS may lack resources to pay for staffing and operations of five health care facilities that tribes have built with their own resources, with a total investment of almost $200 million. ***All other federal programs that serve the health of our nation's populations with the highest need, such as Social Security, Medicare, Medicaid, the Children's Health Insurance Program, and Veterans Administration, will be exempt from funding reductions. But not the Indian Health Service. IHS should be exempt as well.***

[4] September 27, 2013, Washington Post, "New FBI Director James B. Comey stunned by impact of sequestration on agents in the field"

Tribes across the country are forced to subsidize the federal trust responsibility to make up for these draconian cuts. Tribes everywhere are cutting services to their health systems and closing operating hours. The IHS is already only funded at 56 percent of total need, and American Indians/Alaska Natives already experience greater health disparities than other parts of the country.

Figure 4. IHS Funding FY 2010-2013
(Dollars in Thousands)



Sequester Impacts on IHS

Yukon-Kuskokwim Health Corporation

- The Yukon-Kuskokwim Health Corporation (YKHC) administers a comprehensive health care delivery system for 58 rural communities in southwest Alaska. The system includes community clinics, sub-regional clinics, a regional hospital, dental services, mental health services, substance abuse counseling and treatment, health promotion and disease prevention programs, and environmental health services. The Region is approximately 58,000 square miles (roughly the size of Oregon) and encompasses 58 federally recognized tribes. Residents practice a subsistence-based lifestyle, with hunting, fishing and gathering providing the vast majority of their food. The region is larger than 25 states in the nation combined. It is also one of the most economically challenged regions in Alaska and the United States.
- YKHC lost approximately $4.3 million as a result of the FY 2013 sequester. For our next fiscal year, unless Congress eliminates the budget sequester, YKHC expects to lose additional $3.4 million for a total of $7.7 million over the last two fiscal years.
- Sequestration resulted in laying off nearly 50 employees. About half of the 50 laid off workers may be transferred. YKHC is also eliminating 44 positions that were vacant and considered non-essential. The corporation eliminated its summer hire program which often employed college students wanting to make seasonal money.

Klamath Tribes

- Five Directions, an alcohol and drug treatment center for Native American teens run by the Klamath Tribes, is closing. It was one of 11 such centers nationwide serving Natives from Oregon, Washington and Idaho.
- Without Five Directions, the closest treatment center for local youth is in Spokane, Wash.
- Klamath Tribal Health will have to lay off six to eight employees. The rest of the staff will be absorbed into the health center, some to the Youth and Family Guidance Center, the outpatient clinic that will be expanded to compensate for Five Directions' closure.

Spokane Urban Clinic

- The NATIVE Project in Spokane, Washington (a Native American Urban Clinic) will implement three furlough days a month. This will mean the elimination of roughly 150 doctor visits.

South East Alaska Regional Health Consortium

- The South East Alaska Regional Health Consortium announced it will close the Bill Brady Healing Center that provides alcohol and drug treatment to Native Alaskans.

Pine Ridge

- The health education program will cut a full time physical fitness aid to part time – this will dramatically affect prevention of heart disease and diabetes. Topics where there is no additional money – HIV, teen pregnancy, suicide prevention, bullying, chronic care and case management
- Hearing tests for elders and babies have cut days for hearing testing and screening as well as supplies for patients
- Health Administration will start the new Fiscal year with no funds for outreach and there will be no case management for chronically ill
- Alcohol management program (Anpetu Luta Otipi) is assessing how they will continue full time treatment cycles

Natural Resources

Land and natural resources have always been central to tribal cultures and economies. The federal government has fiduciary trust responsibilities to protect the productivity of the trust corpus and ensure fair value and a full accounting of proceeds from utilization. There are trust and legal responsibilities to protect the rights of Indians in their trust property and those rights affecting trust property that are afforded by tribal sovereignty (water rights, land titles, boundary disputes, trespass, hunting and fishing, zoning and land use).

Funding for natural resource management has long been inadequate. Even without sequestration, $100 million is needed annually to provide the minimum base level funding needed to fulfill trust responsibilities for Indian forestry; 800 staff positions are needed, vacancies can't be filled; threats of wildfire, insects, and disease are increasing; costs of fractionation (administration and difficulty of productively using trust resources) are accelerating; lack of funding to manage fee lands that have been returned to trust status.

Failing to properly manage natural resources results in costly consequences. $1 billion has been spent on Cobell-like trust settlements with tribes, at least partially due to the failure to fulfill fiduciary trust obligations for natural resources. This is but one of a host of settlements resulting from litigation over mismanagement of trust resources. Improper management also results in lost jobs and diminishment of natural resource health and productivity. This leads to loss of access and use of traditional foods and medicines, which in turn increase health care and costs of living. Sequestration will make matters worse, making current funding and staffing shortfalls to widen.

There are also insidious impacts of sequestration. The impact to the workforce will be early retirements and loss of expertise. Reductions in force and positions, hiring freezes, furloughs, pay cuts, and inability to provide pay cost increases or provide compensation for required overtime will cause services to suffer. Staff are being exhausted from added physical, financial, and emotional stress due to increased workloads. The uncertainty of stable funding increases the difficulty of recruitment and retention of qualified staff. Sequestration is making worse the lack of funding needed (IFMAT stated that an additional $12.7 million needed annually) to develop and maintain workforce capability through training and education.

Funding uncertainty reduces the ability of tribes to undertake long-term programs and make investments to protect and develop natural resources. Tribes are being forced to try to support natural resource programs by piecing together funding sources and projects, which increases costs of administration and adversely affects program effectiveness and continuity.

Sequestration is resulting in lost opportunities. Inability to secure administrative and environmental clearances reduces the ability of tribes to take advantage of market opportunities. Sequestration reduces the ability to develop resource-based enterprises (e.g., projects that would contribute to US objectives of energy independence and security). Travel restrictions are reducing the ability to provide on-the-ground services and work with tribes.

Sequestration is resulting in deteriorating infrastructure. Loss of commodity production from federal forestlands is contributing to the loss of harvesting, transportation, and manufacturing infrastructure, reducing the ability to defray costs of management (income and forest management deductions), values of materials harvested to generate income and provide governmental services, and employment and business opportunities. Tribes may have to increase reliance on natural resource extraction. Reductions in jobs, income, and community assistance programs increase demands to harvest natural resources to meet daily needs.

Economic Conditions

Employment Sectors

Sequester reductions in FY 2013 and beyond will likely affect employment in Indian Country more harshly than for other communities. A third of Native people are employed in education, health care, and social services delivery. Many of the health, education, and social services in Indian Country receive federal funds, including through the Indian Health Service, Bureau of Indian Education, Impact Aid and through the Bureau of Indian Affairs.

Federal Cuts Disproportionately Impact Indian Country

For many tribes, a majority of tribal governmental services is financed by federal sources. Tribes lack the tax base and lack parity in tax authority to raise revenue to deliver services. If federal funding is reduced sharply for state and local governments, they may choose between increasing their own taxes and spending for basic services or allowing their services and programs to take the financial hit. On the other hand, many tribes have limited ability to raise substantial new revenue, especially not rapidly enough to cover the reduction in services from the across the board reductions of the FY 2013 sequestration.

States and localities finance their own areas of spending and state and local taxes provide the majority of the funding for most of their services. The Census of Governments shows that half of state and local government revenue is from their own taxes, while a quarter of their revenues come from the federal government. Like other governments, there is much diversity among tribes and regions in the proportion of federal sources of revenue to tribal taxes and tribal enterprise profits.

Cuts Will Impact Regional Economies

Not only will reductions to discretionary programs violate the trust obligations to tribes, but cuts will hurt the regional economies in which tribes are major players. A tribal government in Southeast

Alaska, representing more than 27,000 tribal citizens, attracted between $25 million and $27 million in annual funding to the region to support 200 programs and services that enhance the lives and well-being of tribal citizens, families, and communities. These services affect employment, health, education, and cultural identity. The $22.5 million in direct expenditures generated an additional $9 million in indirect and induced economic activity, for an estimated total regional impact of $31.6 million.[5] Reductions to Bureau of Indian Affairs, Head Start, as well as to Departments of Justice and Education will exact a heavy toll on the region's economy.

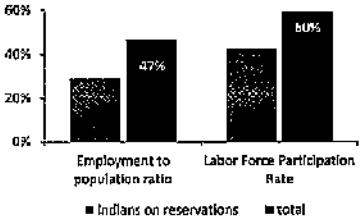
In 2009, the five tribes of Idaho provided total employment statewide for 10,676 jobs, including multiplier effects.[6] The tribes report that they "receive federal government revenues to support tribal government operations, health services, education, fish and wildlife projects, law enforcement, environmental quality, economic development programs and projects, and other activities. U.S. federal agencies serving as funding sources include the Bureau of Indian Affairs, U.S. Fish and Wildlife Service, U.S. Department of Health and Human Services, U.S. Department of Energy, U.S. Department of Agriculture, Bonneville Power Administration, U.S. Environmental Protection Agency, and U.S. Department of Transportation. Those federal funds represent "high powered" spending when they enter the local economies, and provide a relatively large economic impact."[7]

In Oklahoma, 38 tribal nations have a $10.8 billion impact on the state every year, supporting an estimated 87,000 jobs, or five percent of all jobs in the state. Interrupting tribal revenue flow is likely to increase unemployment for the region. In Washington State, a recent economic analysis showed that, in total, $3.5 billion of the total gross state product can be attributed to the activity on American Indian reservations. Also, tribes paid $1.3 billion in payroll to more than 27,000 Washington residents, many of whom were non-Indian. Although some tribes have implemented strategies that enhance economic development for their communities to *supplement* federal sources, that does not *supplant* the federal government's duty to fulfill its trust responsibility.

Labor Force Participation

The sequester cuts pose particular hardship for Indian Country and the surrounding communities who rely on tribes as employers, where the recession has struck especially hard. Census Bureau data show that each employed American Indian supported more than three others who were not employed. By contrast, the proportion for the entire US population is about one to one. Tribal leaders and planners have been working to address the economic inequity represented in the employment-to-population ratio.

Figure 5



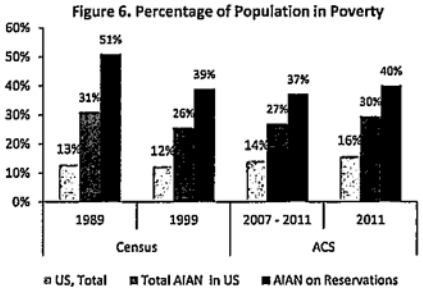
The labor force participation rate—the proportion of able-bodied civilians of working age that are working—also shows much unmet potential for tribal citizens to enter into the economy. Four out of 10 American Indians receive a paycheck, versus nearly two-thirds of total population.

[5] McDowell Group, *Contributions of Central Council Tlingit and Haida Indian Tribes of Alaska*, (Juneau, AK), March 2010
[6] Steven Peterson, *2010 Economic Impacts of the Five Tribes of Idaho On Idaho's Economy*, 2010
[7] Peterson, 2010

Impeding Recovery

Examining the trends in poverty rates on and off tribal lands is informative to the debate on how to address fiscal challenges. From 1990 to 2007, tribes reduced the percentage of tribal citizens in poverty on tribal lands by more than one-third. The poverty rate for all reservation American Indians and Alaska Natives (AIAN) in 1990 was 51 percent (see figure 6). That dropped to 39 percent in 2000, and was recently lowest at 33 percent in the 2008 Census American Community Survey (ACS) estimate. That has gone back up to 40 percent in the 2011 ACS 1-year estimate. The poverty rate for AIAN nationally, on and off reservation lands, was 20 percentage points lower in 1990 than the on-reservation rate, 10 percentage points lower in 2000, and 10 percentage points lower in 2010. Tribes markedly narrowed the gap between reservation and total AIAN poverty, but the recession halted the narrowing of the gap.

Figure 6. Percentage of Population in Poverty



Source: U.S. Census Bureau, 2011 American Community Survey 1 and 3 year estimates, 1990 Census, 2000 Census

Tribes were reversing what were once considered insurmountable challenges, due to increased self-determination, but the recession undermined some of those gains. Tribes want to continue improving economic conditions so that young Native people will want to return to economies that provide work on their homelands.

Conclusion

Absent specific exemptions for BIA, IHS, and other tribal programs, Congress must reach a deal to turn off sequestration entirely because it breaks trust and treaty obligations. Tribes urge Congress to replace sequestration and avoid cutting even more deeply from key domestic investments, which include the solemn duty to fund the trust responsibility. If Congress cancels sequestration cuts to defense spending, the same dollar-for-dollar protection must be provided to non-defense discretionary programs. Reductions in funding to meet trust obligations to tribal nations – public safety, education, health care, social services, and tribal governmental services – are reductions to "high powered" spending for local economies, which will impede economic recovery in addition to causing increased poverty and hardship for Indian Country.

The CHAIRWOMAN. Thank you.

Chairwoman Diver, thank you for being here.

STATEMENT OF HON. KAREN R. DIVER, CHAIRWOMAN, FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA

Ms. DIVER. Thank you for having me, Chairwoman Cantwell, members of the Committee.

I submitted written testimony, and I must admit to being stirred a bit passionately by your vigorous questioning of Dr. Yvette Roubideaux and Assistant Secretary Washburn. I often tell a story when I am talking to people about Indian Country, and you all care so much, and there are so many people who don't know very much. I tell the story of when the elderly nutrition program first started on Fond du Lac, they set the elderly age at age 52, because the average age of death in the 1970s was 56. And how proud we are under self-governance and operating our own clinic that that age is now 74.

The CHAIRWOMAN. That is great.

Ms. DIVER. As compared to my husband's family, a fine European-American family from Scandinavia, whose average age at death is 102.

[Laughter.]

Ms. DIVER. So I look at my parents, age 71 and 75 and know that every single moment I have with them is precious. And I tell you this because, I give you examples in my written testimony, but what we are having to endure right now makes a difference. It makes a difference on preventing death from chronic conditions rather than promoting wellness. You are asking us to be wizards in our own community, every one of these tribal leaders. We are to promote community development, we are to promote economic development, we are to promote health, we are to promote safety. We are to do all of these things without a tax base.

If you want funds to supplement what the Feds give you or the grants that you can raise, then you'd better figure out a way to earn it yourself. And we have done that. Tribal communities have done that, to the extent that now Fond du Lac is the second largest employer in northeastern Minnesota, with 2,200 employees.

The economic impact we make in that community has a ripple effect throughout rural Minnesota. In fact, I am aware that collectively, Indian Country in Minnesota is the largest employer in rural Minnesota. You are taking away our ability to leverage funds, you are taking away our ability to rise up and help support rural communities, not just Indian communities, entire rural communities, with the employment and economic spinoff. You are reducing our chances to leverage matching funds.

We are pretty good at what we do. We build veteran-supportive housing, putting a small amount of our NAHASDA funds into a facility and leveraging that four to one with other sources. We are trying different models of housing to deal with the high-risk populations that you talk about, dual diagnosis, chronic and long term homeless. We are being entrepreneurs and innovators in our service delivery.

So we know how to do our end. But we can't do it without the initial support. So I appreciate your letting me have a bit of this passion, and like I said, I have submitted the written testimony. But I guess I wanted to connect a few dots that, that we need and are just begging for your leadership. The strength of your convictions needs to be there when you are dealing with your House counterparts. Because they are not connecting these dots. Not connecting the dots between the health and well-being of Indian communities, and that affects our neighbors as well as our own communities. They are not connecting the dots of the strides that you have expected tribal communities to make and tribal leaders to step up to, that they are inhibiting our ability to be entrepreneurial and talk about innovative service delivery.

Those steps back are going to cost us more in the long run. And I think I am pretty good at my job, but I am not that good. And what I hear as I am lobbying around the Hill is that we need folks to stand firm in their convictions and speak up in the budget negotiations. That when push comes to shove, we need people that are saying, not in Indian Country. It is too important, the situation is too dire, they have come too far, and we are not going to be a part of pushing them back where they were 100 years ago.

And that is what I ask of each one of you, is to stand up for Indian Country and tell us who we need to haunt in the House,

please. What they are doing is immoral and it is wrong. And they should be ashamed.

Thank you.

[The prepared statement of Ms. Driver follows:]

PREPARED STATEMENT OF HON. KAREN R. DIVER, CHAIRWOMAN, FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA

Chairwoman Cantwell, Vice-Chairman Barrasso, and members of this Committee, I would like to thank you for holding this oversight hearing on the crisis that sequestration is creating in Indian country.

I am Karen R. Diver, Chairwoman of the Fond du Lac Band of Lake Superior Chippewa. The Fond du Lac Band occupies a small reservation in northeastern Minnesota. The Band has approximately 4,200 members, and we provide health, education, social services, public safety and other governmental services to more than 6,700 Indian people who live on or near our Reservation. These programs, and the federal funds that help us provide them, are essential to our ability to educate our children, care for our elderly and infirm, prevent crime, and protect and manage natural resources.

I cannot overstate the damage that sequester has already caused to our ability to provide essential services to our people. In the past two years alone, federal funding for Fond du Lac has been cut by more than $2.5 million. These cuts have left us no alternative but to eliminate jobs, curtail services, and turn away people who most need our help. If sequester continues into 2014, the additional loss of jobs and services will be serious and severe.

The Fond du Lac Band cannot absorb any further reductions in federal funding. Further cuts will not only adversely affect the long term health and well-being of the Fond du Lac community, but with the Fond du Lac Band as the largest employer in the region, those cuts will also adversely affect the broader region—through increased unemployment, and the increased demands that this will place on regional social service programs and related assistance.

Across-the-board sequestration cuts and rescissions to federal programs for Indian tribes will not balance the federal debt. What it will do is set back decades of hard work by Indian tribes and the United States to lift Native people out of poverty and put them on a path to empowerment and self-sufficiency. We urge Congress to exclude from sequester the federal funds that are so desperately needed in Indian country.

Education

We depend on federal funds to operate the Fond du Lac Ojibwe School. This school serves approximately 340 students in pre-K through grade 12. Most of our students come from very low income households, as demonstrated by the fact that more than 90 percent of our students qualify for free or reduced rate lunches. Although the President, in Executive Order 13952 (Dec. 2, 2011), found "an urgent need" for federal agencies to help improve educational opportunities for American Indian students because there has been "little or no progress in closing the achievement gap" between our students and all other students, Indian schools—even without sequester—have been seriously under-funded for years. Sequester has only exacerbated the fiscal crisis in Indian education.

As a result of sequester, in the past two years funding for the Ojibwe School has been cut over $500,000. This, in turn, has had the following adverse impacts on our education program and the children we are trying to serve.

- We had to eliminate 8 staff positions, including staff in critical areas that support science and math, school counseling and psychology, and paraprofessionals for special education.
- We have found it necessary to cut the hours in school readiness programming.
- Cuts in transportation funding have required us to use earlier school bus pick-ups and later drop-offs, creating unduly long school days for younger students.
- This year, we were further compelled to drop young kindergarten students with high behavior needs because we could not staff at the levels required to meet their needs. We are hoping that delaying their entry into school by a year will help with their developmental needs. But this has caused a hardship for their parents and runs a serious risk of stigmatizing the children.

Any further reductions in funding will mean even fewer staff which will force us to further reduce or even eliminate educational programs that are so critically needed for the most vulnerable population—our children.

Head Start

Because of sequester, our Head Start program has been cut $100,000 per year for two years. We have done everything possible to implement these cuts so that we are not required to turn away children from the Head Start program. We have cut administrative staff that support the use of technology, and converted two positions so that they are 9-month positions instead of year-round. We also reduced some transportation services that have, in the past, been provided by the Head Start program. But if sequester continues, next year we will have no choice but to start cutting available slots for children because direct service staff will need to be laid-off.

Housing

Native Americans suffer the most substandard housing—at a rate of six times that of the population at large. At Fond du Lac we have been striving to combat the endemic problems that result from the lack of a sufficient supply of decent, safe and affordable housing.

Our Housing Division currently has a waiting list of approximately 175 applicants seeking low income and homeownership housing. We have many other Tribal members who are also in need of housing, but who have moderate incomes and therefore are not even shown on our waiting list.

Our current housing stock is very limited and far below the need. Many of our housing units are over fifteen years old, with the oldest units built more than 40 years ago, in 1970. Because of the age of our housing stock, the units are constantly in need of maintenance and repairs. Approximately 30 percent of our housing units require major renovation, such as the replacement of roofs and siding, as well as upgrades in plumbing and other utility systems, and the replacement of windows and doors. Other units require routine repairs and maintenance, the average cost of which is at least $5,000 per year.

Because of the severity of our housing shortage, approximately 270 of the Indian households that we serve—close to 20 percent of our service population—currently live in overcrowded homes. It is not uncommon on our Reservation and among our people to find 10 or more individuals living together in a two-bedroom home. Overcrowding, in turn, accelerates the wear and tear on those homes, creating a vicious cycle of need.

Overcrowded and dilapidated housing creates other risks. It increases the risk of fire and accidents, and creates unsanitary conditions, with increased spreading of communicable but normally preventable illnesses. Overcrowded housing "often results in stress, which can magnify family dysfunction and eventually lead to alcohol and child abuse."[1] Such conditions are especially harmful to children, as overcrowding, and the related risk of homelessness "threaten their educational success, health and mental health, and personal development."[2] We see these problems at Fond du Lac.

Our members who are compelled to live in overcrowded homes are also often only a step away from being homeless. As set out in a series of recent studies of homeless and near-homeless persons on Minnesota Indian reservations, including the Fond du Lac Reservation, doubling up with family or friends is often the last housing arrangement a person has before becoming literally homeless, and it is common for people to go back and forth between doubling up and homelessness.[3] A disproportionately high number of Native Americans in Minnesota are homeless. Although Native American adults are only 1 percent of the State population, they are 10 percent of the adults identified as homeless. And while Native American youth (under age 21) are only 2 percent of the youth population in Minnesota, they are 22 percent of the homeless youth that are unaccompanied by an adult.[4]

Federal funds are critical to meeting those needs. With the aid of federal funds, the Fond du Lac Band has been able to partner with state and private entities in an effort to begin to more comprehensively address housing needs. In July 2010, we began construction of a supportive housing development to provide permanent supportive housing to 24 tribal members and their families and which, in conjunction with our Human Services Division, would address the tenant's barriers to maintaining housing and create a support system to prevent homelessness. This year, those same partnerships helped us to operate the first Veteran's supportive housing facility in Indian country.

But sequestration puts our progress at great risk. Even without sequester, funding for Indian housing had not materially increased over the years, while, at the same time, the costs of the supplies, materials and labor necessary to remodel and modernize our aging housing stock have increased every year with inflation.

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[1] U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs In Indian Country*, at 62-63 (July 2003).

[2] Wilder Research, *Homeless and Near-Homeless People on Minnesota Indian Reservations: 2009 Study*, at 3 (April 2012) ("Wilder 2012 Report"), http://www.wilder.org/Wilder-Research/Publications/Studies/Homelessness%20in%20Minnesota,%202009%20Study/Homeless%20and%20Near-Homeless%20People%20on%20Minnesota%20Indian%20Reservations,%20Full%20Report.pdf

[3] *Wilder 2012 Report* at 4; *see also* Wilder Research, *2006 Study: Homeless and Near-Homeless People on Northern Minnesota Indian Reservations*, at 2 (Nov 2007), http://www.wilder.org/Wilder-Research/Publications/Studies/Homelessness%20in%20Minnesota,%202006%20Study/Homeless%20and%20Near-Homeless%20People%20on%20Northern%20Minnesota%20Indian%20Reservations,%202006%20Study.pdf

[4] Wilder Research, *2012 Minnesota Homeless Study: Fact Sheet, Initial Findings, Characteristics and Trends*, at 2 (April 2013), http://www.wilder.org/Wilder-Research/Publications/Studies/Homelessness%20in%20Minnesota%202012%20Study/Initial%20Findings-Characteristics%20and%20Trends,%20People%20Experiencing%20Homelessness%20in%20Minnesota.pdf

Since 2011, our Indian Housing Block grant, provided through the Department of Housing and Urban Development, has been cut $339,000. Prior to those cuts, we could fund the construction of 5 or 6 new homes a year. But the cuts caused by sequester mean that we must now either reduce work on rehabilitation of older housing stock, or reduce the number of new homes built, or possibly both.

Housing represents the single largest expenditure for most Indian families. The development of housing has a major impact on the national economy and the economic growth and health of regions and communities. Housing is inextricably linked to access to jobs and healthy communities and the social behavior of the families, especially children, who occupy it. The failure to achieve adequate housing leads to significant societal costs.

Decent, affordable, and accessible housing fosters self-sufficiency, brings stability to families and new vitality to distressed communities, and supports overall economic growth. Very particularly, it improves life outcomes for children. In the process, it reduces a host of costly social and economic problems that place enormous strains on the Tribal and State education, public health, social service, law enforcement, criminal justice, and welfare systems.

Overall Adverse Impacts of Sequester

These are just some examples of the serious adverse impacts of sequestration on Indian tribes and Indian people. In addition to the cuts described above, we are also dealing with the impact of sequester on the reduced federal funding for: Indian health care provided by the Indian Health Service; social service programs provided through the Bureau of Indian Affairs; law enforcement provided through the Department of Justice and BIA; as well as the safety nets on which the poorest of our people depend to meet the most basic subsistence needs—including the USDA's Food Nutrition Program on Indian Reservations, the Low Income Home Energy Assistance program, and Child Care Assistance provided through HHS. Because of these cuts, the Fond du Lac Band has been compelled to lay-off staff, and reduce some services, and eliminate others altogether. We will do our best to fill the unmet need, and look for partnerships with local governments and others to do this. But the unmet need at Fond du Lac, and in Indian country generally, is massive.

I urge Congress to honor the Federal Government's trust responsibility to Indian tribes and to the Indian people by excluding, from any sequester and mandatory rescissions, the federal funding for the programs that serve Indian country consistent with the Nation's sacred obligations. Miigwech. Thank you.

The CHAIRWOMAN. Thank you for your testimony. And thank you for being here today.

We will now turn to the Honorable Bud Lane, Vice Chairman of the Siletz Tribe from Oregon. Welcome.

STATEMENT OF HON. ALFRED "BUD" LANE, VICE CHAIRMAN, CONFEDERATED TRIBES OF SILETZ INDIANS

Mr. LANE. Thank you, Chairman Cantwell, Committee members. My name is Bud Lane, and as tribal Vice Chairman for the Confederated Tribes of Siletz Indians, I want to thank you for creating this opportunity to hear directly from the tribes on the impacts of sequestration.

The Siletz Reservation is located on the central Oregon coast. Our original reservation was 1.1 million acres and was intended to confederate all the bands and tribes of western Oregon. The Siletz Reservation was significantly reduced by Congress in the late 1800s. Our current reservation is about 0.4 percent of our original reservation.

As a result of termination and subsequent restoration of our tribes, the majority of our 5,000 members are spread throughout 11 counties in western Oregon. Our ability to provide services in such a large area is challenging as it is.

The recent funding cuts through sequestration further threaten our ability to meet the needs of our tribal members. The real effect

on Siletz is the elimination of 10 percent of our workforce and the effect on contract health is even greater.

For the first time ever, we began this year having to severely ration our health care services from the very beginning. This type of rationing usually doesn't occur until mid-year.

As some of you may know, there are no inpatient IHS hospitals in the Pacific Northwest. All of us in the Northwest depend on contract health care for the services that we can't provide directly through our clinics. So for those that we cannot fund directly we have what we call a deferred list of Siletz. It also has a more notorious name known as the walking wounded, because these are actually folks who cannot get referred out because of the limited amount of funds to hospitalization or an operation that they may need.

In a good year, the backlog is always big. And all we are is one catastrophic case away from being not being able to fund hardly anybody to go to the hospital.

On the law enforcement side of things, the situation is even worse for tribal law enforcement. We have contracted local police patrols from the nearest town, and it is seven miles away, to cover the city of Siletz. The funding for that law enforcement came from BIA, from some tribal revenues and from HUD. But along with the already low funding amounts from BIA, cuts from sequestration make that policing contract infeasible. In other words, the city of Siletz and the Siletz reservation could be virtually without police protection as of January 1st, 2014.

The county's Public Law 280 responsibilities have become virtually non-existent. Even if a sheriff is dispatched out to Siletz, it is twice the distance, up to 15 miles, to get there.

Turning to contract support, we believe that Congress' intent is for tribes to receive the full amount due them when they compact or contract programs. Adding insult to injury of sequestration, agencies such as HUD are attempting to retroactively change the rules of allowable contract support costs, previously negotiated in good faith and approved. We, the Siletz Tribe, have been threatened with costs going back to 1998 that had been previously negotiated in good faith and approved by the cognizant agency.

We understand the situation of Federal agencies and their budgetary constraints. But they shouldn't balance their budgets on the backs of the tribes.

I hope I have adequately conveyed to you the very real and negative effects of sequestration on the tribes. We have been as creative as we can in meeting this challenge. But we are quickly running out of options. The tribes have long been among the poorest, most vulnerable populations in the United States and historically have been underfunded by the Federal Government. I implore you to honor treaty obligations and to exempt all tribes and programs serving tribes from the current and any future sequestration.

Several years ago, our tribal leadership met with the former chairman of this very Committee, Senator Daniel Inouye, in Portland, Oregon. He told us that in his view, all tribes have a prepaid health plan, and that it was paid for by our ancestors who ceded their lands to the United States. I hope that the Congress will re-

flect on this unique legal historic and moral situation of the tribes as it does other programs exempted from sequestration.

I thank you for the ability to be here today and I would like to answer any questions that you may have.

[The prepared statement of Mr. Lane follows:]

PREPARED STATEMENT OF HON. ALFRED "BUD" LANE, VICE CHAIRMAN, CONFEDERATED TRIBES OF SILETZ INDIANS

My name is Bud Lane. As Tribal Vice Chairman for the Confederated Tribes of Siletz Indians I want to thank you for creating this opportunity to hear directly from tribes on the impacts of sequestration. The Siletz Reservation is located on the central Oregon Coast. Our original Reservation was 1.1 million acres and was intended to confederate all the bands and tribes of western Oregon. The Siletz Reservation was significantly reduced by Congress in the late 1800s. Our current reservation is 0.4 percent of the original Siletz Reservation. As a result of termination and restoration, the majority of our 5000 members are spread throughout 11 counties in western Oregon. Our ability to provide services in such a large area is challenging as it is. Recent funding cuts through sequestration further threaten our ability to meet the needs of our tribal members.

2008 Economic Collapse

Like the rest of the nation, the Siletz Tribe has been trying to recover from the 2008 crash of the economy. We have worked diligently to keep services and jobs intact for our tribal members and focused funding cuts in the areas of travel, training and staffing. To that end we have left vacated positions unfilled and shifted duties to other staff, froze salaries and step increases from 2010 through 2012, and provided no COLA in 2010, a 1 percent COLA in 2011 and no COLA in 2012. Compare that to federal agencies who, while freezing salaries, still received step increases and bonuses, including a 3.6 percent COLA for 2012.

The Siletz Tribe's recovery has been limited—tribal revenue is slowly coming back but as of 2012 we are still down 35 percent from where we were in 2008. Our federal funding has steadily declined in this same time period.

2013 Sequestration

The Tribe has continued cost cutting in response to the first round of sequestration cuts. Staff travel is restricted to mandatory grantee meetings and to trainings required to maintain professional licensing and certifications. For 2013 we continued not filling most vacated positions and in some instances reduced full-time positions to part-time to achieve savings in salary and fringe benefits. At this point we have had to eliminate 26 positions (10 percent of our staff).

For the first time ever the Tribe's Contract Health Services program began the year on priority levels which restricted services: (1) authorized care is limited to health services needed for urgent or emergent care or to prevent disease and disability and (2) surgeries such as carpal tunnel release, rotator cuff repair, knee surgeries, gastric bypass, inpatient psychological treatment, herniated disc repair and hysterectomies are deferred indefinitely.

Our Tribal Court, exercising limited jurisdiction, averages 500 civil cases a year and is staffed by a full-time Court Administrator, a part-time Deputy Court Administrator, a part-time Chief Judge and four on-call judges. The 2013 Court budget is $197,000 most of which comes from tribal revenue. Only $36,271—less than 19%—comes from BIA funds. A 2010 BIA assessment of Tribal Courts noted that this federal contribution was the lowest of 50 tribal courts reviewed and recommended there be a significant increase funding to the tribe, but that has not occurred. Inadequate funding unnecessarily restricts the tribe from fully exercising jurisdiction and sequestration is worsening this situation.

The Health Department eliminated four positions—a Pharmacy Technician, a Dental Assistant, a Community Health Advocate, and the Clinical Applications Coordinator. We will maintain Contract Health Services at the priority 1 & 2 levels and cancel two specialty provider contracts. The clinic personnel reductions will result in 200 fewer medical transports, 50 fewer home visits, elimination of child safety seat and bicycle safety helmet distribution programs, 240 fewer dental visits, lengthening the time to fill prescriptions, and 12,000 fewer patient visits.

We are eliminating one of two Elders Program Coordinators, the After-School Program Coordinator and Assistant positions, and our Environmental Planner. This will significantly reduce services to our elders, while increasing the workload for the remaining staff person. Elimination of the After-School Program staff requires that

we close the program—impacting 20 children and their families who relied on these services. We are shifting the Environmental Planner duties to our natural resources staff—significantly more work than "other duties as assigned." The functions of this position are essential for ensuring environmental compliance for purchasing, managing and developing land. As this committee knows, the land-into-trust process is cumbersome and time-consuming on the federal side, for Siletz it will now take even longer due to sequestration impacts on staffing.

Additionally, three Administrative positions being eliminated are: Public Relations Clerk, Records Management Clerk, and the Public Works Supervisor. Again, we are shifting responsibilities of these jobs onto other staff. Our Public Information Specialist will now be a one-person department, making it harder to keep up on projects and more difficult to maintain quality. The Records Management Clerk duties have been added to another staff person's duties. The Public Works Crew are reorganized as a team to self-direct their work and report periodically to a manager.

Our Information Systems Department has been making critical upgrades to our operating systems on five servers, as well as the call manager for our phone system. The 2014 cuts will prevent completion of these projects which means we will no longer have vendor tech support for these old systems. This is critical to ensure our clinic's capability to meet HIPPA standards for electronic health records and accreditation standards.

The situation is even worse for tribal law enforcement services which cover tribal lands and the City of Siletz where many tribal members and non-tribal citizens live. These services started out at 120 patrol hours a week under a contract with a neighboring city police department in order to save on costs. At $95,391 the BIA funding covered just under a third of the costs. The Tribe's Housing Department funded another third and the remainder was subsidized by tribal revenue. However, steady revenue decline from 2008 to 2012 required reducing law enforcement coverage from 120 to 80 hours a week. In 2013, BIA funding dropped to $90,809 under sequestration and will be down to $86,298 with the second sequester. In addition, new HUD guidance has reduced the amount Tribal Housing can contribute. And, it is not feasible for the contracted police department to provide services. We are working with the City of Siletz to poll the community's support to help fund these essential services; however, it is anticipated by the Tribe that these services will not be available in our community very soon.

What this means is that the City of Siletz could be virtually without police protection by January 1, 2014. Traditionally the County has policed the outlying areas under P.L. 280, but these services have become non-existent in the last decade. If the County sheriff is called to respond to a crime, the distance has now doubled from 7 to 15 miles up to Siletz.

Insufficient contract support costs is not the only factor affecting the ability of tribes to manage our contract s and grants. During a periodic monitoring of the tribes housing programs, HUD staff disputed costs under our approved indirect rate. The law—Native American Housing and Self-Determination Act—clearly and unambiguously states that indirect costs rates will be determined by a tribe's cognizant agency (not by HUD or any other outside agency). For Siletz and most tribes that agency is the BIA through their National Business Center (NBC).

HUD conducted two monitoring reviews of the Tribes housing program in which they determined the tribes Indirect Cost Rate was not applied correctly to HUD programs. Unable to convince HUD that the indirect cost rate had to be applied consistently to all tribal programs, the Tribe contacted the National Business Center (NBC), only to find that HUD had already been in communication with them and consequently the NBC was unwilling to defend their longstanding approval of our indirect cost proposal. Unfortunately, the tribe felt it had nowhere to go as HUD was threatening to make their finding retroactive (back to 1998), so we agreed to settlement limiting the finding to one year which was a significant amount—$518,405.

Agreeing to settle had immediate fiscal impacts—it shifted two program manager positions from the indirect cost pool to direct costs thereby increasing the Tribe's costs to manage contracts and grants by an estimated $200,000 a year. We need these two positions but it is likely we can only afford one of them.

And, how is it that a single federal agency, in conflict with literally the letter of the law, could do this in the first place? Will tribes have to vet their indirect cost proposals to all federal agencies that they contract and compact with? Where was our trustee in defending the tribe from this intrusive action and the resulting long-lasting harm?

It is important to recognize that sequestration has exacerbated the longstanding issue of insufficient funding for contract support costs. Often the only recourse to address this shortfall is to reduce services to tribal members. For Siletz, we have

seen tribal child welfare positions go unfilled, while remaining staff carry caseloads two times higher than their state counterparts. In some cases the Tribe has to seek additional grants to fund salaries and services—our Natural Resources Clerk has three funding sources. And this situation is not limited to BIA and IHS funding. We support staffing costs for our Elders Program through four sources of revenue—BIA, Title VI–A & C, and tribal gaming revenue.

At some point, service reductions are not an option. For years, the Siletz tribe has contributed funds to cover an increasing CSC shortfall for the Head Start Program. In 2009, this cost reached a high of $90,000 it is now down to just under $60,000. This might appear to be good news but it is not—the cost has gone down due to declining appropriations. Two years of sequestration has taken $100,000 from our program budget, directly affecting the education of our youngest members and their families. We have eliminated positions, reduced others to part time for salary and benefit savings, added duties onto other job descriptions, and most offensive, have had to eliminate classroom days. While the collective sentiment may be that the children are our future, it is not reflected in federal appropriations.

Tribes are legitimate government contractors, whose indirect rates are objectively calculated by the National Business Center (despite HUD's opinion). Payment of these costs to tribes is required by federal law (ISDEAA) and has been upheld by the U. S. Supreme Court *Cherokee Nation v. Leavitt*. There are solutions to this long and ongoing problem and the Siletz Tribes urges you to consider the following actions: (1) appropriating more funds for CSCs to close the funding gap; (2) lifting the cap on CSC appropriations; (3) tapping into un-obligated BIA and IHS appropriations from prior years; (4) prohibiting the National Business Center from altering past rules for negotiating indirect cost rates; (5) extending the statute of limitations for Tribes to pursue CSC claims; and as an alternative to costly litigation, creating a CSC Claims Board to fairly compensate affected Tribes.

I hope I have adequately conveyed to you the very real and negative effects of sequestration on tribes. We have been as creative as we can in meeting this challenge but we are running out of options. Tribes have long been among the poorest, most vulnerable populations in the United States, and historically been under-funded by the Federal Government. I implore you to honor treaty obligations and to exempt all tribes and programs serving tribes from the current and any future sequestration.

Several years ago our tribal leadership met with the former chairman of this Committee, Senator Daniel Inouye, in Portland, Oregon. He told us that in his view tribes have a "pre-paid" health plan. It was paid by our ancestors who ceded our land to the United States. I hope that the Congress will reflect on the unique legal, historic and moral situation of tribes as it does other programs exempted from sequestration.

Thank you for allowing me to share our comments with you today and I would be happy to answer any questions.

The CHAIRWOMAN. Thank you so much. We will now turn to the Honorable Phyliss Anderson, who is the Chief of the Mississippi Band of Choctaw Indians. Welcome.

STATEMENT OF HON. PHYLISS J. ANDERSON, TRIBAL CHIEF, MISSISSIPPI BAND OF CHOCKTAW INDIANS

Ms. ANDERSON. Chairwoman Cantwell, and members of the Senate Committee on Indian Affairs, my name is Phyliss J. Anderson, and I am the Tribal Chief of the Mississippi Band of Choctaw Indians. I am so thankful that you have invited us to come here and speak on behalf of Native American Indians.

In my written testimony, I discussed contract support costs and sequestration, both of which represent a breach in the Federal Government's trust responsibility to Indian tribes. For my remarks, I would like to focus on sequestration and how it is failing Indian Country, including the loss of more than $4 million for Mississippi Choctaw.

I realize that when I talk about $4 million, compared to a trillion dollar budget, that may seem small. But it isn't small for the 10,600-plus membership in our Tribe, especially when the State we

live in is the poorest State. The largest impact for the fiscal year 2013 funding has been with the Chocktaw Health Department, which receives most of its funding from the Indian Health Service program. I will refrain from listing all the cuts to the health care. But I can tell you that payments were slow, even down to the last few days of the fiscal year, especially during the government shutdown.

Such uncertainty for a small reservation hospital in rural Mississippi limits our ability to provide vital health care to more than 10,000 eligible users. Much of this uncertainty was a result of being told for months that the cuts to IHS would be capped at 2 percent. However, OMB ruled that the 2 percent cap only applied to mandatory funds, such as diabetic programs, Medicare and Medicaid. Congress and OMB must change this interpretation to ensure that all IHS funding be exempt from the sequestration.

We also support advanced appropriations for IHS. I would like to thank those Senators who support that legislation. Forward funding by itself will not prevent the harm of sequestration. Nor is it sufficient, it is not a sufficient substitute to fully fund programs that have been significantly underfunded for far too long.

However, advanced appropriations would create a greater level of the budget, certainly to allow us to plan and provide better services to our citizens. Most of our education programs are forward funded. So we were better able to plan for those cuts. But if sequestration continues, stop-gap measures will not be sustainable. And essential services will be needed if reduction is made.

Head Start, after school and summer instructional programs are critical to the Chocktaw youth, many of whom will be at risk for neglect or abuse if the programs continue to be cut. Sequestration has also made overcrowding to our largest school even worst. Our Pearl River Elementary School was originally built for a capacity of 350 students. It now has the enrollment of 657 students, 200 of whom are housed in portable classrooms, some which are 40 years old.

This isn't just an education issue. This is a serious health and safety issue that demands an increase, not a cut, in our school facilities funds. Unfortunately, the safety of our children has taken a back seat to the politics and realities of sequestration.

Cuts to child care protection services, emergency assistance and programs to combat domestic violence put tribes at risk, tribal members in danger. Earlier this year, I stood side by side with many tribal leaders to ensure that Congress reauthorized the Violence Against Women Act with the tribal provisions intact. We fought for months to secure this language. I would like to thank every member of Congress, including the Mississippi Senators, Cochran and Wicker, who helped make this happen.

However, no matter how many programs like VAWA that we authorize, they will not be as effective as they need to be without adequate funding. According to Webster's dictionary, sequester mean to set apart, to keep a person or group apart from other people. Our ancestors, who relinquished millions of acres of their homelands and were forced into reservations, were all too familiar with this concept of setting some Americans apart from others.

Today, sequester mean to set money apart by arbitrarily cutting funds across the board. In my opinion, though, however, the word sequester to me means something else. It means failure. Specifically, the failure of Congress and the President to work together and do their jobs on behalf of the American people.

So in conclusion, my final recommendation to this Committee, the President and every member of Congress, please do your job. The health and well-being of Chocktaw families and all Native Americans throughout this Country depends upon you not failing again.

Thank you for inviting me to testify, and I welcome any questions that you might have.

[The prepared statement of Ms. Anderson follows:]

PREPARED STATEMENT OF HON. PHYLISS J. ANDERSON, TRIBAL CHIEF, MISSISSIPPI BAND OF CHOCKTAW INDIANS

Chairwoman Cantwell, Ranking Member Barrasso and Members of the Senate Committee on Indian Affairs. Halito! My name is Phyliss J. Anderson and I have the privilege and honor of serving as the Tribal Chief of the Mississippi Band of Choctaw Indians. Thank you for holding this important oversight hearing on how Indian Country is affected by sequestration and proposed limits on contract support costs (CSC).

Like many other Tribal leaders, I was disappointed that the Administration's response to the tribal victory in *Salazar v. Ramah Navajo Chapter*, 132 S.Ct. 2181 (2012), was to view the decision as a "problem" that needed to be fixed. As we informed the White House in June, the *Ramah* ruling should have been celebrated as a victory for Indian Country and a strengthening of Indian self-determination, in stark contrast to the recent rulings in *Carcieri* and *Patchak*, both of which pose direct threats to the sovereignty and well-being of Tribes throughout the country.

Instead, the Administration's FY14 budget proposal seizes upon language in the *Ramah* decision and requests that Congress eliminate the rights of Tribes to full CSC funding, by listing each tribal contractor's individual "capped" CSC funding amount in the Interior Appropriations bill. While the House Interior Appropriations Subcommittee rejected this approach, the Senate Subcommittee included the proposal in its version of the bill. If enacted, this would leave Indian Self Determination Act (ISDA) contractors with no remedy for shortfalls in their CSC funding.

In other words, as highlighted in an October 30, 2013, letter to President Obama from more than 60 Tribal leaders (I joined by reference under separate cover dated October 30, 2013), the proposal is "intended to eliminate all future contract claims – essentially converting mandatory bilateral contracts into discretionary unilateral grants." While Congress may have the legal power to legislate this kind of change, to do so would fundamentally undermine the long-standing policy of promoting Indian self-determination.

Moreover, this proposal was developed without consulting Tribes. Talking to a few of your friends in Indian Country is not a legitimate substitute for conducting tribal consultation, nor does it honor the government-to-government relationship between the United States and Tribes which should be based on good faith and mutual respect.

Two weeks ago, during the United South and Eastern Tribes (USET) conference hosted by the Eastern Band of Cherokee Indians, I had an opportunity to question Assistant Secretary for Indian Affairs, Kevin Washburn, who appeared before the USET Board of Directors. To his credit, the Assistant Secretary acknowledged that the Administration could have handled its response to the *Ramah* decision much better. While it remains to be seen if he, the President, OMB and the Senate Interior Appropriations Committee will honor our request to withdraw this proposal, I commend the Administration for finally engaging in the kind of meaningful tribal consultation that should have occurred well before this CSC language was ever proposed.

I would also like to thank the many Members of this Committee who have consistently encouraged the Administration to follow this course of action, and respectfully urge you to keep up the pressure to reject any proposal that does not fully fund ISDA contracts.

Similarly, I urge the Administration to engage in a good faith effort to settle all outstanding CSC claims right now. The Supreme Court has ruled and the Administration should act immediately in accordance with the *Ramah* decision, as well as the subsequent ruling in *Arctic Slope Native Ass'n v. Sebelius*, regarding CSC claims for ISDA contracts with the Indian Health Service.

Like the failure to pay full contracts support costs, sequestration is another example of broken promises made to Indian Country. As countless witnesses have stated before this Committee, the federal government has a trust responsibility to federally-recognized tribes, including budget obligations, that was forged through the Constitution, various treaties and agreements with Indian nations who relinquished millions of acres of land to the United States.

As a result of these treaty and trust obligations, funding for federal Indian programs should not be classified as discretionary spending. The obligation should be mandatory. Unfortunately, because Congress and OMB do not concur with this perspective, the vast majority of Indian funding comes from non-defense discretionary accounts and, therefore, is subject to the across-the-board spending cuts known as sequestration.

We estimate that sequestration has already resulted in the loss of more than $4 million for the Mississippi Band of Choctaw Indians and affected more than 60 programs on our reservation. The largest impact on FY13 funding has been borne by the Choctaw Health Department. This decrease has had a significant impact on patient care, hospital services, and public health on the reservation.

For example, Patient Priority II referrals for needed medical services to outside providers were either delayed or denied. Much-needed prosthetics for patients of all ages were not purchased. While we did not furlough employees and providers related to direct patient care, we did institute a hiring freeze for all other hospital positions.

Moreover, because of the uncertainty related to the budget, we shelved plans for new opportunities for health services such as telemedicine, as well as improvements for emergency services.

In addition, the uncertainty caused by the combination of sequestration and the government shutdown interrupted many hospital and health department operations. Final payments were slow to reach us with payments distributed erratically, even down to the last few days of September 2013. Such an unpredictable stream of income for a small reservation hospital in rural Mississippi that provides services to more than 10,000 eligible users limits the tribe's ability to plan for such services and execute the contracts that are necessary to operate our facility.

Much of the uncertainty related to how sequestration would impact the Mississippi Choctaw Health Department was a result of the confusion created by the Administration as to whether the higher level of across-the-board spending cuts would even apply to the Indian Health Service. For months, many Tribes were told that cuts to IHS programs would be capped at 2 percent, just as cuts to other related programs such as Medicare and Medicaid could not exceed 2 percent. However, OMB ruled that the 2 percent cap only applied to those funds designated as "mandatory," including direct funds such as diabetes program funding, and the reimbursements that the IHS receives from other mandatory funding sources such as Medicare, Medicaid and the Children's Health Insurance Program (CHIP).

Congress and OMB must change this interpretation of the Budget Control Act of 2011 and its predecessor, the Balanced Budget and Emergency Deficit Control Act of 1985, to ensure that all Indian Health Service funding is exempted from sequestration. I agree with other Tribal leaders and many Members of Congress who prefer to replace sequestration with set funding levels as part of completed FY14 appropriations bills negotiated by the Senate, the House and the White House. However, we don't know if and when sequestration will be used as a budget tool in the future. Consequently, the IHS should be added to the list of exempted programs.

That list currently includes such diverse funding as programs administered by the Department of Veterans Affairs, Pell Grants, the Supplemental Nutrition Assistance Program (SNAP), the Temporary Assistance for Needy Families (TANF) program and Child Nutrition/School lunch programs. While diverse, many of these programs benefit some of our country's neediest citizens. As the New York Times noted in a March 2013 editorial, the imposition of sequestration on the Indian Health Service represents a "little-noticed example of moral abdication." Congress and OMB can and should correct this injustice immediately.

We also support efforts to authorize advance appropriations for IHS, as called for by legislation recently introduced in the Senate by Senators Lisa Murkowski, Mark Begich, Tom Udall and Brian Schatz, and in the House by Representatives Don Young and Ben Ray Lujan.

Forward funding, by itself, will not prevent the adverse effects of sequestration. Nor is it a sufficient substitute for fully funding programs that have been significantly underfunded for far too long. However, in light of the challenges I described earlier, authorizing advance appropriations would create a greater level of budget certainty to allow us to plan, recruit and retain better health care professionals and otherwise provide better services to our citizens.

Sequestration and the recent government shutdown have proven that forward funding can have a positive impact. The second largest reduction caused by sequestration impacted our Choctaw Tribal Schools. However, because most of our tribe's education programs are forward funded, we were better able to plan for the cuts. The Choctaw Tribal School System, funded by the Bureau of Indian Education (BIE), experienced nearly $1.5 million in cuts to FY13 funds. However, as a result of forward funding, we were better prepared to deal with education cuts than we were for cuts to healthcare, through the use of a structured hiring freeze, staff furloughs during non-instructional periods, and the identification of alternate sources of revenue for critical afterschool and summer programs. For the 2013-2014 School Year, the tribe was also able to reduce personnel cost and identify unspent carry-over funds needed for funding summer school.

While we may have been able to plan better, if the sequestered funds are not restored through FY14 appropriations, or worse, should sequestration continue, these stopgap measures will not be sustainable and essential services will need to be reduced. Afterschool and summer instructional programs are critical to the health, safety and well-being of Choctaw youth. It is not an exaggeration to state that many of these kids will be at risk for neglect or abuse if these programs continue to suffer from sequestration.

Sequestration has also made an historic problem in our education system much worse. The perennial lack of funding for school facility replacement or expansions prevents the Tribe from addressing overcrowding conditions at our largest elementary school on the reservation. Pearl River Elementary School was built in 1991, by the BIA for a student capacity of 350 students. At the time, we unsuccessfully argued for a design capacity of 550 students, but BIA standards limited growth to a five-year enrollment projection. Since then, we have used tribal funds to expand the school, but Pearl River Elementary currently has 657 students, 200 of whom are housed in portable classrooms, some of which are 40 years old. This isn't just an education issue; this is a serious health and safety issue that demands an increase in school facilities funds, for both Operations & Maintenance (O&M) and new school construction. Unfortunately, the safety of our children has taken a back seat to the politics and realities of sequestration.

The Choctaw Head Start program was also significantly affected. With a January 1, 2013, start date, the program was forced to take steps immediately following sequestration. Although we were able to place some of the Head Start children in other programs, as a result of the cuts in FY13 funds, we were forced to close one Head Start and one Early Head Start classroom.

I would like to mention one more Choctaw department that has been adversely affected by sequestration: the Department of Public Safety. After many years of minimal or no increases, sequestration forced cuts to law enforcement, public safety and fire protection services by more than $500,000. These cuts, which include child protection services and emergency assistance, put the Tribe's most vulnerable members in danger as staff reductions have resulted in corresponding reductions in police response times and first responder readiness on the reservation. Furthermore, the reductions directly limit our ability to combat domestic violence on the reservation, especially by repeat offenders.

Earlier this year, I stood side by side with many of the Tribal leaders who are in Washington this week to ensure that this Congress reauthorized the Violence Against Women Act with the tribal

provisions intact. As you know, the VAWA legislation that Congress passed and the President signed into law included language recognizing the inherent right and power of Tribe's to exercise special domestic violence criminal jurisdiction over certain non-Indian defendants. We fought for months, against very vocal and powerful opposition, to secure this language, and I would like to thank every Member of Congress who helped make passage of that important legislation a reality.

However, as I mentioned to the Department of Justice as part of our VAWA implementation consultation, no matter how many programs we authorize, no matter how much we streamline operations or improve communication between tribal governments and the federal government, these programs will not be as effective as they need to be without adequate funding. Sequestration is denying adequate funding for VAWA implementation at the very same time that it is needed most.

Madame Chairwoman, according to Webster's Dictionary, "sequester" means "to set apart," or "to keep (a person or group) apart from other people." Our ancestors who relinquished millions of acres of their homelands and were forced to live on vastly reduced plots of land, now called reservations, were all too familiar with this concept of setting some Americans apart from others.

Today, in the legislative arena, sequester means to set money apart, by arbitrarily cutting federal expenditures in order to meet certain budget and austerity targets because our political leaders were unable to specify exactly how those cuts should be applied.

In my opinion, however, whether at Choctaw or any other Indian reservation, the word sequester has come to mean something else: failure; specifically, the failure of the United States Congress and the President of the United States to work together and do their jobs on behalf of the American people.

In conclusion, my final recommendation to this distinguished Committee, the President, and every other Member of Congress: please, do your jobs. The health and well-being of Choctaw families and Native Americans throughout the country depend upon you not failing again.

Thank you.

The CHAIRWOMAN. Thank you, Madam Chair. Thank you for being here.

We will now turn to the Honorable Jefferson Keel, who is the Lieutenant Governor of the Chickasaw Nation. Thank you for being here, and thank you for your service at NCAI.

STATEMENT OF HON. JEFFERSON KEEL, LIEUTENANT GOVERNOR, CHICKASAW NATION

Mr. KEEL. Thank you, Madam Chair, and members of the Committee. Thank you for inviting me to come and appear before this honorable committee. It is an honor, and I appreciate not only the opportunity to appear but for you holding this important hearing.

The contract support cost issue truly is a crisis in Indian Country, especially for the Chickasaw Nation. The failure of the Indian Health Service and the Bureau of Indian Affairs to meet its financial obligation to tribes is not only disgraceful, I believe it borders on criminal behavior. We know to the penny what IHS owes every year, because IHS is required by law to report to Congress every year, certified both by the Administration, by HHS, down to the penny exactly how much it has failed to pay us. So figuring out what IHS has failed to pay is not rocket science. It is very easy.

It is laid out in the IHS manual in Section 106 of the Self-Determination Act. For us, that figure is $36,188,534.

Because the nation was not paid contract support services or costs in full, we were forced to reduce services to our patients, which causes a reduction in third party collections opportunity. When you factor in lost third party collections, the Chickasaw Nation has accumulated well over $50 million of non-payment over the past 16 years. Our latest claim for 2013 alone was over $14 million.

Our contract support cost requirements have been calculated every year by IHS to provisions now contained in the manual. But even though IHS has detailed records and submits detailed reports to Congress about how much it owes us each year, they will not settle our claims.

There are several things that need to happen immediately. First, the Supreme Court has said that IHS should have paid us in full. IHS should announce it will pay us these reported shortfall amounts and this Committee should instruct IHS to do so.

Second, Congress should direct the appointment of a special master, someone like Ken Feinberg who settled the BP oil claims and the September 11th claims. Third, Congress should direct that all claims be settled before the two-year anniversary of the Ramah decision. Congress should amend the Indian Self-Determination Act to make perfectly clear that the issue is not what the tribes spent, but what did IHS fail to pay.

Congress should reject the new contract by contract caps that OMB had asked Congress to include in the appropriations for this year. The job is to honor these contracts in full, just like any other government contract.

Finally, Congress should direct both agencies to work openly with tribal leaders and tribal contracting experts when exploring any contracting reforms.

Regarding the *Ramah* case, I have been told that a year and a half after the decision came down, the government is about to start a statistical sampling of about 9,000 contracts. We already know what the BIA failed to pay and the Supreme Court understood that. This case, the *Ramah* case has been decided by the Supreme Court. It is time to bring it to an end.

The Chickasaw Nation has been able to meet the shortfalls created by the failure of the IHS and the BIA to honor their contract obligations to the nation. But most other tribes are not as fortunate. The shortfalls cause real heartache and suffering for tribal people every day.

Regarding sequestration, as you know and as you have heard, some of the poorest areas in America are located in Indian Country. It is just unfathomable that the Federal Government would try to balance the budget on the backs of the poorest of the poor in this great Country of ours. Tribal leaders have been dealing with underfunded or drastic cuts in program funding for decades. Loss of funding means loss of services, which causes loss of jobs, devastates families and damages local communities.

Diversified economies allow us to provide high quality services to our people while reducing the reliance on the Federal Government. There are a number of tribes, as you have heard, that are making

significant progress and are reinvesting in their communities. This raises the quality of life for our citizens and at the same time provides tremendous benefits to our local, non-Indian communities. Again, we ask Congress to clarify once and for all the responsibility of the Federal agencies to meet its financial obligations regarding contract support costs and we ask that you not allow sequestration to occur one more day in Indian Country. Hold the Indian tribes harmless in the next budget rounds.

Thank you.

[The prepared statement of Mr. Keel follows:]

PREPARED STATEMENT OF HON. JEFFERSON KEEL, LIEUTENANT GOVERNOR, CHICKASAW NATION

Madam Chair and members of the Committee, thank you for holding this important hearing and for the opportunity and honor to appear before you today.

Our job as leaders is to help our people in any way we can. We want them to be successful for themselves, their tribes and their communities. It is our responsibility as leaders to make sure our citizens have access to a quality education, housing, health care and safety. It is our duty to provide support for them while they pursue their dreams.

The contract support cost issue truly is a "crisis" for the Chickasaw Nation, both when it comes to the status of our claims that have been *pending with IHS for over 8 eight years,* and when it comes to the continuing annual shortfalls we suffer and which we must therefore subsidize year in and year out.

The failure of at least two federal agencies, the Indian Health Service and the Bureau of Indian Affairs, to defy judges' orders to meet their financial obligations to the tribes is disgraceful. We know to the penny what IHS owes every year, because IHS is required by law to report to Congress on what it owes the Chickasaw Nation. It is also required by law to report to Congress every year how much IHS failed to pay us. So figuring out what IHS failed to pay us isn't rocket science: it's already been calculated, certified by IHS, certified by HHS, and reported to Congress. All this is laid out in the IHS Manual and in section 106 of the Self-Determination Act, and for us that totals $36,188,534.

In reality, when you factor in lost third-party collections, the Chickasaw Nation has accumulated well over $50 million dollars of non-payment over the past 16 years. Because the Nation was not paid contract support costs in full, we were forced to reduce services to our patients which caused a reduction in third-party collections opportunity. Our latest claim for 2013 alone was over $14 million. On average, for every $3,500 lost, we could have served another patient as an inpatient, or outpatient, including provision of X-ray, laboratory services and pharmaceuticals. With a claim of well over $50 million (cumulative from 1996–2013) we could have handled between 14,000 and 20,000 more patient visits.

The Chickasaw Nation operates a 72-bed state-of-the-art hospital, the Chickasaw Nation Medical Center (CNMC), in Ada, Oklahoma. This is an IHS hospital. In addition, the Nation operates IHS-funded health center clinics in Ardmore, Tishomingo, Purcell, and Durant, as well as wellness centers in Ada, Ardmore, and Tishomingo, and additional nutritional centers in Ardmore and Purcell. These healthcare facilities employ approximately 1,100 people, including physicians, registered nurses, dentists, physicians' assistants, nurse practitioners, midwifes and a very considerable support staff from receptionists to billing clerks to janitors. In the 12 month period ending May 31, 2011, our medical center performed 2,664 surgeries, and experienced 588 births, 8,422 inpatient days and 2,392 admissions. During the same period, the Nation had 445,478 in-patient visits.

This is one of the largest tribally-operated health care systems in the United States, and much of it, including our clinics and Ada Medical Center, are IHS-funded facilities. The Chickasaw Nation compacts with IHS to operate them for the government under the self-governance provisions of Title V of the Indian Self-Determination Act. We do this because, as history has shown, we run them better than IHS ever did or ever could. We cut the red-tape, we are more efficient, and we redesign the IHS programs to match what our people actually need. We are, of course, fully accountable to IHS, and after the close of every year we provide IHS with a comprehensive audit of how we spent our compact funds. But unlike IHS, we are also accountable to our own tribal citizens, and that is the driving reason why our services in every respect far outshine what IHS was ever able to do.

For as long as we can remember, IHS has underpaid the Chickasaw Nation's negotiated requirements for contract support costs. The Indian Self-Determination Act says that IHS is required by law to negotiate those requirements with us and to then add those costs *in full* to our compact every year. That is the negotiated contract price. Most of these negotiated contract support cost requirements are to cover our personnel management, accounting, procurement, and other overhead costs of the Nation without which we could not operate. They cover our annual audit costs. They cover our insurance costs. In the general government contract setting they are called G&A costs—general and administrative costs. So this is not a system that is unique to tribal contracting or to the Chickasaw Nation.

Our contract support cost requirements have been calculated every year by IHS through provisions now contained in the IHS Manual. (The Bureau of Indian Affairs has a very similar set of instructions for calculating these costs for our compact with the BIA.)

For years, IHS told us that it had no responsibility to pay us our full contract support cost requirement. It would pay some of our costs, but then not the rest. Some years we were actually told we had to wait on a waiting list—even though we were running a government contract and operating services for IHS. But as the Committee is aware, in 2005 the Supreme Court ruled that IHS was wrong to have told us that. The Supreme Court in the *Cherokee Nation* case said our contract was no less binding on the federal government than any other government contract. So later in 2005 we filed claims reaching back to 1995, and since then we have regularly filed additional claims up through 2012.

But, even though IHS had detailed records, and had submitted detailed reports to Congress, about how much it owed us each year, IHS would not settle our claims. By 2012—7 years after filing our first claims—IHS finally paid us $7 million to settle just the first 15 months of our claims. But we had a total of 18 years of claims pending with IHS, not just 15 months.

In 2012, the Supreme Court spoke again, and it again said the government was liable for failing to pay our full contract support cost requirements. The Federal Circuit Court of Appeals also rejected all kinds of other defenses IHS had thrown up. So you would think that in 2012, finally, all of our remaining 16 years of claims would finally be resolved. After all, in its reports IHS told Congress we had not been paid $36,188,534 through 2012. At a minimum you would think the Nation would have swiftly gotten a check for that $36,188,534.

Instead, IHS announced that it was not going to focus on what it had failed to pay us, but focus on what the Chickasaw Nation spent in IHS funds. Naturally, since the Nation could not spend what IHS did not pay, the net result is the government would owe us virtually nothing. And that is exactly what IHS told us earlier this year: that IHS would pay us virtually nothing.

In April we sat down for two days of negotiations with IHS in Anaheim California. By the end of those discussions we thought we were making progress. IHS first promised to get us a fresh offer in May, then in June after we provided additional documentation, then in July, and on and on. Seven months later we have still not heard back from IHS, and we have no idea if we will ever hear back from IHS. It's basically radio silence, and every time IHS says it will get us a number, nothing happens. Most recently, the Judge said we should propose a trial date for next year because nothing is happening.

This is the story of just one of the so-called 54 active settlement negotiations the IHS Director has said is underway at this time. I know from other tribal leaders that in most other instances, nothing has happened at all. IHS may have a list somewhere of dozens of cases it would like to settle out of the 200 cases involving 1600 claims; but in one of the first cases to go into the settlement process after the Supreme Court *Ramah* decision came down—our Chickasaw Nation case—nothing is happening, and nothing has been happening for months.

There are several things that need to happen immediately.

First, the Supreme Court has said IHS should have paid us in full, and IHS has already told Congress what it would have paid us if it had paid us in full. At least for the basic claim amount, settlement should have been instantaneous after the June 2012 *Ramah* decision. IHS should announce it will pay us these reported shortfall amounts, and this Committee should instruct IHS to do so.

Second, Congress should direct the appointment of a Special Master, someone like Ken Feinberg who settled the BP oil spill claims and the September 11 claims.

Third, Congress should direct that all claims will be settled before June 2014, the 2 year anniversary date of the *Ramah* decision.

Fourth, Congress should amend the ISDA to make perfectly, absolutely, beyond-any-shadow-of-a-doubt clear, that the issue here is what did the IHS fail to pay, not what did the Tribes spend. The agencies' so-called "incurred cost" approach is un-

supported by anything in the law and is just a gimmick they invented to chop down the amount the government owes us. We had a deal. The government failed to honor the deal. The Supreme Court said that was wrong. The government now just needs to honor the deal.

Fifth, Congress should reject the Administration's recent counter-attack on the Tribes and reject these new contract-by-contract caps that OMB has asked Congress to include in the appropriations for this year. Apparently no good deed goes unpunished. The Tribes actually win a case in the Supreme Court—actually they win that case *twice*—and OMB's response is to try and reverse that victory by legislative fiat hidden in an Appropriations Act. That is wrong, it is immoral, and it is illegal. Instead, the job now is to honor these contracts in full on a going-forward basis, *just like any other government contract.* To my surprise, even the U.S. Chamber of Commerce has condemned OMB for daring to permanently underpay these government contracts.

Finally, Congress should direct both agencies to work openly with tribal leaders and tribal contracting experts when exploring any contracting reforms. Just as the contracting process should be transparent and accountable, so, too, the process for regulating the contracting process needs to be open and transparent.

No changes to the contract support cost system should be made without full consultation, and an open and transparent process visible to all interested Tribes and tribal contracting experts. If, as IHS seems inclined to often say, the so-called Federal Advisory Committee Act is unintentionally creating an impediment to full and open participation by all tribal representatives and experts, then that Act needs to be amended. The time has to end when the Secretary or the Director of IHS are permitted to tell tribal representatives in a room that they are forbidden to speak.

Before closing, I just want to say one word about the *Ramah* case. That is the pending class action that is addressing 19 years of contract support cost claims against the BIA. I have been told that a year and a half after the decision came down, the government is about to start a statistical sampling of about 9,000 contracts. I am also told that when each tribe's contract is selected, the issue the government will look at is not what the BIA failed to pay, but what the Tribe spent. Again, you cannot spend what you are not paid. We are about to see years of sampling and tribal studies to come up with some global number that has nothing to do with what the government actually owes.

In the Supreme Court case, in one place the Court says that over the course of certain years the BIA failed to pay "between 77 percent and 92 percent of tribes' aggregate contract support costs." As that statement shows, we already know what the BIA failed to pay, and the Supreme Court understood that. This new sampling idea is but another example of lawyers and agencies gone wild. The *Ramah* case has been decided, finally, by the Supreme Court. It is time to bring it to an end. It should have been ended last year. Again, a Special Master appointed by the President or by Congress should be directed to cut through all the delay tactics and get this case settled at once.

Thanks to many blessings, the Chickasaw Nation has been able to weather the challenges it has confronted by the failure of the IHS and the BIA to honor their contract obligations to the Nation, and through the Nation the government's obligations to our citizens. We have been able to cover the government's shortfalls with our own money. We have been funding an unfunded mandate that the Supreme Court says the government should have paid.

But most other Tribes have not been as fortunate, and the shortfalls have caused real heartache and suffering for tribal people.

I ask the Committee to do everything in its power to see these contract support cost issues promptly resolved and put to rest. We have far more important work to do than to litigate with the government for another 10 or 20 years over past contract liabilities. We ask Congress to pass legislation so that tribes can receive proper payment in exchange for the services the Tribes provided in good faith on behalf of and in reliance upon the Federal Government.

Regarding sequestration, for tribal nations there are no positive effects of sequestration to speak of. Tribal leaders have been dealing with underfunded or drastic cuts in program funding for many years. Cuts in budgets cause rippling effects, cuts in services, which causes loss of jobs, which devastates families, and damages the local economies. However, sequestration does require the Federal Government to make some decisions regarding the size and functions of the various departments within the federal government itself. Again, tribes have been doing this for years.

The inherent sovereign rights of Indian tribes was recognized by this country's founding fathers, and affirmed in the United States Constitution. At its most basic level, the economic success of the United States is built upon the land and natural resources that originally belonged to the tribal nations. As you well know, the un-

derpinning of federal spending in Indian Country is based on sacred treaties between Indian tribes and the United States of America. This sacred trust between tribes and the federal government commits our federal partners to the protection of Indian lands; the protection of tribal self-governance; and the provision of social, medical, and educational services for tribal citizens. The authority to fund programs that fulfill this responsibility is founded in the U.S. Constitution. More fundamentally, full funding for the Indian Country budget was pre-paid with the loss of our land, and with our ancestors blood. We are not a "line-item" to be negotiated away, we are a commitment to be honored.

Tribal leaders know the pressures of scarce resources better than most, and each of us has had to make hard decisions to build the economic strength of our peoples. In order to reduce their reliance on the federal government for the provision of services to our peoples, many tribes have entered the business world. Tribes are diversifying our economies and are now providing high quality services to our people.

In some areas across the country, Indian gaming has become the lifeblood of tribal communities. There are a number of tribes that are making unprecedented progress. Gaming revenues provide those fortunate tribes with the access to funding that is necessary to diversify their economies. Tribes are now reaping those benefits and are reinvesting in their own communities. These successes allow us to raise the quality of life for our citizens, and at the same time provide tremendous benefits to our local non-Indian communities.

In Oklahoma, you see the result of tribal leaders who have stepped up to the plate and made the tough decisions. We've gone from managing poverty to advancing prosperity. Tribal Nations in our State contribute almost $11 billion to the State's economy, and five percent of the jobs in the State are provided by Tribal Nations.

The tribal business community has an important role to play in the ever evolving global economy. For tens of thousands of years, our people have been stewards of the environment. But, we are also successful stewards of our economies and societies. As tribal businesses continue to grow, it is more and more clear that we bring value to the table.

The Chickasaw Nation understands that we are part of the emerging economy, one that is built on the complexities of people, communities, and an inter-connected world community. We, along with other tribes, are proactively participating in defining and shaping the new global marketplace. The Chickasaw Nation has a diversified economic portfolio that includes a bank (Bank2), a tribal corporation, Chickasaw Nation Industries (CNI), a metal fabrication facility, a chocolate factory (Bedre), and healthcare and energy development ventures that provide a high rate of return.

The Menominee Nation has a large and successful timber operation in Wisconsin with a sawmill and a furniture manufacturing facility. The Menominee forestry program is one of the most well-managed timber operations in the world. The Three Affiliated Tribes in North Dakota is building an oil refinery on its lands which will benefit the entire country, and there are other tribes with much to offer.

Tribal Nations in Washington sell Northwest Pacific oysters to Japan. The Cherokee Nation has a growing international tourism business relationship with Germany. Tribal Nations are also expanding their manufacturing capacity as contractors. For example, the Penobscot Nation in Maine manages a portfolio that includes a wood recycling business and another business that builds guidance systems for military applications. Another high profile example of tribal business success is found in one of the most bold entertainment chain transactions I am aware of in Indian country, in which the Seminole Tribe of Florida purchased the globally-recognized Hard Rock Café business for $965 million dollars. The Tribe now owns Hard Rock Cafes in 53 countries and has only seen an annual increase in locations since the deal was finalized in 2006.

Across Indian country tribal leaders are working together to find ways to capitalize on these opportunities. One of the ways that we can improve our communities and strengthen our tribal economies is through Inter-Tribal Trade. There are many tribes that have developed resources and diversified their economies, and they are now poised to assist other tribes. It is up to us to find ways that we can assist in these efforts. Indian country can and should, develop an Inter-Tribal Trade agreement that tribes can use to work with each other.

Trade has always been at the core of our way to interact with one another, and with others. Like CEO's, tribal leaders are required to consider political, economic, and business risk when making decisions about when to expand, when to borrow money, and when to diversify. In addition, we must ensure our enterprises remain competitive by developing new market shares; by providing appropriate incentives for our employees and, by leveraging innovation. But the role of tribal and Indigenous leaders goes well beyond that of a CEO.

We also have unique political, business, and cultural risks that need to be carefully measured. For example, when we consider a new business venture, strategy, or market, we need to make certain it fits with the values of our communities. We need to make sure any development will provide real opportunity for productive and meaningful employment for our citizens. We need to consider how and when we best utilize our limited natural and geographic resources.

Most importantly, we consider to whom we are answerable. Tribal leaders must decide whether to reinvest our dividends in our business for possible future growth or help those in need at home. We consider the sacrifices made by our ancestors to hold on to our land when we choose to develop our land or utilize our resources. And, we strive to make decisions that will improve the quality of life for our community today and in the long term. These are often hard choices and heavy responsibilities. But if we take the necessary steps to position ourselves to take advantage of current opportunities and trends, tribal leaders are poised to make significant advances for their people, enterprises, communities, and nations in the decades to come.

We can reach out to one another, create government and enterprise partnerships and establish nation-to-nation trade. In the past, trade among our Nations has produced peace, cultural exchange, and wealth for our people. We need to form more partnerships based on government-to-government trade.

The promise of economic strength that will come from working together will enable us to address one of the most pressing issues today: fighting poverty in our communities.

Tribes are working together more closely than ever before, to protect our sovereign rights and to make advances on many key legislative issues. Some of these include helping Congress to pass a clean *Carcieri* legislative fix so that Tribes can continue economic development activities and continue reducing their reliance on the federal budget. As I noted, we also need to secure full payment for contract support costs, so that our contract with the government, just like our other business contracts, are honored. We also need to secure advanced appropriations for the Indian Health Service to further stabilize this most essential governmental program.

From land restoration, to education, to tax reform, to energy, to health—Indian country has a stake in every federal policy decision. Indian issues are not partisan issues. The last few months have made it clear that Indian country is common ground for all members of Congress.

Tribal Nations and Congress must all continue to work together to open new windows of opportunity to secure our communities, and most importantly secure our futures as sovereign nations. Whether it be the farm bill or language preservation, Indian Country must remain focused on all windows of opportunity and engage on issues of significance.

It's also time for Congress to make some tough decisions, too. It's time to once and for all deal with the devastating effects of the sequester. Our Tribal Nations cannot sustain the ongoing effects of Congress' refusal to keep its pre-paid commitments to the Tribal Nations.

Over the past four years we have made significant progress with Congress and the Administration. We need the President and Congress to work with us to address outstanding issues regarding contract support costs and to sustain this work that will take our nation-to-nation relationship to the next level.

We must continue to create action plans for energy security and natural resources, and to protect our cultures and languages. Most importantly we must protect the very basis of our communities—our people—and more critically the future of our communities: our children. This means doing everything we can, on every issue, to take proactive steps. We ask Congress to honor its obligations and to hold the Tribal Nation's harmless in future budget actions.

The CHAIRWOMAN. Thank you, Mr. Keel.

Now our last witness, thank you for being here, is the Honorable Aaron Payment from the Sault Ste. Marie Tribe of Chippewas from Michigan. Thank you so much for being here.

STATEMENT OF HON. AARON PAYMENT, CHAIRMAN, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

Mr. PAYMENT. Thank you. Thank you for inviting me and to the Committee members.

My tribe is one of the largest tribes east of the Mississippi. Our treaty is the 1836 treaty of Washington. In our treaty, as most treaties, it provides for the health, education and social welfare as long as the grass grows, the winds blow and the rivers flow. Pretty common language in most of our treaties. Our service area includes the seven eastern-most counties in the Upper Peninsula of Michigan. Only about 13,000 of our members live in the service area, so they are not covered by our contract health service delivery funding or a BIA catchment areas.

So I want to deviate from my testimony for a second and remind the Senate Committee, which you are already aware of, but that our funding is not welfare. It is not reparations and it is certainly the forced assimilation, smallpox, historical trauma, all of that would justify reparations, but it is not reparations. It is not even entitlements. Unfortunately, in this tenor and government today, entitlements is a negative word where it should be a good thing.

We prepaid through our treaty obligations. We prepaid with the blood, sweat and tears and millions of acres of our ancestors. And when we say ancestors, we are not talking about hundreds and hundreds of years ago. We are only talking about our great-grandparents generation. They made the sacrifice and we prepaid for the services that we are supposed to be getting.

So we held up our end of the deal or our contract, if you will. And contracts are not supposed to be unilateral. So we ask that you honor the treaties and don't continue the legacy of broken treaties. Honor your contracts. We have done so.

Historically we have been burdened by shortfalls and contract support costs. Just like the sequester, these cuts have been devastating. In the Bemidji area, our shortfall in contract support is almost $46 million. In Michigan, it is almost $14 million. My tribe filed their claim after the Ramah case last summer, and not really much has happened since then. We are in an environment of litigation where we should actually be working together to try to figure out how to honor the outcome of the Supreme Court case.

In Indian Country we had a victory with the Supreme Court case, but it doesn't really feel like that right now. As a tribal leader it seems to me like our trustee should be finding ways to resolve this issue on our behalf and advocating on our behalf, rather than trying to find ways to, as someone else said earlier, cheat us out of the money that is actually due.

So the agencies instead are looking for ways to evaluate how we spent our programs. I have to assume that is going to mean to diminish the liability that is actually due to us. However, I need to clarify that we can't spend something that we didn't get. When you get an under-amount, you find ways to work underneath that. So I am fearful that the conclusion is going to be that we really didn't need it or it wasn't due. And I have to say that that approach is tautological and circular reasoning and really, it is nonsense, it is absolute nonsense. So the government doesn't win when it pays less than it owes. The government wins when justice is done, and we are asking for justice. The Supreme Court has made perfectly clear that justice here means paying the portion of the contract support that is due to us.

On sequester, I brought my little document that spreads out the actual impact to my tribe last year. It was $1.7 million, health alone was $1 million. The projected sequestration could go up to $5 million in cuts. We have laid off, we furloughed our Head Start staff. We have tried to do everything we could to withstand this. But it has been devastating. During the shutdown, our special diabetes program, we didn't have our award letter, we had to lay off our special diabetes staff. Only for a week, but we ended up losing our director, because she wants stable employment. She is a medical professional that has other opportunities.

Going into the implementation of the Affordable Care Act, I am fearful that another program that we cut was our COLA for our medical staff. We don't have COLA for our medical staff. We haven't had COLA for all of our other team members for years. But it is going to be difficult to try to retain our physicians under the Affordable Care Act, when there are 100,000 new jobs opened up for them.

The final thing, and I will leave this, but the final thing I also wanted to call attention to is, I participated in the Faces of Austerity. This shows the impact of sequestration all across the Country, not just Indians. I want to put a pitch in for stopping sequestration. Obviously for us, but if it is possible to protect community action, I am on our community action board, Head Start, Meals on Wheels, the Upward Bound program, all the Great Society programs. I was born in 1965 and benefited from many of those programs. This year I was selected as Sargent Shriver award winner for my continued contributions to the Great Society programs. I would be remiss if I didn't stand up for and speak for them as well.

All of these programs work together. Last year the Federal agencies minimized the impact. Next year the impact is going to be drastic, because the full brunt of sequester is going to be felt next year. Maybe then citizens will understand what the impact is and they will start contacting their Congressmen and their Senators to insist that they represent us, rather than follow some ideology that is being pushed by one party or another.

Thank you.

[The prepared statement of Mr. Payment follows:]

PREPARED STATEMENT OF HON. AARON PAYMENT, CHAIRMAN, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

Good afternoon and thank you Chairwoman Cantwell and Vice-Chairman Barrasso for inviting me to testify today.

My name is Aaron Payment and I am the Chairman of the Sault Ste. Marie Tribe of Chippewa Indians. My Tribe is one of the largest tribes east of the Mississippi River with 41,000 members. We were re-recognized in 1972 after a 20-year struggle. The 1836 Treaty of Washington recognized my Tribe's aboriginal territory, and this is where we have resided since time immemorial and where we continue to reside today.

Our service area includes the seven eastern counties in the Upper Peninsula of Michigan. About 13,000 of our members reside in our service area. Since being re-recognized in 1972, my Tribe has engaged in the arduous task of re-acquiring land in our original territory to meet the needs of our members. The present-day trust land of my Tribe is just over 1,000 acres. That is not a large amount of land, yet with the resources that we have we operate our tribal government and provide essential governmental services for our tribal citizens, including housing programs, youth and education programs, employment programs, health care programs, social services programs and law enforcement services. Our health care programs, alone,

employ 260 employees and operate four primary care centers and two satellite clinics. In carrying out many of these functions, we contract with the Indian Health Service and the Bureau of Indian Affairs under the Indian Self-Determination Act to administer the programs that these two agencies would otherwise operate for our people.

We do this because depending on the government to run these programs not only breeds more dependence; it also leaves in place cookie-cutter programs that are developed in Washington, D.C. by bureaucrats who have no knowledge of our culture and our local needs. By running these programs and services ourselves, we are also able to rebudget funds and redesign these contracted programs to best meet the needs of our people, just as Congress intended when it enacted the Indian Self-Determination Act.

But, historically, we have been burdened by shortfalls in contract support cost payments. And just like the current sequester, these cuts have had a very real and negative impact upon our community.

Contract support costs cover the fixed overhead costs we must incur to carry liability, property and workers compensation insurance; to meet federal legal and regulatory requirements; to conduct federally mandated annual audits; to supervise and manage our program and employees; to purchase supplies; to provide health insurance to our employees; and, to do all of the necessary things that a government does when it employs people to run government programs, but which the federal government does from resources that we will never be able to access, including the alphabet soup of agencies that help the BIA and IHS day in and day out, like the GSA, DOJ, OMB, OPM, OGC and countless other agencies.

These contract support costs are our fixed overhead costs. And while we try to keep these costs as low as reasonably possible, they cannot be eliminated entirely. At the same time, these costs are audited every year. So when the Federal Government, through the Interior Business Center, sets these costs for a new year, the government is setting these costs based upon real audits. None of this involves guesswork. In short, these are hard costs—real costs—and they simply have to be paid.

But the agencies do not pay them. That's right: the government does not pay these contract costs, at least not in full. The government fully pays the overhead costs of other government contractors, but it does not pay the overhead costs of our Tribe and it does not pay the overhead costs of most other tribal contractors. In fact, the agencies don't even ask Congress for enough money to pay these contract obligations in full. This year is a good example: the President's budget only asks for $477 million for IHS contract support cost payments even though IHS says the actual costs are over $75 million more. The same is true of the BIA: the $230 million the President's budget requests is roughly $10 million short of what is required to pay all tribal contractors in full for the work we do for the government under these contracts.

This is not just a problem for my Tribe. For instance, if you look at the contract support cost shortfall reports that the Indian Health Service sends every year to Congress, you will see that virtually every Tribe is underpaid at some point in time, and most are underpaid all of the time. In the IHS Bemidji Area where my Tribe is located, the total amount of the underpayments IHS reported to Congress for fiscal years 2007 through 2011 was $45,521,239. For just the Tribes in the State of Michigan, IHS reported to Congress that its underpayments totaled $13,850,650. When you think about it, that is an enormous amount of health care for Indian people that has been lost.

For years—really for decades—IHS and the BIA told us that this was just the way it is, that tribal contracts were "different" and "unique" and that we were not entitled to be treated as well as other government contractors. Frankly, we believed what we were told. But then in the 1990s some Tribes started to protest these underpayments in the courts, and in 2005 the Supreme Court said in the "Cherokee Nation" case that the government was wrong all along, and that we had been entitled to be paid, and that it had been wrong to force us to cut or subsidize services in the federal programs we were operating in order to cover the fixed costs of running those programs. And so it turned out that our right to be paid was at least as strong as the rights held by other government contractors.

But right after the 2005 Supreme Court decision, the agencies told us that times had changed in the meantime. The BIA and IHS said that the Supreme Court decision involved a period of time when the agencies could have lawfully paid us in full, but that in the meantime the agencies had worked out a new system with Congress that actually prohibited the agencies from paying our contracts in full. Once again, we trusted the agencies and figured they must be right. But once again it turns out the agencies were wrong, and last year the Supreme Court decided in the *Ramah Navajo* case that we should have been paid in full all along. The Supreme Court

said that any claims we had would be covered by the Contract Disputes Act and paid out of Treasury's Judgment Fund.

After that, we confirmed that our claims over the BIA contract shortfalls were being covered by the *Ramah Navajo* class action lawsuit, so we focused on filing claims over our IHS contract shortfalls. We did that in the summer of 2012, but since then, nothing has happened. It's been over 16 months since the Supreme Court decision, and well over a year since we filed our claims, yet nothing has happened. And nothing has happened in the *Ramah Navajo* case either.

These are difficult times for all Indian Tribes. Not only are federal budgets not keeping up with inflation, not only are they not being increased to meet our needs; they are actually being cut. At our Tribe, shingles vaccinations have been cut, and reduced foot care will eventually mean increased amputations. At a time like this, settlement payments from these cases would be of critical help in keeping services running.

But as far as we can see, nothing is happening. For a tribal leader, this is difficult to understand. I say this because we watched very large and longstanding disputes with the Tribes and with Indian people settled swiftly and on fair terms once President Obama took office. He brought a can-do attitude to long-festering problems, and his people got the message. The *Cobell* case was finally settled. The tribal trust fund cases were finally settled. The Indian farmers' cases were finally settled. The President saw to it that all of these settlements were achieved on fair and reasonable terms, even though the courts had not resolved whether the government was even to blame, much less how much. Why? Because it was important to resolve these long-simmering disputes once and for all, and to turn the page on these historic wrongs.

Compare those situations to the issue at hand. When it comes to contract support cost claims, Indian country has something that no one had in those other cases: a complete tribal victory by the highest court in the land, the Supreme Court, and not once, but twice. As a tribal leader, it seems to me that the relevant agencies would redouble their efforts to resolve all of this that much faster, in keeping with the President's commitments to Indian people.

But that is not what the agencies are doing. They seem to be stalling and looking for ways for the government to pay less, and maybe nothing at all. I am told the agencies no longer think it is relevant to look at how much the agencies should have paid. Instead, the agencies want to look at how we ran out programs and how much did we spend. The IHS Director said this in a public letter she issued earlier this year, and I am told this is the BIA's view, too. But we have already been audited over how we ran out programs: we are audited every year and the government gets those audits every year. Our audits are clean audits, just like most audits across Indian country.

As for how much we spent on our programs, all I know is that *we cannot spend what we are not paid.* If the agencies will only reimburse us for what we spent, they will probably calculate that we are owed nothing. But how can that be? If you read the Supreme Court decision in the *Ramah* case you will see that the Court ruled that the government was responsible for its underpayments. That is what the whole case was about, just like the *Cherokee* case. This has nothing to do with how we spent the portion of the money the government paid under our contracts.

I believe the President is committed to seeing these issues resolved fairly and quickly. But I also believe that there are some in the agencies who do not see it that way, and that is unfortunate. The government doesn't "win" when it pays less than it owes; the government "wins" when justice is done—Justice. And the Supreme Court has made it perfectly clear that Justice here means paying the portion of the contracts that the agencies failed to pay at the time.

That is not a hard number to calculate. I say this because the agencies kept records every year of how much they paid and how much they didn't pay. They told us the amounts and they told Congress these amounts. Might there me some errors? Undoubtedly yes, and maybe the true number is a little higher or a little lower; nothing is perfect. But for purposes of settling these claims once and for all, it seems to me, as a tribal leader, that many years and millions of dollars could be saved by just using the data the government already has to settle up all of these claims. Going forward, certainly the goal should be improved accuracy. But to settle up the past claims when the numbers are essentially known is just good business and good government.

The NCAI has called for swift resolution of all outstanding claims, and we agree with NCAI. We also agree that the best course of action is for Congress or the White House to appoint a special master who can wind up all these claims, and who is instructed to do so swiftly. We agree that if clarifications are needed to the law about what Tribes are due, those clarifications should be made at once by this Com-

mittee. But most of all, we agree that these claims need to be wound up in the next few months and then promptly paid out of Treasury's Judgment Fund. Our people, Indian people all over the country, are suffering from grossly underfunded care, and now from the sequester cuts that came on top of those already poorly-funded programs. We are doing our best under difficult times. The last thing we need is another decade of battles with the government, especially when the courts have spoken so clearly and directly to the point.

We cannot take more, not my Tribe, not the Tribes in the State of Michigan, and not the Tribes in the rest of the country. It is time to stop this longstanding 20 year battle and to turn the page of history. I am confident that this is what the President wants, that this is what Congress wants, and that this is what Tribal Leadership wants. Now we need to work together, and creatively, to actually make it happen.

Before closing, I wish to convey our Tribe's gratitude for the work of this Committee, and especially for the September 30 letter that several Committee members sent to the OMB Director, urging that OMB withdraw its proposal to essentially convert our contracts into discretionary grants (by permanently underfunding them at whatever levels are fixed by the agencies). Although much of Indian country has been angered by this proposal, I prefer to see it as a hasty over-reaction to the Supreme Court's *Ramah* decision, driven strictly by fiscal concerns and developed without due regard for the nature of these contractual agreements. I am certain that the President believes in tribal self-governance and self-determination, in the sanctity of our contracts with the government, and in the importance of the Nation honoring its fiscal obligations both abroad and at home. OMB's proposal cannot be reconciled with those core values.

Congress has already once rejected OMB's proposal when it enacted the current Continuing Resolution, and the House appropriations subcommittee also rejected OMB's proposal earlier this summer. While OMB proposals are never actually withdrawn, hopefully your input and the input of Tribal Leadership this week will persuade OMB to allow its proposal to simply fade away. If not, we hope and trust that this Committee will see to it that the appropriations process is not mis-used to effect fundamental changes in the Indian Self-Determination Act.

Thank you, Madam Chair and Vice-Chairman Barrasso, for the honor of testifying today, and I look forward to working with all Members of the Committee in developing swift and just solutions to the current contract support cost crisis.

The CHAIRWOMAN. Thank you. I want to thank all the witnesses for their testimony.

I want to make sure that I have this correct on this contract support issue. Chairwoman Diver kind of expressed it, and that is, when you turn over these services, you can get more efficient results. So the notion of self-governance, if you will, in driving more efficiency in the services that are delivered.

So Chairman Payment, I understand every year you enter into negotiations with the U.S., pursuant to that Self-Determination Act and what services you are going to provide and how much the United States will pay, including what the law calls the contract support costs. Is that not right, every year, you enter into an agreement?

Mr. PAYMENT. We do. As last year showed us, with the impact of sequestration, it is obviously not an agreement, because it is contingent on whether or not the funding exists. So we do support advanced funding, as the others do.

The CHAIRWOMAN. So how many years have you contracted with the U.S.?

Mr. PAYMENT. We have been doing self-governance funding for IHS since, we were one of the pilots for the Country, so the early 1990s.

The CHAIRWOMAN. So in all those years when you were contracting with the United States, did they ever inform you that the negotiated amount that you contracted with them was not the amount that they were going to pay you?

Mr. PAYMENT. No.

The CHAIRWOMAN. So for years and years and years, you negotiated and said, okay, we will deliver these services for this amount of money?

Mr. PAYMENT. For 21 years. We have never been notified that we are doing was not correct. We negotiate the agreement that we operate from. So there is obviously a presumption that what you are doing is correct, because the Federal Government has agreed to it.

The CHAIRWOMAN. So President Keel, why do tribes continue to take over Federal programs if the contract support costs are constantly underfunded?

Mr. KEEL. Tribes have proven, Madam Chair, thank you for that question, the tribes have proven over the years that they can operate these programs more efficiently, with less money, because they are closer to the community. In fact, these programs are absolutely critical to taking care of our people. If we didn't agree to contract and take over these programs, many of our people would not get services. So we agreed to do this.

Now, the Chickasaw Nation has been fortunate, as I said, we have a diversified economy. We have some economic development activities that allow us a revenue stream to, as I said, meet the shortfall of some of these requirements. So we basically subsidize these programs out of our own funds.

The CHAIRWOMAN. President Cladoosby, Jefferson Keel and others have suggested this special master, similar to what we did with the Deepwater Horizon, because there was a lot of complexity here, a lot of complexity in the 9/11 victims compensation fund. So are you advocating for something like that as well?

Mr. CLADOOSBY. Yes. Yes, Madam Chair, that is a great question. The Administration appears to be in need of some direction from this Congress in that matter. We will be more than willing to work with you, NCAI will, to find a constructive path forward. Because it is not the first time, we are not creating the wheel here. This is something that has been done with the September 11th victims and the BP Horizon oil spill, as President Keel has indicated.

So at the rate that they are going, it is unacceptable. Sixteen resolved out of 1,600, that is unacceptable. If they think that they can continue that record going down the road, we are not going to get there. We need this special master to help move this process along a lot faster than it is right now. So we need your help in encouraging this Administration to do that.

The CHAIRWOMAN. Thank you. Senator Franken?

Senator FRANKEN. Thank you again, Chairwoman Cantwell, for holding this hearing. Thank you, Chairwoman Diver, for your eloquent oral testimony and your also eloquent and helpful written testimony. I think that you said it was about $2.5 million that you have been cut in the last two years alone, that the Fond du Lac has been. How is that $2.5 million cut compared to your entire budget for the Band?

Ms. DIVER. Thank you very much for that question, Senator Franken. Out of our total program funding, that is about 6 percent, 6 percent the first year and another 5.2 percent, so just a little over 11 in total.

Senator FRANKEN. If the sequester continues into next year, what choices will you have to make in your budget and what will that mean for your tribe?

Ms. DIVER. I will have to start to cut actual Head Start slots, instead of the ancillary programs around that support the teachers, I will have to start to cut teachers. Before we start cutting teaching staff in our school, we would probably reduce transportation, at which point quite a number of our students would choose to leave our school and go to other school districts that don't have the cultural competency or the tribal focus, language activities, those types of things. They will leave our school district for those that can provide those levels of support service.

Our housing block grant, we are already having to make a hard choice between adding to our housing stock or reducing maintenance, deferring maintenance on the old 1937 Act housing. That is not a great long-term solution. I would much rather keep homes rehabbed than have to tear them down and replace them.

Senator FRANKEN. You have already had to drop kindergarten students with behavior difficulties. And you have just had to stop letting them go to school, right?

Ms. DIVER. It was actually one of the most heart-wrenching decisions that we have had. We had to take several kindergarten students that came in with pretty high level behavior needs. And because we could not give them the paraprofessionals that would ease their way into kindergarten, we actually denied them enrolment, asked them to leave and come back in a year. We are hoping their cognitive development in the next year will put them in a different place.

The struggles for the parents are that now they are having to arrange child care, having copays for those types of activities. We are worried about stigma to the children. And once again, many of the parents faced with some of those decisions may choose to go to a non-tribal school so that they can get the services they need for their children.

Those entities that they are choosing to go to that have the services have the ability to do something tribes do not, and it is called levy. So as an alternative to sequestration, maybe we should consider letting tribes levy in our ceded territories. We are being asked to provide services and rely on all of you good folks to help us make that happen, or raise the money ourselves. There is no other entity of government that has to do that. That was just wishful thinking, I understand.

[Laughter.]

Senator FRANKEN. Chairwoman Diver, you cite research that overcrowded housing is especially harmful to children and can harm their education success and their health and mental health. We talked about that a little bit in the first panel. Could you talk to the Committee about sort of the accumulated risks to the health, education of children because of housing cuts? And just what all of this looks like in human terms.

Ms. DIVER. Sure. After 25 years in the housing, operating and developing business, and bringing those skills back into my own community, we have been a leader in Indian Country with developing other menus of services besides low income rentals and

homeowners. Because those models alone don't work. Our supportive housing units for chronic and long-term homeless, those are the families you spoke about earlier, Senator, the ones that get doubled and tripled up, because that is what homelessness looks like in Indian Country, verified by the Wilder Research Center in Minnesota.

We see spikes in police activity that we track, behavioral health incidents, commitments, delinquency, truancy. When we opened up our 24 units of supportive housing, we are now in our third year with four of the families where their children for the first time in their lives have not had to change schools in the middle of the year.

In terms of impact, maybe mom and dad aren't better, but what we see is the incidence of alcohol use declining significantly and their severity and number. We see joint case management among school counselors, behavioral health workers, social workers, so that we can get the packages of services those kids need. The average saving in cost for stable housing for families is estimated to be for every dollar spent on stable housing and services there is a saving of $9 to crisis care and other systems later.

Senator FRANKEN. Thank you, Chairwoman Diver. You are a great leader in Minnesota for your tribe, for Fond du Lac. You are a true friend. Thank you.

Ms. DIVER. And thank you to all of you for saving my clinic on some behavioral health of my own.

The CHAIRWOMAN. Thank you. Senator Begich.

STATEMENT OF HON. MARK BEGICH,
U.S. SENATOR FROM ALASKA

Senator BEGICH. Thank you very much Madam Chair. I apologize that I wasn't here for the first panel. I was busy on an Alaska issue, an issue that I know you are familiar with and others, Pebble Mine. I was working through two groups at the same time. It has an impact on Indian Country and our State.

Let me first say thank you all very much. My poor staff, they write good questions for me, and I get frustrated always when I come here, only because I wish I was here for the last panel, and listening once again on contract support services and the inability for this Administration to deal with this issue once and for all.

I am looking at the testimony that Dr. Roubideaux sent, the written testimony. And she had two alternatives to deal with this, which I am trying to reserve my words of what I describe these, they are useless. She settled 16 of these issues out of 1,600. And they need, I say they, the tribes across this Country, including Alaska, need to have a separate opportunity, and if it is a special master that is appointed or some situation outside the hands of Indian Health Services.

Because here is what I think is going to happen. We will be here next year. We will have the same conversation, we will say the same thing and it will be 30, maybe, settled out of 1,600. This is ridiculous. It is outrageous. When they know that they can settle this, I think Mr. Keel said it best, and I have heard the data, they have the numbers. They have to verify to this Committee and this Congress on what is back-owed. Now, somehow that number has

changed, then obviously they certified something incorrectly, which means they weren't telling the truth when they sent the paperwork to us. I doubt that, I think it was probably truthful, I think we all agree that whatever those numbers were, that is what they were behind in payment.

I know they may make the legal argument that that was a BIA case and that is different. Despite the fact that BIA is going to do a class settlement and get it all done by 2014. It is amazing that magically one agency can get it done but one other agency is incompetent and unable to get it done. I know, they have heard from me and I am trying to be polite with my words. I just cannot believe they cannot resolve this, it is a simple request that the Indian Health Services do and this Administration do, and that is set an organization up, an individual to do, if it is called a master or whatever it might be, but someone to go through these claims and settle them and be done.

The money is in Treasury, it is a setaside legal fund, to do this. It doesn't touch Indian Health Services money. It is appalling to me that they cannot get this done.

The second part of this is, they need to set a plan, and I know, and I will ask the new chairman in regards to contract support cost working group. I know a couple of days ago you all met. Dr. Roubideaux said they are going to reinstate this. I have just a couple of basic questions. Is OMB going to be in those meetings? Because if the Office of Management and Budget is not in those meetings, it is a useless meeting. No disrespect to my friends at OMB, they are the great sanitizers. You send a budget up, they clean it off. I know this as a former mayor, my OMB did it to every department I had, because my department heads would come to me and say, did you know we actually proposed this and OMB cleaned it off. Is OMB going to be involved in that working group?

Mr. CLADOOSBY. That is a great question. We are hoping that they are involved. Once again, one of those agencies that we would really love to have an Indian desk in OMB, to have a presence there. We have been pushing this request. Yes, we agree that they need to be there and they need to be at the table.

Senator BEGICH. Maybe we can as a committee or individually make the request of the Administration. Because a working group without the people who manage the money, it is going to be a lot of great conversation you will have. Good philosophical debate, you will feel good when you leave, everyone leaves. Then a year later or six months later or two months later when the working group comes together—did she give you a timetable when the working group will start meeting?

Mr. CLADOOSBY. Does anybody at the table know if there is a timetable set for this? Aaron?

Mr. PAYMENT. We actually, we are here, and both of us are on stack. This is one of the issue we were asking for in the new position in OMB. It is going to be immediate. My first question was, because I want to be on that committee, and I represent the Midwest.

Senator BEGICH. I would like to be on that committee.

[Laughter.]

Mr. PAYMENT. So one of the things that I have impressed to the Secretary of Health and Human Services is that, tribes recognize that President Obama has been one of the best presidents as it relates to Indian issues.

Senator BEGICH. Absolutely.

Mr. PAYMENT. This is a disconnect. This is absolutely not congruent with his promise to uphold the treaty obligations, the creation of the White House Council, all of those things suggest a different approach. So what I am trying to figure out, I am a political scientist by academic training, where this is coming from and trying to understand it. I think that new position in OMB might help. I have asked several people to get a word to the President that this is not reflecting very well on his commitment to Indian Country. We need to uphold our treaty obligations.

I want to say one other thing quickly, if I have the chance. I am newly the vice president for the Midwest for NCAI. And I want to speak for our Alaska tribes as well. My tribe has a casino. One hundred percent of our revenue is used to supplement the services that the Federal Government is not providing us, so I loved your term supplement. But some tribe don't have that. And so the devastation of the shutdown and the devastation of the sequestration for the Alaska tribes or for the Nevada tribes or for the tribes that don't have gaming has been devastating. It is devastating for us. But for them, they have nowhere to turn and no one to look to.

Senator BEGICH. That is right.

Mr. PAYMENT. So your leadership by the way, is really respected by the leaders in your State. So thank you.

Senator BEGICH. Thank you. I know my time is up, but I will just end on this, and that is, Madam Chair, I want to do whatever we can. I sent a letter to the President last week outlining five specific issues. This was one of them, the master, resolving this. And I do agree, in the last five years, this President has done a lot for Indian Country, more than most have done in years, as we look at the history.

But it just seems like there is something not, and your phrase was a good one, connecting here. There is something missing in this linkage and it seems like it is not a complicated problem. It is almost like every time we go to the gate, we go to a different door. And they say, no, no, go to the next door. And we never find the right door. And so I want to again, the letter I sent last week to the President was very direct with specific recommendations. I was not hesitant to be blunt about it. But I want to be able to help you. But I can tell you, this testimony and the written testimony is unacceptable to me, of the solutions to solve this problem from Dr. Roubideaux. She has heard enough from me, I am sure. But I will do whatever I can.

I thank you all for the work you do. The work you have to do under sequestration, and as you know, some of you may know, I have proposed an advance funding bill. Just as what we did in the first year I got here, I sent it to the VA. We did it for the medical VA, we should do it for our Indian Health Services. These are not discretionary, they are mandatory. They are treaties. They are contracts. And we should fulfill the obligation that we set out. We are dealing with VA, and we did that a year and a half ago. I also have

another bill with the VA to finish off their benefits to make them also advance funding in Indian Health Services. So we will look forward to working with you on that.

Thank you, Madam Chair. I know I extended more than I should have. But this just frustrates me. I will try my best next time to come with a very positive attitude on something. I don't know what it will be, but it will be something.

The CHAIRWOMAN. I appreciate it, Senator Begich. If you needed a few more minutes, please take them. I said at the beginning of the hearing that you could see from our colleagues the level of frustration, only because we hear from our constituents and only because Indian Country and the State of Alaska or in Minnesota or some of these various places are large parts of constituencies and economic tools. When they don't have the resources then obviously everything is strained.

So I want to thank this panel and the witnesses here for their testimony. You have shown some light on the challenge and some ideas about solutions. I am glad that the Administration and the Assistant Secretary and Director Roubideaux were here, because hopefully we can now move forward in resolving both of these issues, getting some parity as it relates to health services in sequestration and in dealing with the contract support issue and moving forward in a more timely fashion.

So again, I thank my colleagues also for showing up and for their commitment to making sure these issues are heard. With that, we are adjourned.

[Whereupon, at 4:34 p.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. CATHY ABRAMSON, CHAIRPERSON, NATIONAL INDIAN HEALTH BOARD

Chairwoman Cantwell, Vice Chairman Barrasso, and Members of the Committee, thank you for holding this important hearing on contract support costs and sequestration. Both of these issues are of paramount importance to Indian Country and we sincerely appreciate the attention that this committee has given to the discussion of these key concerns. On behalf of the National Indian Health Board (NIHB) and the 566 federally recognized Tribes we serve, I submit this testimony for the record.

First, I would like to emphasize the importance of the Federal Trust responsibility, when it comes to the health of American Indian/Alaska Native (AI/AN) people. Based on treaties between Tribes and the United States for the exchange of peace and Tribal lands as well as United States Supreme Court cases and statutory acts, the Federal Trust responsibility is an absolute legal obligation under which the United States has the highest responsibility and trust to Indian Tribes. The Snyder Act of 1921 (25 USC 13) legislatively affirmed this trust responsibility. To facilitate upholding its responsibility, the Federal Government created the Indian Health Service (IHS) and tasked the agency with providing health services to AI/ANs. Since its creation in 1955, IHS has worked toward fulfilling the federal promise to provide health care to Native people. In passing the Affordable Care Act, Congress also reauthorized and made permanent the Indian Health Care Improvement Act (IHCIA). In renewing the IHCIA, Congress reaffirmed the duty of the Federal Government to American Indians and Alaska Natives, declaring that "it is the policy of this Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians—to ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy." (P.L. 111–148, Indian Health Care Improvement Act, § 103(2009).

To fully understand the implications of these two issues, it is crucial to understand the state of health for AI/ANs. The AI/AN life expectancy is 4.1 years less than the rate for the U.S. all races population. AI/ANs suffer disproportionally from a variety of diseases. According to IHS data from 2005–2007, AI/AN people die at higher rates than other Americans from alcoholism (552 percent higher), diabetes (182 percent higher), unintentional injuries (138 percent higher), homicide (83 percent higher) and suicide (74 percent higher). Additionally, AI/ANs suffer from higher mortality rates from cervical cancer (1.2 times higher); pneumonia/influenza (1.4 times higher); and maternal deaths (1.4 times higher).

AI/ANs have paid in advance for their health care. Sequestration and refusal to fully pay contract support costs are but two examples of the failure of the U.S. government to uphold its trust responsibilities while irresponsibly seeking to balance the federal budget on the backs of those who depend on the fulfillment of these agreements.

In 2003, the U.S. Commission on Civil Rights released a report titled: *"A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country."* This report detailed the lower health status and poverty for AI/ANs. Sadly, despite increases in federal spending, little has changed in Indian Country over the last decade when it comes to health. In 2003, IHS was 0.5 percent of the Department of Health and Human Services' (HHS) budget. Today, IHS spending is only 0.4 percent of the HHS budget. The crisis is still here, funding is not, and Tribes are continuing to suffer. To make matters worse, the inability of the Federal Government to protect the IHS from sequestration and a failure to pay Tribes' contract support costs has only exacerbated the problems of health delivery in Indian Country. As Chairwoman Cantwell noted in the November 14 hearing, "Our country's financial troubles are not really stemming from our obligations to Indian Country, and frankly, we're not doing a good job in fulfilling those obligations."

Sequestration Cuts and Indian Health

IHS spends roughly $2,896 on each patient per year. This is far less than the national average of $7,535 for health care spending per capita per year and even less than the $12,042 average for Medicare and $6,980 for the Veteran's Administration. Despite the legal promise to provide health care in perpetuity for AI/ANs, the Federal Government is falling woefully short.

In FY 2013, the IHS lost $228 million dollars due to the across-the-board spending cuts of sequestration and to rescissions. This was a critical blow for an agency that is funded at only 56 percent of total need. Late last year, a technical interpretation by the Office of Management and Budget (OMB) confirmed that IHS would be subject to the full sequestration amount of 5.1 percent. This was a surprise to many Tribes and, in fact, to IHS, because the Budget Control Act of 2011 (BCA) (P.L. 112–25), which governs sequestration, includes language that exempts IHS from all but 2 percent of sequestration. All other federal programs that provide health care services the nation's populations with the highest need, such as Social Security, Medicare, Medicaid, the Children's Health Insurance Program and the Veteran's Administration, have been exempted from these funding reductions. But, not the Indian Health Service!

This determination left many Tribes' scrambling to find a way to continue health services in FY 2013. Over the last several months, NIHB has heard from countless Tribes about the negative impacts of sequestration on their ability to deliver or access of health care. For many, this means shutting down facilities, furloughing employees and denying access. Others have shifted funds from other Tribal services; meaning, that they are forced to subsidize the federal trust responsibility. For example, the NATIVE Project in Spokane, Washington (a Native American Urban Clinic) will implement three furlough days a month. This will mean the elimination of roughly 150 doctor visits. On the Pine Ridge Reservation, the health education department will cut a full time physical fitness aid to part time—dramatically affecting efforts to prevent heart disease and diabetes. Also on Pine Ridge, testing and screening services for elders and babies have been reduced.

These cuts are literally a matter of life and death. The Rosebud Sioux Tribe has lost over $119,000 due to sequestration. Since March 2013, the death rate on the reservation has at least doubled because patients coming into facilities with critical problems just cannot get the care they need. The Mississippi Band of Choctaw Indians has said that referrals for medical services except those that are necessary to prevent the immediate death or serious impairment of the health of the individual have been delayed or denied. These delays and denials often cause the patients' health to get worse, leading to higher treatment costs down the road and sometimes death. The South East Alaska Regional Health Consortium announced it will close the Bill Brady Healing Center that provides alcohol and drug treatment to Native Alaskans.

On the Lower Brule Sioux Tribe's reservation located in South Dakota, there are not many opportunities for economic development. While some Tribes are forced to supplement the federal trust responsibility for health programming with funds from other programs or Tribal businesses, this is not a possibility on the Lower Brule Reservation. They have experienced budget cuts totaling over $77,000. This means they have had to drastically reduce a patient transportation program which takes individuals from this remote location to other cities to receive care. Dedicated Tribal health staff members still take the patients in many cases, but they are using their own funds. The alcoholism program on Lower Brule has lost $33,000, and now the treatment facilities do not have enough staff, supplies or meetings to help Tribal members. Mental health programs were cut by $6,000. This is a devastating reduction considering that in the Northern Plains region, American Indian young people are five to seven times more likely to take their own lives than other American youth. In a place where funds for health are already far below the need, sequestration cuts have left Tribal health directors desperately trying to make it work.

While some Tribes have been able to make some tough cuts to services and staff to remain open, next year Indian Country will be in a much worse state. For FY 2014, the situation for Indian health will be even further diminished if IHS is held to any sequester reduction. The Sault Ste. Marie Tribe of Chippewa Indians estimates that next year they will eliminate several health positions including several nurses and a registered dietitian and cancel other programs, such as their HIV program which provides over 1,000 visits annually. Tribal programs should be entirely exempt from sequestration in FY 2014, as they are a fulfillment of the trust responsibility to Tribes by the U.S. government.

However, if this is not possible, NIHB requests the Senate Committee on Indian Affairs to weigh in with the OMB, and explain that IHS should have a special sequestration exemption for FY 2014 and beyond, pursuant to current law. In FY

2013, the Budget Control Act (BCA) spelled out how sequestration would work and left open that even exempt accounts could be sequestered. However, for FYs 2014–2021, the Act specifies that the sequestration order should reduce spending for all accounts except those exempted (i.e., held at 2 percent sequestration) in Section 256, which includes IHS. In addition, the BCA required line-by-line sequestration in FY 2013 only. This means, unequivocally, that all of IHS, discretionary, and mandatory alike, would be held at 2 percent under any future sequestration reductions under the BCA. Regardless, let us be clear: there should be NO REDUCTIONS in IHS funding for the IHS, Tribal, and Urban (I/T/U) system. Two percent is too much!

Support for Advance Appropriations

NIHB has previously weighed in with this Committee regarding support for Advance Appropriations for the Indian Health Service. On October 10, 2013, Senator Lisa Murkowski introduced legislation, S. 1570, to provide advance appropriations for the IHS. While this measure will not solve the complex budget issues for IHS, it will be an important first-step in ensuring that AI/ANs at least continue to receive the health care we have come to know. Advance appropriations, which proved to be very effective for the Veteran's Administration health system, would allow Indian health programs to effectively and efficiently manage budgets, coordinate care, and improve health quality outcomes for AI/ANs. This change in the appropriations schedule will help the Federal Government meet its trust obligation to Tribal governments and bring parity to the federal health care system. Adopting advance appropriations for IHS would result in the ability for health administrators to continue treating patients without wondering if -or when- they would have the necessary funding.

Additionally, IHS administrators would not waste valuable resources, time and energy re-allocating their budgets and engaging in arduous outreach and education to the Tribes each time Congress passed a continuing resolution. Indian health providers would know in advance how many physicians and nurses they could hire without wondering if funding would be available when Congressional decisions funnel down to the local level. Health care services in particular require consistent funding to be effective. We urge this Committee to quickly consider S. 1570 and report the bill favorably to ensure that Tribes can move forward to a more stable funding mechanism.

Contract Support Costs

The Indian Self-Determination, Education and Assistance Act (P.L. 93–638), which has allowed Tribes to operate health programs directly on behalf of the Federal Government and is arguably the single greatest policy change when it comes to improving health delivery in Native communities. By empowering Tribes to run their own health programs, services are provided more efficiently and effectively because Tribes have better knowledge of their population and possess the important cultural understanding that can lead to better health outcomes for AI/AN people.

However, when contracting to provide health care services, Tribal governments have not received their full administrative payments, or contract support costs (CSC), from the Federal Government. According to the IHS "CSC are defined as reasonable costs for activities that [the Tribe] must carry out but that the Secretary either did not carry out in her direct operation of the program or provided from resources other than those under contract." These are fixed costs that are negotiated before the Tribe and the Federal Government finalize a contract.

This decade-long problem has forced many Tribes to shift funds from other programs to make up the difference; again, exacerbating some of the challenges that AI/ANs face when it comes to health. Again, subsidizing the federal Government's responsibility. This affects all of Indian Country, as each Tribe has at least one contract with the Federal Government. In June 2012, the Supreme Court issued a ruling in *Salazar vs. Ramah Navajo Chapter* that held that the U.S. Government must pay each Tribe's contract support costs even if the full amount to fund this has not been appropriated by Congress. Despite this, little progress has been made on resolving the past claims. In 16 months, IHS has settled only 1 percent of the 1600 pending claims. At the current rate, it would take over 100 years to settle these claims. Clearly, more must be done at IHS to ensure that there is adequate resolution on this issue and more must be done by the Federal Government to bring this matter to a quick and equitable resolution.

It is important to emphasize that these costs are negotiated in advance with the government, so prompt settlement amounts do not require much guesswork. The Supreme Court found in the *Ramah* case that 72–92 percent of CSC were paid between the years of 1994–2001, and these cases can be paid from the judgment fund. Yet, the Administration has done little to move forward since the decision. This same

Administration has shown unprecedented leadership in settling several historic Indian-related cases when there were no court rulings holding the government liable. These include settlement of individual Indian claims (*Cobell*), Tribal trust claims (*Nez Perce*), and Indian farmer claims (*Keepseagle*). There is no excuse for failing to promptly settle all outstanding claims where the Supreme Court has spoken and where certified agency reports to Congress show all amounts due. NIHB echoes others in Indian Country who have advocated for a Special Master to promptly settle all outstanding CSC claims. Congress should also set a quick deadline for the full resolution of these claims.

Future Funding for Contract Support Costs

To make matters worse, on the heels of the *Ramah* decision, the Administration used their FY 2014 Budget request to support a major reform of the CSC payment system—and did so without engaging in Tribal consultation. The FY 2014 Budget recommends that the government enter into individual contracts with each Tribe for CSC funds that each Tribe will receive. This proposal was made without consultation from Tribes, and is therefore a violation of established Tribal consultation policies as well as Executive Order 13175, which states the purpose *"to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes."* IHS Director Dr. Yvette Roubideaux stated, at her nomination hearing before the Senate Committee on Indian Affairs on June 12, 2013: "We have heard loud and clear the Tribes do not like our proposal . . . we anticipated that the Tribes would not like the proposal." Tribal consultation could have mitigated the damaging impact of this ill-conceived and onerous policy.

The Budget language, if enacted, would mean that Tribes and Tribal Organizations are the only government contractors in the United States not receiving full compensation when entering into contracts with the United States Government. Furthermore, it would serve to further violate the federal trust responsibility to provide health for American Indian and Alaska Native people. If the Administration negotiated a CSC cap with a particular Tribe and then experienced an administrative shortfall over the course of the contract, the Tribe would be required to subsidize the federal trust responsibility by covering those additional costs: Again. This was clearly not the intent of the Indian Self-Determination Education and Assistance Act.

Assistant Secretary of the Bureau of Indian Affairs Kevin Washburn said at this Committee's hearing on November 14, the Administration's proposal to put individual caps on contract support costs is "not something that makes a lot of sense in many respects . . . " Even the U.S. Chamber of Commerce has recently weighed in on behalf of Tribes against this proposal. Yet, the Administration still pushes forward with this misinformed policy, and reiterated support for it in the Office of Management and Budget's anomalies report issued at the end of FY 2013. NIHB agrees with the statement Senator Murkowski provided at the hearing that, "The fact that we are continuing to bring this up before members of the Administration, I find very, very frustrating."

NIHB is encouraged by the recent decision of the IHS Acting Director to reinstate the Contract Support Cost Workgroup in order to move forward to find a long-term solution to fund CSC. This group was abruptly abandoned in 2012 by IHS, which cited it could not meet due to restrictions within the Federal Advisory Committee Act. The IHS Acting Director has stated that this group will meet in early December 2013 and will quickly make recommendations. NIHB calls on this Committee to hold the IHS accountable to this plan. There is much work to be done, and it is critical that the group meet as soon as possible.

NIHB, again, appreciates the attention that members of this Committee have given to this critical issue, and the tough tone it has taken with the Administration on the misguided proposal around CSC. However, we have a long way to go before this issue is fully resolved. NIHB urges the committee to maintain its support for the speedy resolution of past CSC claims, and also urges the Committee to continue to hold hearings so that we may pave a path forward.

Conclusion

On behalf of the National Indian Health Board and the 566 federally recognized Tribes we serve, we thank the Committee for holding this important hearing. Both sequestration and CSC are critical issues that have a direct impact on the health and well-being of AI/ANs. To summarize, we recommend the following:

1) Restoration of the $228 million in IHS funds lost due to sequestration and rescissions in FY 2013

2) Full exemption from sequestration for IHS and other Tribal programs in FY 2014 and beyond

3) The Committee should promptly consider and pass S. 1570, which provides advance appropriations for IHS.

4) Congress should direct a special master to settle past CSC claims and impose a deadline for resolution of these claims.

5) Reject the Administration's proposal to place individual caps on CSC.

6) Hold the IHS accountable to their commitment to reconvene the CSC Workgroup.

State and local governments have the power to tax in order to fund government services. Tribes do not have that option. In many remote Tribal communities, economic development is also unfeasible. Tribal governments depend more heavily on Federal Government sources, thereby making the impacts of sequestration and contract support shortfalls even graver to Indian Country. Funding of IHS and other Tribal programs are a fulfillment of the federal trust responsibility that has been long established through the Constitution, treaties and law. These obligations to Indian Country are not discretionary. It is time that the first Americans stop being the last Americans when it comes to health care delivery, access and opportunity.

Thank you for the opportunity to offer this testimony.

PREPARED STATEMENT OF LLOYD B. MILLER, PARTNER, SONOSKY, CHAMBERS, SACHSE, MILLER AND MUNSON, LLP

My name is Lloyd Miller and I am a partner in the law firm of Sonosky, Chambers, Sachse, Miller and Munson, LLP.

I offer this testimony in two capacities. First, I am counsel to the National Tribal Contract Support Cost Coalition. This Coalition is comprised of 20 Tribes and tribal organizations situated in 11 States. Collectively, these Tribes and tribal organizations contract to administer $400 million in IHS and BIA services on behalf of over 250 Native American Tribes. [1]

Second, I am counsel to 50 Tribes and tribal organizations pursuing claims against the Indian Health Service over contract support cost underpayments which occurred as far back as 1995. More generally, I have worked for over 25 years in matters involving contract support costs, including work on several legislative matters, on numerous regulatory matters, and (among other cases) as counsel for the prevailing Tribes in *Cherokee Nation & Shoshone-Paiute Tribes v Leavitt,* 543 U.S. 631 (2005) and co-class counsel for the prevailing Tribes in *Salazar v. Ramah Navajo Chapter,* 132 U.S. 2181 (2012).

In 1988, former Chairman Inouye and this Committee noted that no single enactment has had a more profound effect on more tribal communities than the Indian Self-Determination Act, and no issue has been more critical to the success of that Act than the payment of contract support costs. These statements were part of this Committee's exhaustive report which accompanied the historic 1988 Amendments to the Indian Self-Determination Act, 25 U.S.C. §§450–458aaa-18. *See* S. Rep. No. 100–274 (1987).

Today we celebrate the fact that, over the course of nearly four decades, Tribes and inter-tribal organizations have taken over control of vast portions of the Bureau of Indian Affairs and the Indian Health Service, including critical federal functions in the areas of health care, education, law enforcement and land and natural resource protection. Today, not a *single* Tribe in the United States is without at least one self-determination contract with the IHS and BIA. Collectively, the Tribes annually administer some $2.8 billion in essential federal government functions, employ-

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[1] The NTCSCC is comprised of the: Alaska Native Tribal Health Consortium (AK), Arctic Slope Native Association (AK), Central Council of the Tlingit & Haida Indian Tribes (AK), Cherokee Nation (OK), Chippewa Cree Tribe of the Rocky Boy's Reservation (MT), Choctaw 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), 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), and the Northwest Portland Area Indian Health Board (43 Tribes in ID, WA, OR).

ing an estimated 35,000 people. Contract support cost issues thus touch every Tribe in the United States.

The 1988 Amendments (Pub. L. No. 100–472) eliminated any possible doubt that self-determination contracts are fully enforceable under the Contract Disputes Act, just like other government contracts. Congress did so by adding Section 110 to the Indian Self-Determination Act. 25 U.S.C. § 450m-1. This is key to understanding how we got to where we are today.

Before the 1988 Amendments, court decisions like *Busby School of the Northern Cheyenne Tribe v. United States,* 8 Cl. Ct. 596 (1985), had treated these contracts as if they were mere discretionary grants and, on that basis, had denied Tribes the right to recover damages when the agencies failed to pay their full contract support cost obligations under the contracts. S. Rep. No. 100–274, at 34–35 (discussing *Busby*). In one 1987 hearing on this issue, then-Chairman Inouye pointedly noted that, in his capacity as a member of the Defense Appropriations Subcommittee, DOD frequently came before the Committee to request supplemental appropriations to cover shortfalls in amounts due under government contracts. Yet, he noted, when the shortfalls are in contracts with Indian Tribes, the relevant agencies never come to the appropriations committee for supplemental funding. Chairman Inouye then vowed to change this prevailing view by amending the Indian Self-Determination Act.

The late Chairman Inouye's remarks are worth repeating here for the record:

> A final word about contracts: I am a member of the Appropriations Committee, and there we deal with contracts all the time. Whenever the Department of Defense gets into a contract with General Electric or Boeing or any of the other great organizations, that contract is carried out, even if it means supplemental appropriations. But strangely in this trust relationship with Indians they come to you maybe halfway or three quarters through the fiscal year and say, "Sorry boys, we don't have the cash, so we're going to stop right here" after you've put up all the money. At the same time, you don't have the resources to sue the Government. Obviously, the equity is not on your side. We're going to change that also. [Applause]
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> HEARING BEFORE THE SELECT COMMITTEE ON INDIAN AFFAIRS ON S. 1703, TO AMEND THE INDIAN SELF–DETERMINATION AND EDUCATION ASSISTANCE ACT, 100th Cong., 1st sess., at 55 (Sept. 21, 1987).

In 1988, this Committee's deep concern that the underpayment of contract support costs resulted in reduced patient care and other services, combined with this Committee's commitment to providing solid contract remedies if the agencies continued to underpay the contracts, led to the enactment of powerful contract support cost funding provisions (§ § 450j-1(a)(2), (g)), mandatory congressional reporting requirements (§ 450j-1(c)), and reliable contract enforcement mechanisms. § 450m-1(a).

Despite these heroic measures, and despite a second round of amendments in 1994 (Pub. L. No. 103–413), the agencies continued to fall short on their contract obligations. By the late 1990s, IHS was underfunding tribal contracts by nearly $100 million a year. The BIA, too, was failing to meet its contract obligations (although at considerably lower sums). All along, the agencies insisted that Tribes had no enforceable right to be paid in full, and the agencies therefore shirked their responsibilities to report these shortfalls to Congress and even to request the funds necessary to pay the contracts in full. In this environment, it was inevitable that litigation would follow.

It is not necessary to catalogue all of the ensuing litigation, because we already know the rest of the story. After more than a decade of litigation by a few courageous Tribes in various courts and boards, in 2005 the Supreme Court issued a unanimous decision against IHS (and, by extension, the BIA too). The Court upheld this Committee's legislation against attacks that its words were empty rhetoric, and the Court agreed that contracts with Tribes are as fully enforceable against the government as any other government contracts. That was the *Cherokee* case.

But even before the *Cherokee* case finished its journey in the courts, IHS put into place a scheme to undermine the Tribe's rights for the future. After suffering an early defeat in a Portland district court,[2] IHS in 1988 persuaded the Appropriations

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[2] *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala,* 988 F.Supp. 1306, 1311–12 (D.Or. 1997). Although this opinion was later reversed by the Ninth Circuit, *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Thompson,* 269 F.3d 948 (9th Cir. 2001), *opinion amended and replaced* by 279 F.3d 660 (9th Cir. 2002), three years later the district court reopened the judgment in the wake of the *Cherokee* decision (*Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala,* 408 F.Supp.2d 1073 (D. Or. 2005)), and thereafter entered an amended judgment of $1.2 million against the government.

Committees to erect limiting earmarks-caps-on the total amount the agency could spend on contract support cost payments.

IHS was unabashed in its intentions: it wanted to foreclose any future claims by tribal contractors. IHS might eventually lose the *Cherokee* case (which involved years *before* 1998), but IHS had a new plan to escape any further liability, while still permitting IHS to keep the benefit of all of the services the Tribes were providing. In developing this new attack on tribal rights, IHS followed a path the BIA had started in 1994, though for entirely different reasons. In 1994, the BIA merely wanted to separate its direct service appropriation from its contract appropriation; its initial goal wasn't to cheat the Tribes on their contracts. In due course, however, both agencies came to see these earmarking appropriations caps as a way for the agencies to underpay the contracts with impunity.

But contract law doesn't work that way. If a contractor performs work for the government, the contractor is entitled to be paid. And if the agency asks for insufficient funds from Congress to cover all of its contracts—yet still accepts the contractor's services, be it operating an IHS hospital or running a BIA police department—then the agency remains responsible: it either pays the contracts or the government answers in court.

It took 14 years for various cases to wind their way through the courts on this new issue. But in June 2012 the Supreme Court rejected the agencies' new scheme to avoid liability to the Tribes. The Court's decision echoed Chairman Inouye's remarks from a quarter century earlier: "Consistent with longstanding principles of Government contracting law, we hold that the Government must pay each tribe's contract support costs in full." *Salazar v. Ramah Navajo Chapter,* 132 S. Ct. 2181, 2186 (2012). The Court made plain that "the Government's obligation to pay contract support costs should be treated as an ordinary contract promise." Id. at 2188.

Although the *Ramah* case involved the BIA, the Supreme Court also vacated a decision from the U.S. Court of Appeals for the Federal Circuit in the government's favor involving IHS and sent that case back to the lower court. Two months later the Court of Appeals concluded that "[t]he Secretary [was] obligated to pay all of ASNA's contract support costs for fiscal years 1999 and 2000." *Arctic Slope Native Ass'n, Ltd. v. Sebelius,* No. 2010–1013, Order at 6, 2012 WL 3599217 (Fed. Cir. Aug. 22, 2012).

One would think this would be the end of the matter. But not so. The tenacity of the agencies in their efforts to underpay tribal contractors is nothing short of remarkable.

First, the agencies secretly concocted yet another scheme to cheat the Tribes. They proposed language never before seen in government contracting law, seeking to establish several hundred mini-caps on the amounts the agencies will pay each individual contractor this year-and at levels far below what the contractors are actually owed. Even the U.S. Chamber of Commerce has come out four-square against this unprecedented move. The reaction from this Committee was swift, and I will not repeat here the testimony this Committee heard on this issue last April. The House appropriations subcommittee rejected the proposal outright, and over a dozen Senators have asked OMB to withdraw the proposal. Yet at last word, OMB is continuing to press Congress to insert this provision into the final funding measure Congress adopts for fiscal year 2014.

Second, the agencies have failed to promptly settle the damages portions of all outstanding claims. The result: as of today—over 17 months since the Supreme Court's *Ramah* decision—the BIA has yet to settle *any* portion of the *Ramah* litigation (although admittedly that case has unique complexities, since it is a class action covering 20 years of underpayments suffered by some 500 tribal contractors under at least 9,000 contracts). For its part, the IHS Director testified to this Committee in writing last Summer that the agency is facing close to 1,600 claims from 200 Tribes totaling about $2 billion dollars. Yet *the agency has only managed to settle 19 of 1,600 claims* since the *Ramah* case was announced (including 3 claims settled on November 18th). That is a rate of 1 percent of the claims resolved every 17 months. At that rate, it will take more than a century for IHS to complete it work. *If IHS triples the rate of its work, it will still take 32 years to resolve the claims.*

Why is this happening? To fully answer that question, and to understand what should be happening instead, requires a detour back through the Indian Self-Determination Act.

The Indian Self-Determination Act. Every self-determination contract has a price attached to it for the work the Tribe is to do, and the ISDA sets forth the elements of that contract price. First, § 450j-1(a)(1) addresses the direct program costs, which are also called the "Secretarial amount." These are "the amount[s] the Secretary would have expended had the government itself [continued to] run the program."

Arctic Slope Native Ass'n, v. Sebelius, 629 F.3d 1296, 1298–99 (Fed. Cir. 2010), *vacated on other grounds* 133 S. Ct. 22 (2012).

But tribal contractors incur administrative and overhead costs to carry out functions that the agencies cannot transfer to the Tribes. The agencies cannot transfer much of their financial management and personnel management functions to the Tribes. They cannot transfer many payroll functions. There are even costs Tribes must incur but that the agencies never incur in the first place (such as paying for insurance, workers compensation premiums, legal advice and representation, annual auditing and reporting requirements).

For all of these reasons, the ISDA in § 450j-1(a)(2) specifies that "[t]here shall be added to the amount required by paragraph (1) [*i.e.,* to the Secretarial amount], *contract support costs* which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management . . . ." By and large, these are simply "administrative expenses," *Cherokee*, 543 U.S. at 634, but they can be substantial. And since they are fixed costs, when the agencies fail to pay them, Tribes still incur the costs and they must divert program funds to pay them. Accordingly, services are necessarily reduced.

The IHS Manual contains an entire chapter devoted to explaining how the agency determines each Tribe's "contract support cost requirement." The Manual is clear that the "contract support cost requirement" means: "[t]he full amount of [contract support cost] need for new and expanded programs (plus ongoing contracted or compacted programs) as determined under this chapter pursuant to Section 106 of P.L. 93–638 as amended [25 U.S.C. § 450j-1]." IHM § 6–3.1.E.5. This "contract support cost requirement" is comprised of two parts: "indirect" costs and "direct" costs. The total of these two costs constitutes the Tribe's total annual "contract support cost requirement."

Indirect contract support costs. Indirect contract support costs constitute the majority of contract support costs. These costs are generally determined by applying a tribal contractor's "indirect cost rate," 25 U.S.C. § 450b(g), "to the amount of funds otherwise payable to the Tribe" (that is, to the Secretarial amount). *Cherokee,* 543 U.S. at 635. For most Tribes, the relevant "indirect cost rate" is issued by the Interior Department's Interior Business Center. This "rate" is drawn from audits of prior year activities which show how much a Tribe spent on administrative overhead expenses, versus how much the Tribe spent on the actual delivery of services.

The IHS Manual requires IHS to determine the contractor's indirect contract support cost requirement "by applying the negotiated [indirect cost] rate(s) to the appropriate [IHS] direct cost base." IHM § 6–3.2.E.1. The "appropriate direct cost base" includes both the Secretarial amount paid under the contract, and all additional direct contract support costs negotiated to carry out the IHS contract (such as workers compensation insurance costs associated with nurses or other health department employees carrying out the IHS contracted programs). *See* IHM § 3.4.E.1; IHM § 6–3.3.A.3. The product of multiplying the "indirect cost rate" times the "appropriate direct cost base" is the contractor's indirect contract support cost requirement.[3]

Direct contract support costs. As noted earlier, direct contract support costs include a Tribe's payments for workers compensation insurance and other personnel health and related insurance or other benefits not transferred by IHS to the contractor as part of the Secretarial amount, yet which are necessary to prudently manage the contract. The IHS Manual instructs that these costs are to be negotiated according to detailed guidelines set forth in the Manual and an Appendix. IHM § 6–3.2D; IHM Exhibit 6–3-H. Once negotiated, direct contract support costs are paid on a "recurring basis" (IHM § § 6–3.2D, 6–3.2D(2)) and "do not require annual rejustification to the Secretary . . . ." IHM § 6–3.1E(12). Each year the Tribe has the "option to negotiate with the Secretary" over these costs. 25 U.S.C. § 450j-1(a)(3)(B). But until they are re-negotiated, they remain fixed.

Duplicative costs. Once the indirect costs are calculated, and once the direct contract support costs are negotiated (or carried forward from a prior year with just an inflation adjustment), the IHS Manual requires a final review ensure that, if any of the contract support costs were actually covered by the Secretarial amount (which sometimes happens), the agency will receive a credit adjustment against what would otherwise be due. IHM § 6–3.2.B.

After all of these steps, *"[t]his adjusted CSC requirement is the Section 106(a)(2) amount that the [contractor] is eligible to receive." Id.*

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[3] The Manual sets forth other fine-tuning adjustments, but for purposes of this general description they are omitted here. *See, e.g.,* IHM ¶ 6-3.2.F.2 (discussing "tribal shares" adjustment).

Once the contract amount is determined, for most Tribes it is due in full at the beginning of the year. 25 U.S.C. § 450j-1(g) ("Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled.") That said, payment delays are chronic. Nonetheless, once all of the contract funds are paid to the Tribe, the Tribe can reallocate the funds and redesign the contracted programs to best meet local needs and priorities (so long as services to eligible beneficiaries are not cut off). Further, funds not spent in the contract year can be carried over and spent in a later year (a not uncommon occurrence, given that many agency contract payments are not made until the last days of the fiscal year).

All these provisions are indicative of a fixed price contract—payment of a lump-sum amount up front, the ability to re-budget the funds once paid, and the specific command that the funds need not be spent in the year in which they are awarded.

The Annual Contract Support Cost Shortfall Report. Once the negotiated contract price is set, there is an agency reporting requirement. Congress established this mandate in the Act to monitor whether the contract amounts were being fully paid. That is, the *ISDA requires IHS to report to Congress each year on the agency's calculation of the contract support costs that are due, and what was actually paid against what was due.* 25 U.S.C. § 450j-1(c); *see also* IHM § 6–3.5B (requirement to prepare annual reports). Because IHS has chronically underpaid the amounts due the Tribes, Congress mandated that the annual report include *"an accounting of any deficiency in funds needed to provide required contract support costs* to all contractors for the fiscal year for which the report is being submitted . . . ." 25 U.S.C. § 450j-1(c)(2). These reports are known as the "IHS Contract Support Cost Shortfall Reports."

The IHS Manual dictates the process for creating the annual Shortfall Report. First, the Manual requires that each "Area Director . . . shall maintain a historical record of funds negotiated and awarded" in eleven different categories, including direct program funds, direct contract support funds, indirect cost rates, direct CSC requirements and indirect CSC requirements. IHM § 6–3.5(A).

Next, the Manual provides deadlines by which the shortfall data must be collected, provided to each Tribe for review, and submitted to numerous IHS Offices for review, including the IHS Headquarters Director, the Director of the Office of Tribal Programs, and the Director of the Office of Tribal Self-Governance. *Id.* It is certified for accuracy by each Area finance office and each Area Director. It is certified for accuracy by the Headquarters finance office. Then, the report is transmitted to the IHS Director for her approval "no later than February 1." *Id.* at § 6–3.5(A)(3). Finally, the Report is submitted to the Secretary of the HHS, who also approves the Report. (Unfortunately, the Secretary's certification has typically taken months, and often has taken years. The IHS data report for FY 2012 has still not been submitted to Congress, although it was due to Congress last Spring.)

At the end of this rigorous review process, the Secretary is required to submit the Shortfall Report to Congress. 25 U.S.C. § 450j-(1)(c). As noted, the report provides "an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted . . . ." 25 U.S.C. § 450j-1(c)(2).

The last report submitted to Congress is illustrative. The IHS Director noted in the narrative portion of the FY 2012 Report that the Report was "prepared as required by [25 U.S.C. § 450j-1(c)]" and contains "an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted." Report at 3. That is, both the statute requires, and the Director acknowledges, that the Report contains an accounting of the underpayment of contract support costs each year, Tribe by Tribe.

Contract Damages. All of the foregoing leads to the question of damages: what does the government now owe a contractor if the agency did not fully pay the contract amount? Here, the law seems clear.

First, general contract law principles control the government's liability, because "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Winstar v. United States,* 518 U.S. 839, 895 (1996) (quoting *Lynch v. United States,* 292 U.S. 571, 579 (1934)). *See also Mobil Oil Exploration & Producing Se., Inc. v. United States,* 530 U.S. 604, 607–08 (2000) (quoting *Winstar* and relying on the RESTATEMENT (SECOND) OF CONTRACTS (1981) ("RESTATEMENT")); *Franconia Assocs. v. United States,* 536 U.S. 129, 141 (2002) (quoting Mobil Oil and applying principles of general contract law).

Second, under general contract law a contractor is entitled to be paid damages which will *put [the contractor] in as good a position as he would have been in had the contract been performed . . . .*" RESTATEMENT § 344(a) (emphasis added).

These bedrock principles are easy to apply in the case of ISDA contracts. The IHS Shortfall Reports compute the negotiated price of each Tribe's contract for each year. The Reports also recite how much of that price was not paid. What is due now is the remainder of that contract price. It may be that today a Tribe wishes it had negotiated a different (and higher) amount, or that the agency wishes it had negotiated a different (and lower) amount, but general contract law does not permit the parties to go back on the original negotiated deal they struck.

IHS's flawed approach. Which brings us to IHS's alternative, and deeply flawed, approach. IHS takes the position that damages are to be assessed by first calculating how much money the Tribe actually spent in a given year to run the IHS program. Second, IHS would calculate how much of what the Tribe spent IHS already paid the Tribe. If there is a difference, that amount is the amount of damages the government now owes. This is the so-called "incurred cost" approach.

The problem with this approach is it doesn't make sense.

If a Tribe was owed $10 but it was only paid $8, then the most the Tribe could have spent of IHS money is the $8 it received. It cannot spend money it never received. Under the Tribe's approach to calculating damages, the Tribe is owed the $2 that IHS promised to pay but never did pay (in other words, the amount IHS certified in the Shortfall Report). But under the IHS approach, the government can never owe more than the $8 because that is the amount of the costs the Tribe "incurred"—and if, by chance, the Tribe spent only $7 that year and carried the other dollar over to the next year, the government's position is that *the Tribe owes IHS* that $1. This makes no sense.

But this kind of gamesmanship is not new. It was identified as a problem in 1987. At that time, Congress expanded upon the BIA's identical "incurred . . . cost" approach to damages, and this Committee called that approach "unacceptable":

> [T]he Bureau has argued that even if the self-determination contractor was entitled to receive the amount of indirect costs generated by its indirect costs rate . . . the contractor could not recover the difference between the amount it was entitled to receive under the contract, and the amount the Bureau paid . . . The rationale offered by the BIA for this argument was that since the contractor had not received the funds it was entitled to receive, it had also not spent them and, therefore, had not incurred any costs which could be recovered as an indirect cost under the contract. *Clearly, this is an unacceptable argument.*
>
> S. Rep. 100–274 at 37 (1987) (emphasis added).

The "incurred cost" approach to damages under the Act has not been pressed in ISD cases since 1988, nor in cases resolved before or after the 2005 *Cherokee* case. It has only been resurrected since the *Ramah* case. Why is that? Because IHS insists that the Supreme Court mandated this approach in the *Ramah* case. But that is quite a stretch. IHS reaches for this by observing that the Court used the word "incurred" in the opening paragraph of the Court's opinion. But the *Ramah* case was not about calculating damages, much less about how damages are computed; the case addressed whether the government had any liability at all.

Moreover, when it comes to the issue of contract underpayments, the Court actually suggested just *the opposite* of what IHS now argues. The Supreme Court explained that, during the relevant timeframe at issue in the case, "appropriations covered only between 77 percent and 92 percent of tribes' aggregate contract support costs. The extent of the shortfall was not revealed until each fiscal year was well underway, at which point a tribe's performance of its contractual obligations was largely complete." *Ramah,* 132 S.Ct at 2187. If any implication can be drawn from this passage, it would be that the damages due now are the portions of the contract amounts that the agency failed to pay—the shortfall amounts.

IHS also relies on the statute, which itself uses the word "incurred." But that argument is simply wrong. While the ISDA does state that contract support costs must "*include*" certain incurred costs, *see* § 450j-1(a)(3), contract support costs are generally not *limited* to those costs (except in the case of specialized "start-up" and "preaward" costs, *see* § 450j-1(a)(5)-(6)). I do not need to recite to this Committee the elementary rule of statutory construction that the word "includes" means "includes *but is not limited to*." *See* OFFICE OF THE LEGIS. COUNSEL, U.S. HOUSE OF REPS., GUIDE TO LEGIS. DRAFTING, § VII(A), *available at http://www.house.gov/legcoun/HOLC/Drafting*__Legislation/Drafting__Guide.html (emphasis added). In short, there is no basis in the statutory text for limiting contract damages to so-called "incurred" costs.

The "incurred cost" argument IHS has resurrected this past year is not even colorable under the statute. But if there actually were actually some ambiguity on the issue, the answer would be just the same and just as clear. This is because the

ISDA contains special, strict statutory rules of construction that this Committee purposely added in order to force any ambiguity to be resolved in the Tribe's favor-something the Supreme Court remarked upon twice in its opinion. *See, e.g., Ramah,* 132 S. Ct. at 2187, 2191 (citing § 450l(c), (model agreement § 1(a)(2)); . Thus, *according to the Supreme Court, IHS can only prevail on its view of the statute if it can "demonstrate that its reading is clearly required by the statutory language*." *Ramah,* 132 S. Ct. at 2191 (emphasis added). Plainly, that is not possible here.

Despite the clarity of the controlling law and 25 years of consistent agency practice, in a matter of months IHS has managed to completely derail the settlement process. Cases which should have been resolved in a matter of months on the basis of the Shortfall Reports are now being settled for a fraction of the amounts in a litigation process that will continue to take years. Unless changed, it will take decades to resolve these cases, and the result will not be just. Worse yet, resolution of the damages issues will consume enormous time and resources for both the Tribes and the agency, all at a time when all should be focused singularly on delivering health care to the least healthy and most underserved populations in the Nation.

The current situation cries out for a radical change in direction. The current approach to settlement of these cases is *simply not working.* [4]

Nor is there any meaningful promise in the IHS Director's discussion of an "alternative procedure" where IHS makes a speedy assessment based on more limited investigation and then conveys to a Tribe a take-it-or-leave-it offer. I have worked with two Tribes for whom such a process actually worked, but their claims were small and limited, and their settlements were under $200,000. That process will not and cannot provide speedy justice to the vast majority of Tribes.

Although IHS promises that this alternative "is less time-consuming" (Dr. Roubideaux Testimony at 5), there is nothing speedy about it. One small tribal clinic we work with in California requested a speedy "alternative procedure" offer on June 17, by email to the Acting IHS Director. The Tribe did not receive a response from the Acting Director until five months later, (the day of this Committee's hearing). Worse yet, the Tribe was told that the actual speedy offer itself would not be coming for another six months. Eleven months—*almost a full year*—is not a typical definition of the word "speedy" and hardly bodes well for Tribes with more substantial claims.

The IHS Director also testified that there were scores of settlement negotiations now underway. It is difficult to credit this statement. My firm and I are currently involved in active settlement negotiations with only five out of the 50 tribal contractors we represent. It is true that another dozen or so tribal contractors have been put on a theoretical list as "ready" for settlement negotiations, but in actuality, no settlement negotiations are underway. If our firm is any reflection, it would appear that, at best, IHS is only actively engaged in settlement negotiations with 10 percent of the 200 Tribes that have pending claims against the agency.

The way forward is clear, as suggested in testimony by several other Tribal leaders, including NCAI President Brian Cladoosby, Sault Ste. Marie Chippewa Chairman Aaron Payment, and Chickasaw Lt. Governor Jefferson Keel.

1. The White House should take charge of the entire settlement process and promptly appoint a Special Master. The only exception should be for the 20 or so cases already in mediation, and others that enter alternative mediation processes. If the White House will not act, Congress should.

2. The Special Master should be instructed to settle the outstanding claims by beginning with the IHS Shortfall Reports, while also hearing any additional claims Tribes wish to have heard.

3. All claims should be resolved on or before June 18, 2014, the two year anniversary of the *Ramah* decision.

4. Congress should immediately enact an amendment to the Act to establish clear rules for computing damages in these cases. (This would not be the first time Congress amended the ISDA to force a recalcitrant agency to obey Congress's clear instructions.)

5. Finally (and as I mentioned in my testimony to this Committee last April), Congress should reject OMB's proposal to start capping individual contract amounts at less than the amounts that everyone—Tribes and the agencies alike—all agree are due this year for services duly rendered to the United States. The United States must honor its contractual obligations to tribal governments on no less an equal footing than it honors it obligations to other contractors and to other Nations. America does not default abroad, and it should not default at home.

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[4] Everything noted here is equally true of the BIA, whose process for calculating contract support cost requirements is virtually identical to the IHS process. *See* National Policy Memorandum NPM–SELFD–1 (Dep't of Interior May 5, 2006).

By any measure, the Indian Self-Determination Act has been a stunning success, most importantly for the Indian citizens served, but also in the strengthening and maturing of modern tribal government institutions. This Committee has had everything to do with bringing about the conditions necessary for that success.

Now is the time for Congress to keep that commitment to the Tribes and to finish the job the Supreme Court began. The Court has spoken, and it is time for the Tribes to be paid so that this unfortunate chapter can be closed.

Thank you for the opportunity to offer testimony on the contract support cost crisis facing Indian Country.

PREPARED STATEMENT OF PHILIP RIGDON, PRESIDENT, INTERTRIBAL TIMBER COUNCIL

Madam Chair and Members of the Senate Committee on Indian Affairs, I am Phil Rigdon, President of the Intertribal Timber Council (ITC) and Deputy Director of Natural Resources for the Yakama Nation. On the behalf of the ITC, I hereby submit this testimony on the Consequences of Sequestration on Native American Natural Resources for the record of the Committee's November 14, 2013 Oversight Hearing on "Contract Support Costs and Sequestration: Fiscal Crisis in Indian Country."

The ITC is a 38 year old organization of some 60 forest owning Indian tribes and Alaska Native organizations that collectively manage more than 90 percent of the 18 million acres of BIA trust timberland and woodland acres—one third of the trust land base—as well as millions of timberland and woodland acres owned by Alaska Native organizations. These lands are a source of thousands of jobs and many millions of dollars in economic activity in and around Indian Country. Beyond their economic importance, forests also store and filter the water and purify the air to sustain life itself. They sustain habitats for fish and wildlife, produce foods, medicines, fuel, and materials for shelter, transportation, and artistic expression. In short, our forests are vital to our economies, cultures and spiritual well being.

Automatic spending cuts (sequesters) under the Budget Control Act of 2011 (BCA) are applied across-the-board to great swaths of the federal discretionary budget, absent Congressional and Presidential agreement otherwise. The inability to reach agreement triggered sequester for FY 2013 and appears to be impending for FY 2014.

Budgets for the Bureau of Indian Affairs (BIA), the Indian Health Service (IHS) and a variety of other federal tribal programs have been affected by the BCA's indiscriminate sequester process, despite the federal government's unique and often binding treaty and other obligations to tribes, placing tribal communities and natural resources at increased risk. As reported by the 2003 U.S. Civil Rights Commission report "A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country", Tribal programs and natural resources have long suffered from inadequate and inequitable funding. A particularly key federal obligation, rooted in treaties and fiduciary trust responsibility, is the protection and management of Tribal land and its resources—Tribal natural resources—that play a central and critical role with Tribes and their members. This testimony examines the consequences the sequester is having now, and could have in even larger measure in the future, on Tribal natural resources.

Land and Natural Resources Have Always Been Central to Tribal Cultures and Economies

Tribal lands and natural resources, often secured by treaty and to be held in perpetuity, serve as homelands for many Tribes. These resources and federally reserved rights to fish, hunt, and gather provide a wide array of elements basic to tribal life:

- Fish, wildlife, and plants: foods and medicines for subsistence and health,
- Shelter, fuel and materials for household use and commerce,
- Income, livelihoods and entrepreneurial opportunities,
- Protection of water, air and soils,
- Sacred sites and cultural resources, and
- Recreation.

U.S. Obligations for Tribal Natural Resources

The United States has historic, binding and judicially and statutorily affirmed trust and treaty obligations to Tribes and their natural resources. These obligations include:

- Fiduciary trust responsibilities to protect the productivity of the trust corpus and ensure fair value and full accounting of proceeds from utilization;
- Trust and legal responsibilities to protect the rights of Indians in their trust property and those rights affecting trust property that are afforded by tribal sovereignty (water rights, land titles, boundary disputes, trespass, hunting and fishing, zoning and land use);
- Provision of all services necessary to enable Indians to utilize all rights based on treaty, statute, proclamation, sovereignty, trust responsibility, or otherwise;
- Supporting the capacity of Tribal governments to fulfill their responsibilities and authorities for managing natural resource on and off reservations; and
- Providing full contract support costs for programs administered by Tribes under self-determination contracts and self-governance compacts.

Funding For Tribal Natural Resource Management Has Long Been Inadequate

Over many years, the insufficiency and inequity of federal funding of Tribal natural resources have been repeatedly documented by governmental and non-governmental commissions and studies, as well as being determined by federal courts. Information on sequester's impacts on Indian forestry are summarized below.

Forestry—The third statutorily-required decadal report of the independent, blue-ribbon Indian Forest Management Assessment Team (IFMAT–III), completed in June 2013, finds that per-acre federal funding of tribal trust forest management is just one third that of the U.S. Forest Service. That inequity is essentially unchanged from BIA Forestry funding insufficiencies documented in the 1993 and 2003 IFMAT reports. IFMAT–III also found that, even without sequestration:

- An additional $100 million needs to be added to the BIA Forestry budget annually to provide the minimum base level funding needed to fulfill trust responsibilities for Indian forestry,
- 800 additional BIA and tribal contract/compact Forestry staff positions are needed; current and arising vacancies can't be filled,
- An additional $12.7 million is needed for staff recruitment and development to maintain workforce capabilities, and
- Indian trust forests are deteriorating due to increasing threats from wildfire, insects, and disease.

The Costly Consequences of Failing to Properly Manage Tribal Natural Resources

Inadequate federal trust management of Tribal natural resources can have costly consequences for Tribes and their members, for surrounding communities, and for the Federal Government, including:

- *Litigation.* The federal trust responsibility for the protection and management of Tribal forests is a binding, compensable fiduciary obligation similar to a private trust, and the United States can be—and has been—found liable for inadequate or inappropriate management. Over the past several years, the U.S. has paid more than $1 billion on 70 *Cobell*-like trust settlements with tribes, at least partially due to the failure to fulfill fiduciary trust obligations for natural resources. This is but one of a host of settlements resulting from litigation over mismanagement of trust resources. Unless affirmative actions are taken to proactively address long-standing and emergent problems, claims for future damages arising from the failure to fulfill fiduciary obligations can be expected.
- *Job and economic losses* affecting individual workers in tribal and surrounding communities and reducing revenues for tribal governments to meet community needs.
- *Diminishment of natural resource health and productivity,* either as a direct result of insufficient or inappropriate management or due to overall management failure to maintain forest health, increasing the associated risk of catastrophic loss of the forest resource through fire, infestation or disease.
- *Reduced availability of natural resource-based traditional foods and medicines,* increasing social welfare costs and adversely affecting human health in tribal communities.
- *Degraded water, air, soil, and fish, wildlife and plant resources and habitats,* increasing conservation concerns and reducing management flexibility and development opportunities.

- *Reduced ability to protect irreplaceable cultural and sacred sites* from damage or loss.
- *Shift of funding away from proactive forest health and management to cover increasing wildland fire suppression costs.* In a self-fulfilling downward spiral, an increasing proportion of available federal forest funding is being spent for wildfire suppression (50 percent of the USFS budget is dedicated to suppression), reducing forest health and management funds that proactively reduce wildfire risk and severity. This approach promises to lead to progressively increasing costs as the failure to invest funds to treat the land to reduce potentials for catastrophic loss is diminished. This strategy abdicates federal trust responsibilities for maintaining the health and productivity of tribal forests and places the safety and welfare of tribal communities at great risk.

Sequester Will Make Matters Worse

Current funding and staffing shortfalls will widen.

Insidious impacts of sequestration:

Workforce Impacts

- Expertise is being lost due to programs that encourage early retirements to reduce funding needs.
- Reductions in force and positions, hiring freezes, furloughs, pay cuts, and inability to provide pay cost increases or provide compensation for required overtime lead to poorer service and staff exhaustion from added physical, financial, and emotional stress due to increased workloads.
- Travel restrictions will hinder the ability of agency staff to get out into reservation forests to make first-hand evaluations and determinations, degrading management decisions and transferring costs to tribes in order to meet with federal officials.
- Uncertainty of stable funding increases the difficulty of recruitment and retention of qualified staff, damaging program continuity and development and causing the quality of decisions to deteriorate and the need for more staff training and education to increase.
- Inability to fund co-operative student intern programs will hinder development of future managers.

Impacts on Planning, Management and Productivity

- Short-Term Horizons. Financial uncertainty reduces the ability of Tribal forest managers to plan for and undertake long-term programs and make investments to protect and develop natural resources.
- Increased Reliance on "Soft Money." Tribes are being forced to try to support natural resource programs by cobbling funding sources and projects together, greatly increasing costs of administration and adversely affecting program effectiveness and continuity.
- Lost Opportunities. Inability to prepare advance plans and secure administrative and environmental clearances reduces the ability of tribes to take advantage of market opportunities, reducing the value of the trust corpus. Sequestration of support will also reduce tribal abilities to develop resource-based enterprises (e.g., projects that would contribute to U.S. objectives of energy independence and security).
- Deteriorating Infrastructure. Loss of commodity production from federal forestlands is contributing to the loss of harvesting, transportation, and manufacturing infrastructure, reducing the ability to defray costs of management, increasing reliance on direct federal funding for forest health and management activities, and restricting the capability of materials harvested to generate income and provide governmental services, employment and business opportunities.

Increased Pressure on Tribal Communities and Resources

- Community Cohesion. Competition for limited funding for programs and jobs will heighten stress within already fragile Tribal communities.
- Increased reliance on natural resource extraction. Reductions in jobs, income, and community assistance programs increase pressure to liquidate natural resources over the short term to meet daily needs.

- Colonialism by Budget. Desperation for jobs and income to provide governmental services can coerce Tribes into making imprudent decisions regarding their natural resources.

Collateral Impacts

The across-the-board nature of sequesters also has indirect but significant effects on Tribes by reducing the capacities of neighboring forest entities, including other federal forest agencies and states participating in federal programs.

- *Increased Tribal Risks and Burdens Due to Reduced Capacity of Co-Managers.* The reduced capacity of governmental forestland neighbors, particularly federal public forest managers, to actively manage and maintain their adjacent land and resources will subject Tribal forests to increased risk of catastrophic loss through fire, infestation and disease. Additionally, the reduced capacity of federal public land agencies to enforce laws and regulations to protect environmental functions in Tribal traditional use areas increases risks to Tribal trust and other co-managed resources such as fish, wildlife, plants, soil, air, and water. These reduced capacities of neighboring governmental agencies shifts management and protection burdens onto Tribes, resulting in diminishment of treaty and reserved rights, reduces flexibility for management of Tribal resources, and deprives Tribal access and use under federally reserved rights.
- *Reduced Ability of Forest Neighbors to Cooperate and Collaborate.* Despite recognition that landscape-scale forest management is needed, sequestration will force reduced federal and other program participant staff to spend more time on their individual agency "boiler-plate" administrative functions, diminishing capacity to work cooperatively and collaboratively on landscape activities. This will result in increasing isolation and fragmentation that will diminish integrity of ecological functions and foster proliferation of inefficient, compartmentalized and incompatible management of the forest landscape.

Madam Chair, Members of the Committee, the ITC hopes this testimony helps illuminate the broad and devastating consequences that BCA sequesters have on Native American natural resources. The health and productivity of our natural resources and our communities are closely intertwined. The consequences of sequestration can be direct, indirect, short-term and long-term, immediately evident and subtle. Sequestration threatens to undo the progress we have been able to make over the last four decades. It will trample on tribal rights and interests, jobs and economies, and our efforts to lift our communities toward self-sufficiency. It compounds and exacerbates historical federal funding inequities, insufficiencies and indifferences against which the Tribes have struggled for generations. We join with all the other voices throughout Indian Country to urge that Native American programs be removed from the ruinous BCA sequester and that support for federal obligations to Tribes be treated as non-discretionary expenditures.

PREPARED STATEMENT OF MYRON P. NANENG, SR., PRESIDENT, ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS

Good Afternoon. My name is Myron P. Naneng, Sr. I am the President of the Association of Village Council Presidents (AVCP) located in Bethel, Alaska.

This Testimony is shared with the Senate Committee on Indian Affairs on some of the major impacts of contract support costs and sequestration we have experienced at the Association of Village Council Presidents and the 56 member Tribes on the Yukon Kuskokwim Delta.

Situated in a geographical area approximately the size of the State of Oregon, our 26,000 Alaska Natives rely primarily on a subsistence way of life. Because of our remote location, there are no roads connecting any of our villages to each other or to the rest of Alaska. As a result, the normal daily conveniences enjoyed by Tribes in the Lower 48 come at a premium. High on our list of challenges is the devastating impact that sequestration has had on our people.

The following examples are just a sample but hopefully describe the level to which the federal deficit has had on our people and the ability for AVCP to fulfill its mission to provide critical social services and public safety to the region:

Housing - Home Improvement Program cut by 100%. Eighty percent of the homes in our region are substandard and require repair or completely replacement. The loss of this program has had a devastating effect on quality of life.

Low Income Home Energy Assistance Program cut by 35% (national).

Head Start cut by 5%, resulting in the elimination of student bus service, lunch assistance, travel, and all summer hires.

Child Care cut by 5% with the potential of an additional 5%.

Education cuts including providing scholarships to students from 5K to 2K.

Tribal government office closures, staff lay-offs and limited office hours

Employment and economy. AVCP was forced to close Yuut Yaqungviat Flight School (tribal owned flight training). This flagship flight school, the only one in the nation that graduates bi-lingual pilots, was started in 2003, and has produced 53 certified pilots, most of whom have remained in the region. The school's closure eliminates educational and employment opportunities in an economically-deprived region, but also results in a financial impact of a loss of $500,000 per year to the AVCP region.

At AVCP, travel will need to be reduced, which we rely heavily upon in connecting with greater Alaska and engaging with our federal partners. We must also consider a hiring freeze, in an area with the highest unemployment and lowest per capita income.

Many of our membership in villages rely on AVCP for many human and social services that we provide. For example, we have been hit by strong winter storms this past week, and we have villages in our region who are experiencing disaster flooding with major damage to water/sewer systems. Communities in our region, such as Kotlik, Emmonak, Alakanuk, Nunam Iqua, Scammon Bay, and Hooper Bay have been hit the hardest. In some cases, they have no water, the roads to airports are washed out, and the runways at the airports are destroyed, leaving any relief for urgent health care impossible. In some villages, the damage is so severe, that recovery from the impact of the storms will continue for many months to come. The winter storm season is just starting in Alaska, and we anticipate it only to get worse. That means, communities will need assistance this winter, and with sequestration, it will be hampered.

In an area with the highest unemployment and suicide rates, and lowest per capita income, our people are having to choose between food or heating fuel. If this winter is anything like the one we experienced two years ago, we anticipate the challenges our people to face to come down to choosing between the basics of life, food and shelter in some cases. Sequestration is not helping our situation in Western Alaska.

The current budget dilemma is thwarting our efforts to promote economic growth and provide for the future. The challenges are even greater to overcome the poverty, historical trauma, and lack of housing and education that accompanies rising unemployment.

In conclusion, it is critical that full contract support costs be funded and Tribes be declared exempt from sequestration.

Thank you.

PREPARED STATEMENT OF JACQUELYN POWER, SUPERINTENDENT/PRINCIPAL, BLACKWATER COMMUNITY SCHOOL

Dear Madam Chairwoman:

We are writing to provide comments on the impacts of sequestration on our school. Blackwater Community School (BWCS) is located on the Gila River Indian Reservation, southeast of Phoenix, Arizona. BWCS is funded by the Department of the Interior for early childhood through second grade and by the state of Arizona as a charter school for grades three through five.

What is commonly known as the Blackwater Community School (the "School") is actually a combination of two distinct legal entities. Grades K-2 are a Tribally Controlled Grant School, and grades 3-5 are an Arizona charter school, the Akimel O'odham Pee Posh Charter School. This unique structure and its location on the Gila River Indian Reservation, make it heavily reliant on Impact Aid and other sources of federal funding. The School has no ability to raise tax revenue and is entirely dependent on grant funding. Further, due to a BIA moratorium on grade expansion, the charter school is the only option for providing instruction in grades 3-5.

Of the two schools, the charter relies more on Impact Aid funding to maintain its educational programming. As the only major federal K-12 education program that is current-year funded (meaning funding appropriated in one fiscal year is used in the same school year), Impact Aid was subject to an immediate reduction of funds for the 2012-2013 school year. This created a financial hardship on our school, as we do not have other resources to address the shortfall. If funding stays at the currently projected 80% level, the School will need to cut two positions, one from the teaching staff and one from the Instructional Technology department. However, if the funding drops to the projected 50% level, the School will cut up to twenty-five percent of its 3-5 grade staff. This will result in significantly larger class sizes and fewer resources for students. While many schools have reported that an increase in state funding has helped lessen the

effects of declining Impact Aid, the State of Arizona has not significantly increased its funding to charter schools.

Because the School lacks the ability to raise revenue through other means, the effects of continued cuts in Impact Aid and other federal funding due to sequestration will ultimately result in the closure of the 3-5 charter school. If this happens, students will be required to attend school outside of the community where they will be subject to longer commutes, larger class sizes, and will no longer receive the benefit of the cultural and language instruction provided by the School.

The Blackwater Community School's education program from early childhood through grade two receives funding from the Department of the Interior, Bureau of Indian Education. Since school year 2008-2010 funding has risen only 5%, less than $330.00 per student. Historically funding would have risen by 12% over the same three year time period. Insufficient funding has resulted in the school not being able to provide raises to its faculty and support staff for the past four years, thereby affecting retention of high quality instructional staff. The No Child Left Behind legislation requires schools to hire and retain highly qualified staff. We have also been unable to provide professional development opportunities for teachers to ensure they remain current in practices that are changing due to the implementation of the Common Core standards. Without adequate funding schools are not able to meet this requirement. Due to lack of funding we have been unable to purchase new textbooks and computers to support the move to the new standards that are supported by the Department of Education and the Arizona State Department of Education. We also have not been able to provide extra curricular activities, summer education programs to retain and enhance learning, and address much needed deferred maintenance. The cost of the school lunch program has increased each year and because many of our students rely on the school to provide a proper nutrition program (all of our students qualify for the free and reduced lunch program) we provide a breakfast and lunch program for all students. The sequestration funding level has adversely affected this program. Learning is directly affected if students are hungry or do not have a high quality nutrition program. In order to continue this program it is necessary to receive adequate funding. If funding decreases next year we will have to lay off staff to continue this important program.
The federal government requires schools to meet high standards which our school has consistently accomplished, however it is much more difficult given the severe budget constraints at both levels. The BIE's school system only has 33% of its schools achieving Adequate Yearly Progress. A decrease in funding will only result in less schools meeting the No Child Left Behind or Race to the Top standards. While we have met these standards since the No Child Left Behind legislation was passed and are a Arizona Performing School, a continuation of the sequestration funding level will eventually result in our joining those schools

not meeting the national standards. With budget cuts in basic funding there are insufficient resources to meet academic requirements especially when teacher recruitment, retention of highly qualified staff and professional development are so critical.

Our school has increased its enrollment by over 70%. This is a result of construction of 170 houses in our attendance area by the Gila River Indian Community. Our school is undersized by over 22,000 square feet. The school was constructed in 1939 for less than 100 students and although it underwent renovation in the mid 1990's, it is too small for our present enrollment of over 400 students. The Bureau has provided modular classrooms but we now have more students in temporary housing than in permanent construction. The Department has not requested funding for replacement school construction, which means our students will remain in modular buildings far into the future. Our requirements for school replacement are approximately 7 million dollars, which would result in our students having access to a high quality learning environment. We urge the Congress to support funding for replacement school construction to address substandard school facility conditions.

In summary our school is frugal and focuses its funds on instruction, which is evident by our achievement results. We have met Adequate Yearly Progress each year and need sufficient resources to meet state standards. We urge Congress to support increased Impact Aid funding at no less than the 2012 funding level, and also recommend ISEF funding be increased to no less than the fiscal year 2012 level plus the Consumer Price Index for each subsequent year. The proposed FY 2014 ISEP funding level by the Bureau is $13 million less than the FY 2012 level. This funding level is insufficient for our school to achieve and maintain high standards.

Please contact me if you have questions about our letter or if you require additional information.

We appreciate your continued efforts to support Indian education.

PREPARED STATEMENT OF DAN WINKELMAN, VICE PRESIDENT FOR ADMINISTRATION AND GENERAL COUNSEL, YUKON-KUSKOKWIM HEALTH CORPORATION

The Honorable Chairwoman and Members of the Committee:

I am writing to urge you to direct the Indian Health Service (IHS) to immediately pay past contract support cost (CSC) claims to Tribes and Tribal organizations based upon IHS's own CSC Shortfall Reports; appropriate full CSC's to Tribes and Tribal organizations; and exempt the IHS and their tribal self-governance partners from the harmful effects of the sequestration cuts placed in the Budget Control Act of 2011.

I. BACKGROUND.

The Yukon-Kuskokwim Health Corporation (YKHC) provides health care under the authority of 58 tribes and pursuant to a compact with the IHS under the Indian Self-Determination Act.[1] YKHC has approximately 1,600 employees and a $160 million budget to serve 30,000 mostly Yupik and Athabascan residents of Alaska's roadless Yukon-Kuskokwim Delta. In addition to 41 village and 5 sub-regional clinics, we operate a hospital and numerous regional ancillary facilities.

II. THE CSC SHORTFALL AND SEQUESTRATION ELIMINATES JOBS AND VITAL HEALTH CARE SERVICES TO ALASKA NATIVES/AMERICAN INDIANS.

There is nothing in Indian Country with a larger impact to jobs creation than fully funding CSC's to existing Tribal compacts and contracts. Many of these jobs would be high-paying, permanent positions to provide health care and support functions and could be filled relatively fast.

[1] Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 et seq. (1975) (hereinafter "ISDA").

A. Fully Funding CSC's Means Immediate Jobs For Indian Country.

In Indian Country, the jobs for the provision of health care and its related support services are already created, but not fully funded. That is, the compacts and contracts the federal government has with Tribes and their Tribal organizations fund existing health care programs. However, there is an existing shortfall for indirect and direct CSC's that would otherwise be spent on additional personnel and other support costs and services. By fully funding CSC's, workers will be placed into jobs and the federal government will finally fulfill our nation's long-standing promise and contractual commitment to support tribal self-determination and self-governance.

1. The CSC shortfall penalizes Self-Governance Tribes for carrying out health care programs on behalf of the federal government.

The CSC shortfall puts Tribes at a financial disadvantage when they exercise one of their most important rights of Self-Governance, the delivery of quality health care. Instead of Tribes being on an equal footing with other federal contractors when carrying out federal contracts, Tribes are intentionally underfunded their negotiated CSC amounts. Unlike Halliburton, Boeing and other federal contractors, Tribes do not receive their full CSC amounts when carrying out programs, services, functions or activities of the federal government. Why?

The CSC shortfall becomes antithetical to the ISDA's general purposes by hindering the federal government's ability to be fully "committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities."[2]

In a September 28, 2011 bipartisan letter[3] from 9 U.S. Senators to President Obama, the Senators described how Tribes are impacted by cutting their already insufficiently funded health programs when Congress does not fully appropriate CSC's:

> When these fixed costs are not paid, Tribes are compelled to divert resources by leaving positions vacant in the contracted programs serving their members in order to make up the difference.[4]

The CSC shortfall for YKHC at the end of fiscal year 2011 was $3.6 million. This lack of vital funding leaves positions vacant and programs partially funded. It directly affects the ability of tribal organizations like YKHC to provide health care and thus, reduce health disparities within our region.

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[2] ISDA, 25 U.S.C. § 450a(b) (Declaration of Policy).
[3] SEN.'S BEGICH, MURKOWSKI, ET AL., Letter to Pres. Obama Requesting Full CSC Funding in FY2013 Budget p.1 (Sept. 28, 2011) (hereinafter "Bipartisan Letter").
[4] Bipartisan Letter at p.1.

B. **Exempt IHS And Its Self-Governance Partners From Sequestration Because The Provision Of Health Care To Alaska Natives/American Indians Is Not Discretionary, But Mandatory.**

The provision of health care to Alaska Natives/American Indians is not discretionary, but is a solemn trust responsibility of the federal government.

The sequester's program and service cuts to Alaska Natives/American Indians went into effect on March 1, 2013 because the Administration and Congress failed to act to prevent them from going into effect. These cuts to Tribes and Tribal organizations were 5.1% and have already had an immediate and devastating impact on Tribal communities. The media widely reported that jobs throughout Alaska and the Lower 48 have been lost and various types of health services provided by Tribes to Alaska Natives/American Indians have been partly eliminated and/or reduced. For example, due to sequestration YKHC lost $4.3 million in vital funding for fiscal year 2013. Another decrease of $3.4 million is expected for fiscal year 2014 for a total funding reduction of $7.7 million.

To accomplish this unanticipated funding cut, YKHC recently was forced to permanently close over 40 position vacancies, and in addition, eliminate Home Care services and layoff more than 20 employees throughout the Yukon-Kuskokwim Delta. The elimination of our Home Care services impacted over 80 clients who qualified for the services.

Health services to Alaska Natives/American Indians have long been impoverished and according to the federal government, the IHS is funded at approximately 50% of the expected need when compared to the health care provided to federal employees. Instead of funds increasing to the IHS and its tribal self-governance partners, funds have dramatically and unexpectedly decreased since fiscal year 2011 by approximately $240 million in rescission and sequestration cuts to the IHS. Decreasing funds to these important and vital tribal programs, services and 566 governments is not the right federal policy, especially when the IHS has been and still is significantly underfunded. As you know, because tribes are domestic dependent nations, the federal government has a fiduciary trust obligation to all 566 tribal governments and this obligation is not discretionary.

III. CONCLUSION.

I respectfully request that the Senate Committee on Indian Affairs work with the full Senate, House and the Administration to accomplish the following:

1. In accordance with the Ramah/Arctic Slope cases, IHS should immediately pay all outstanding claims for unpaid CSC's based upon IHS's own CSC Shortfall Reports;
2. Any additional damages claimed by Tribes and Tribal organizations due to IHS's breach of contract, can be resolved through settlement discussions but there should be no further delay in paying the CSC shortfall claims;
3. Fully fund CSC through additional appropriations; and
4. Exempt the IHS and their tribal self-governance partners from the current sequestration and any future sequestration of appropriations.

PREPARED STATEMENT OF DR. SHERRY JOHNSON, DIRECTOR, SISSETON WAHPETON OYATE TRIBAL EDUCATION DEPARTMENT

13-14 Sequestration effects on Sisseton Wahpeton Education Entities

Sequestration: Educational Entities must be excluded from the Budget Control Act and sequestration of education funding must be stopped. Funding levels must be restored to their previous levels. The Local impacts to education budgets and the resulting reduction in school staff is especially devastating due to the loss of instructional services. When Indian Education achievement performance is already at a low increasing the ratio of teacher to students is the last measure that should happen. Additionally, the loss of employment opportunities further compounds the problems for reservation economy.

- Tiospa Zina Tribal School

  5 teacher positions
  1 Data Administrator
  1 Para Educator
  Reduction in Budgets for: Instructional materials, supplies, building repairs, Parent involvement

- Enemy Swim Day School

  2 teacher positions
  1 administrative position
  Reduction in Budgets for: Student activities, Parent involvement, instructional materials supplies

- Head Start

  34 seats for children were lost
  1 administrative position
  6 teacher/teacher aid positions
  Reduction in Budgets for: Instructional materials, supplies, facility costs

Dave Archambault II
Chairman

TRIBAL COUNCIL
(AT LARGE)

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Rock Creek District

Robert Taken Alive
Running Antelope District

Samuel B. Harrison
Porcupine District

November 20, 2013
Via Regular Mail

The Honorable Heidi Heitkamp
United States Senate
SH-502 Hart Senate Office Building
Washington, DC 20510

RE: Standing Rock Sioux Tribe and Contract Support Costs

Dear Senator Heitkamp:

I write to seek your help in addressing a matter of basic fairness to tribes in connection with our dealings with the federal government. When the federal government makes a promise to a tribe in a contract, that promise should be kept. But even though the Supreme Court has upheld this principle, the federal government has failed to comply, on a large scale, with this mandate. The Tribes, including Standing Rock, are not being paid the promised amounts in connection with their contracts with the federal government.

As you know, when a tribe agrees to operate a program under the Indian Self-Determination Act, the federal government and the tribe enter a contract – which specifies the amount that the federal government promises to pay, including for certain administrative costs known as contract support costs. The Supreme Court has ruled in the Ramah case that tribes are entitled to be paid the full amount that the government promised – and that if the government fails to pay that amount, tribes may file claims and recover the unpaid amounts.

Unfortunately, the government regularly does not pay the tribes the amounts it promises – and in fact the government each year certifies to Congress the amounts of each tribe's contract support cost shortfall. At Standing Rock, this means that we run many programs for our people, but then we are shortchanged on the amounts promised to us as contract support costs. When the federal government fails to pay the promised amounts of contract support costs, the result is that fewer services are provided to our people.

Fairness demands that the Tribes' existing contract support cost claims be resolved promptly. Unfortunately, the Bureau of Indian Affairs and the Indian Health Service have failed to do this.

The Supreme Court upheld the right of the Tribes to receive full payment for their contract support costs in June, 2012. Resolution of these claims should be a simple matter, since the agencies have already certified the amounts of the shortfalls to Congress. Despite this, less than 1% of the Tribes' contract support cost claims nationwide have been resolved. There is simply no excuse for this delay. The payment of these historic contract support cost claims would not impact the federal budget – since they would be paid from the Judgment Fund. But, even though the Supreme Court has held the government liable, and there is no budget impact, the government lawyers seem intent on delaying the process.

We urge you to let the Administration know that prompt resolution of these claims by the government must occur and that justice for tribes must not be further delayed. As in the Cobell, Tribal trust fund and Keepseagle cases, if the Administration makes this a priority, the job can be done quickly. In fact, since the law is settled, resolution of the contract support cost claims should be much easier than resolution of the cases the Administration already settled. The Administration must advance a speedy settlement process and get the job done.

Resolving existing claims is vitally important, but justice must also not be denied for the future. In this regard, we are very concerned about the OMB's proposal to eliminate future contract support cost claims. OMB has been proposing provisions in the fiscal year 2014 appropriations and continuing resolution measures that would cap each tribe's contract support costs and prevent future claims, even for tribes that were shortchanged. This would basically overrule the Ramah decision, as it would allow the government to enter contracts with tribes, not pay the proper amount of contract support costs, and not be subject to claims for the shortfall.

The OMB proposal is unfair, and it was advanced without any consultation with the Tribes. Administration officials have now candidly admitted that this was a mistake – that a proposed change in the law that adversely affects the tribes like this one should not have gone forward without adequate consultation with the tribes. We urge you to oppose the OMB proposal, to seek its withdrawal by the Administration, and to express your support for meaningful tribal-federal consultation at the highest levels to address the contract support cost issue for the future.

Tribes must not be penalized for entering Self-Determination contracts, and the government must not be allowed to continue to break its promises to the Tribes.

Thank you for your support.

Sincerely,

Dave Archambault, II, Chairman
Standing Rock Sioux Tribe

SPIRIT LAKE TRIBE

P.O. BOX 359 • FORT TOTTEN, ND 58335 • PHONE 701-766-4221 • FAX 701-766-4126

The Honorable Heidi Heitkamp
Senate Committee on Indian Affairs
SH-502 Senate Hart Office Building
Washington, DC 20510

November 20, 2013

Dear Senator Heitkamp:

I want to thank you for scheduling a meeting with the North Dakota tribes during my recent visit to Washington, DC to attend the 2013 White House Tribal Nations Conference. The discussion stressed the myriad of issues experienced by the Spirit Lake Tribe and how sequestration has negatively impacted our ability to provide law enforcement, health services, and education, to our poverty stricken reservation.

The foundation for creating safe communities lies in our ability to enforce our established law and order code. Currently, we have one officer per shift even during high crime times to protect our 248,000 square acre reservation. Criminals realize we are at a loss to patrol, arrest, investigate, and prosecute law breakers for both misdemeanor and felony crimes. This has resulted in our Reservation becoming a haven for the criminal element. Prosecution of criminals relies on the ability of officers and investigators to collect evidence and conduct investigations, which is further hampered by the lack of personnel.

The Spirit Lake Health Center, funded by the Indian Health Service, has also felt the impact of sequestration this past year with an approximate cut in funding of $440,000. We estimate this funding in relation to provision to healthcare could have funded two physicians and two mid-level practitioners to provide services to our people. American Indians residing on the Great Plains continue to experience low life expectancy at 66 years of age compared to 75 for the U.S. population. Furthermore, we continue to have higher rates of chronic diseases and comorbidity related to diabetes, heart disease, and cancer.

Lastly, education is critical to building the foundation for healthy communities throughout our reservation. We need to become knowledgeable of the majority society to efficiently build culturally competent models within our contemporary society. Research indicates education enhances health, quality of life, and happiness. Furthermore, those who are knowledgeable in their culture are more likely to succeed academically; thus, education must be provided from a cultural perspective. The funding cuts to education are especially devastating as this has taken away from already inadequate resources to provide services that may be the only hope for our upcoming generation to address the social issues that have become the norm.

All of the issues we are experiencing are interrelated to one another. I encourage and thank you for speaking on behalf of the Spirit Lake Nation and the North Dakota tribes.

Sincerely,

Leander R. McDonald, PhD, Chairman

National Association of Federally Impacted Schools

Shortchanging our Future: Sequestration's Damage to Impact Aid Schools

Report by: Jocelyn Bissonnette
October 2013

Special thanks to Sheariah Yousefi

"We are planning for tough times instead of looking for ways to provide children with more opportunities to be successful in life's endeavors." – *Superintendent Ed Stansberry, Walthill Public School, Nebraska*

Background:

A major component of the Budget Control Act of 2011 was deficit reduction. Specifically, the law created a Joint Select Committee to establish a plan of $1.2 trillion of savings over a decade. The committee's failure triggered across-the-board discretionary spending cuts – or sequestration – for Fiscal Year (FY) 2013, while nine remaining reduction targets will be met through lower discretionary spending caps.

The FY 2013 sequester cut federal education spending by over $2 billion when it went into effect on March 1, 2013. Most federal education programs are structured in a way that allowed school districts a year to plan for the cuts to their 2013-2014 school year budgets. A major exception to this structure is Impact Aid, which reimburses school districts financially impacted by the presence of the Federal Government, either through the removal of taxable property (i.e. national grasslands, laboratories, etc.) or through the costs of enrolling federally connected children (i.e. military-dependents, students living on Indian trust land, etc.). First signed into law in 1950, the program has not been fully funded since 1969. As the only major federal K-12 education program that is current-year funded (meaning funding appropriated in one fiscal year is used in the same school year), Impact Aid was subject to an immediate reduction of funds for the 2012-2013 school year.

A May 29, 2013 memo from Office of Management and Budget (OMB) Director Sylvia Burwell instructed federal agencies to submit budget proposals at five-percent below the discretionary spending levels of the previous fiscal year (a similar memo was sent last year). Impact Aid school districts are planning for a second round of Impact Aid cuts at the same time other federal education programs, including Title I and the Individuals with Disabilities Education Act (IDEA), are also being reduced.

Methodology:

This report is a qualitative analysis of school districts that receive Impact Aid funding anticipating a second round of sequestration. It is a follow-up to a qualitative study conducted last year.[1] Identical questions were posed to personnel at Impact Aid-recipient school districts using online survey-collection software. While the two sets of data cannot be directly compared, they can, when taken together, provide a measure to evaluate how federally impacted schools are implementing cuts to their federal revenues.

2012 survey (2012-2013 school year): The survey was distributed to roughly 400 National Association of Federally Impacted Schools (NAFIS) school districts and 175 superintendent members of the American Association of School Administrators in August 2012. We received 334 total responses.

2013 survey (2013-2014 school year): Identical survey questions were distributed August through October of this year to 395 NAFIS school districts. We received 298 responses, a 75-percent response rate. As in the previous year, respondents represented demographically diverse school districts in terms of

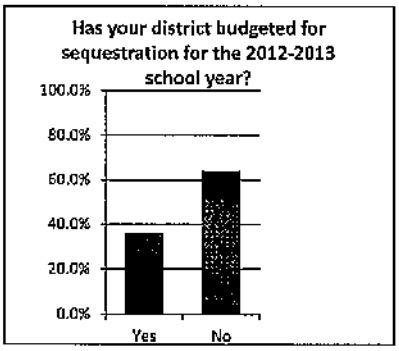
[1] *"Impact Aid and Sequestration: The Impact of the Budget Control Act on Federally Impacted Schools."* National Association of Federally Impacted Schools. 2012

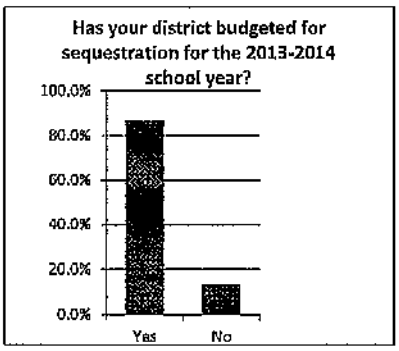
size (total student enrollment), geography (42 states were represented), and the percentage that Impact Aid funding comprises of the school district's budget. Districts commonly represent more than one type of student population or federal impaction, each of which is represented in the survey.

Results:

The percentage of respondents who answered affirmatively to budgeting for sequestration this year increased significantly over last year (see chart below).

2012 survey (2012-2013 school year): The 2012 report included a number of findings that are still useful in connection with this year's study. For example, the percentage of school districts that adjusted for the cut was 36-percent (120 of 334). The percentage of districts budgeting for the sequester was slightly higher for Indian lands districts (40-percent) and respondents where Impact Aid makes up 30-percent or more of the district's budget (41-percent). School districts able to avoid cuts for the 2012-2013 school year noted they were spending conservatively or accessing reserve funds. However, several districts were not aware of the impending cuts at the time their district budgets were being finalized and others simply could not afford to make the reductions.



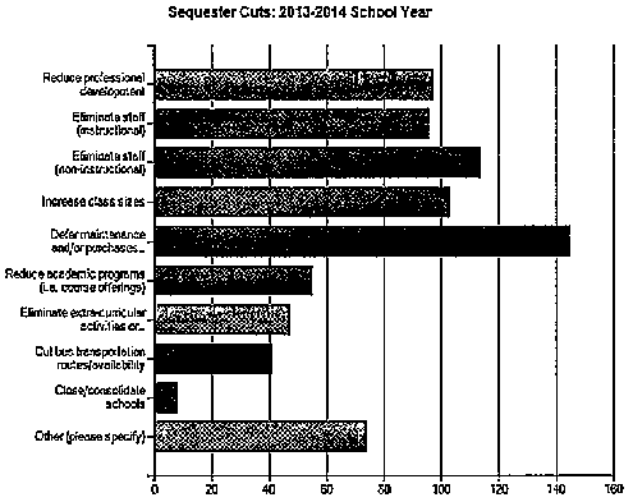


2013 survey (2013-2014 school year): For the 2013-2014 school year, the percentage of districts that have budgeted for sequestration more than doubled to 86-percent (257 of 298). The percentage is slightly higher among respondents from Indian land districts at 89-percent. For districts where Impact Aid makes up at least 30-percent of the school district's budget, 92-percent have built in the cuts. Respondents among the small percentage that did not build in cuts noted they are budgeting conservatively, have enough of a fund balance from which to draw or resources accounting for increased enrollment have offset lost funds. Several districts had not approved their final budget at the time survey data was collected and for others Impact Aid comprises only a small fraction of the district's budget. One district – Bon Homme School District 4-2 in South Dakota – made drastic cuts in the previous school year. Superintendent Dr. Bryce Knudson is "hoping [sequestration] will not happen as it will hurt us financially

in a large way." Several respondents noted another round of cuts would likely impact staffing and programs.

2012 survey (2012-2013 school year): Impact Aid was sequestered by $67 million in March of 2013, the middle of the 2012-2013 school year. Based on survey feedback ahead of the of 2012-2013 school year, the top five areas for reduction (for the 36-percent of school districts that budgeted for the sequester) were: defer maintenance and/or purchases, eliminate non-instructional staff, increase class sizes, eliminate instructional staff, and reduce professional development.[2]

2013 survey (2013-2014 school year): Of the 86-percent of districts that budgeted for the sequester this school year, the top five areas for reduction were the same (though the order of the last two switched): defer maintenance and/or purchases (144), eliminate non-instructional staff (112), increase class sizes (102), reduce professional development (96), and eliminate instructional staff (94). In addition, 54 school districts reduced academic programs, 46 eliminated extracurricular or summer activities, 41 cut their transportation budgets, and eight have closed or consolidated schools. Districts are also dipping into their reserve accounts, freezing salaries and combining positions, cutting field trips and supplies, reducing community outreach services and living stipends for staff, increasing food prices, and deficit spending.



Among the districts delaying maintenance, one has had to put updates to their 63-year-old high school on hold. Rocky Mountain School in Oklahoma was using its Impact Aid funds to keep facilities updated since the district has "virtually no local tax base." Now, Impact Aid funds are being used for basic instructional and operating expenses largely due to state cuts. Their buildings, they report, are in dire need of plumbing, roofing, wiring-electrical, and network updates.

Technology and curriculum are also being impacted. Sequester is hitting districts' technology budgets, noted eight respondents, from a freeze in new initiatives, like 1:1 computing, to impacting the ability of

[2] Ibid

districts to implement new and online assessments. According to Superintendent Patricia Cleary, Barberton City Schools, Ohio: "The sequester has hampered our ability to fully prepare our students for the higher expectations of new standards." Seven districts are concerned about either not having sufficient resources to adequately prepare students for the Common Core State Standards and PARCC (Partnership for Assessment of Readiness for College and Careers) exam or simply not being able to replace outdated curriculum.

Forty-one districts made cuts to their transportation budgets. "We can only defer maintenance for so long before more expensive issues arise," says Dr. Jaret Tomlinson, Superintendent of Knob Noster Public Schools, Missouri. In California, the Klamath-Trinity Joint Unified School District had to reduce bus routes. Students participating in after school activities are now walking multiple miles down a state highway to get home.

Six of the eight school districts experiencing school closures are Indian lands. According to Clay County Schools Director Jerry Strong in Tennessee: "Unfunded mandates, reduction in funding and added requirements has my system on the edge of bankruptcy."

There are limited means of support, whether private grants or increased state funding, for school districts to cover losses in federal revenue, so districts are cutting their budgets or taking out loans. Arizona's Shonto Preparatory School is on Navajo trust land. The closest public school is 50 miles away and there are no organizations or businesses that pay property taxes. "It is important for all students to have opportunities equitable to other districts with a lucrative tax base," says Superintendent Lemual Adson. He continues: "To penalize students due to the lack of a tax base and the failure of the Federal Government to pay their 'fair share' of taxes is a detriment to our people. . . There are no alternative resources at all to make up for the lost revenues of Impact Aid." One district arranged for a bank loan to cover the cost of emergency repairs to electrical and internet systems caused by lightening. Five school districts have increased taxes or are contemplating a tax hike to make up for federal cuts. The lack of funding is not going unnoticed. Superintendent Dr. James Sarrada of Northern Burlington County Regional School District in New Jersey believes "community members, our taxpayers and senior citizens on fixed incomes, are weary of the sequestration consequences and are becoming more and more frustrated with the Federal Government's unwillingness to pay 'their fair share' of the expenses to educate the military child."

Budget cuts are often detrimental to vulnerable student populations, even as their districts try to insulate them from the worst of it. Important programs to preserve the culture and languages of Native American populations, as well as children requiring alternative education, are at risk of reduction or cancellation. Royal Valley Unified School District 337 in Kansas reduced performance opportunities for a local Native American Singers and Dancers group, in which 85 K-12 students participate. Ignacio School District 11-JT in Colorado is not offering a Native American Studies class with the Ute language, which Superintendent Rocco Fuschetto describes as "desperately needed," and which is spoken by members of the community. "We are trying to meet all of the needs, educationally and emotionally, at a reduced rate," Fuschetto says. Window Rock Unified School District No. 8 in Arizona reduced and relocated their Navajo Immersion School from a K-8 to a K-6. Both districts have experienced school closures. According to Superintendent Dr. Joe Davis of Washington County Schools, North Carolina: "We have had to reduce our alternative school program because of these cuts. With a significant population of

students in our district needing additional support, this [alternative school] program has been the catalyst to delivering a quality education to students in some of the most challenging circumstances."

Students in poverty are feeling the brunt of the cuts. "Our district serves a rural, high at-risk population due to poverty, mobility, substance abuse and domestic abuse," says Jennifer Lynn, Superintendent and K-2 principal of Baraga Area Schools in Michigan. She continues: "Reduction of programs and services drives those who can afford transportation to neighboring districts, thus concentrating our at-risk population further. Sequestration is on the backs of our most vulnerable children and communities." Due to state and federal budget cuts, Parker Unified School District in Arizona had to increase class sizes in the primary grades from 20-23 students to 27-29 students. Business Manager of Columbia School District #206, Washington, Rod Pankey comments: "Sequester cuts have hit particularly hard in rural areas where student population has declined due to a sluggish economy and no jobs. . . These federal cuts, along with significant loss of state funding, has greatly impacted our ability to serve our Native American students, as well as all our students. It really hurts when our poverty index is such that 80-percent of the students qualify for free and reduced meals. These kids need the programs the most if they have any chance to break the cycle of poverty and seek a bright future with a college education."

One common theme from respondents is the frustration over the uncertainty of federal funding. Eight districts said specifically the uncertainty over the timing and level of payments makes cash flow management very difficult, even lamenting Congress' inconsistency in appropriating funding. Superintendent George Linthicum of Arlee Schools in Montana, sums up this sentiment: "Probably the greatest concern beyond keeping the doors open and providing basic learning opportunities is the mindset created by the uncertainty that sequestration manufactures." Enrichment opportunities have been put on hold and there is unease over delayed maintenance given the district would be hard-pressed to repair a high-cost item.

In Linthicum's district, contract bargaining has become more "emotionally laden," while another superintendent describes the annual process as contentious. Two respondents noted that the cuts are impacting morale. The result of attrition in South Dakota's Chamberlain School District is increased responsibilities and stress levels because, as Business Manager Holly Nagel puts it, "they have to do more with less." One district has doubled the number of teacher observations and evaluations, but has not been able to hire an additional supervisor. In the case of three other districts, teacher recruitment and retention seem to be in jeopardy. Superintendent Terry Ebert of Fremont County School District #21, Wyoming writes: "By reducing the wage figures that can be offered, the quality of personnel attracted (or even inclined) to work at our District on an Indian reservation has declined substantially."

Additional cuts will continue to deplete available reserves and force local leaders to make painful cuts. "We are trying to hold on to our current staff because we are already cut down to the bone," says Superintendent Tony Thomas of Salina Public Schools in Oklahoma. No change in funding next year will mean the district will look at cutting personnel. Classified and certified staff, vocational, Native Arts, and music programs are all on the chopping block, according to survey respondents. If cuts endure over the next couple of years, four school districts would be forced to undergo significant reductions, four others would consider school closures.

If sequestration continues, one of the first items Minnewaukan Public School, North Dakota may be forced to cut is an early childhood program. Jean Callahan, a principal writes: "Our kids deserve the same

type of education as wealthier kids, but sequestration is not allowing us to provide this." Lackland Independent School District in Texas, which almost exclusively educates military dependents, has already eliminated early childhood and computer lab programs, Spanish and technology applications classes. Cuts will continue to have negative consequences – and not just from a lack of Impact Aid. Two districts interceded in local Head Start programs: one stepped in to provide transportation for students; the other started providing services for students this year. However, a reduction in separate services or maintenance will be required to continue this program beyond 2014. Another district may have to reduce the number of students they serve in Head Start from 275 to 175 while reductions to mainly poor and special needs children are also being considered.

The cumulative, short-term impact of cuts on some of our most vulnerable districts is taking its toll. More worrisome is the long-term, compounding damage of years' worth of cuts. What follows is a collection of responses detailing the challenges facing underfunded school districts:

> "This year we have eliminated six elementary teachers, four gifted teachers, three Title I teachers, one music teacher, three literacy collaborative teachers, and five secondary teachers. We have also eliminated classified aids. This has increased our class size, decreased our planning and professional development time, and increased our parents' frustration that needed services for our kids are not available. It would be nice to live in a country that actually valued education for all students." – *Supervisor of Student Services/Certified Personnel Gary Walker, Fairborn City Schools, Ohio*

> "We have cut our after school program and activity bus. We have reduced our summer school program. We have reduced our ordering of supplies and materials. We have cut our music program. All of this has a direct impact on our students and the ability to access engagement in activities." – *Superintendent Tim Ames, Wellpinit School District, Washington*

> "We have eliminated all athletic funding which is a huge issue in a small school. The parents and coaches are trying to raise funds to support athletics. We have cut two fulltime kindergarten classes to one half-day class. We have eliminated a PE teacher at the elementary and teachers will be teaching their students PE. We have furloughed three days. We are going to a four-day school week." – *Business Manager Marcia Hoffman, Plummer-Worley School District #44, Idaho*

> "Impact Aid has been used to provide instructional supports, provide funding for building maintenance, and to provide supports for children of military families, children with disabilities, and to meet the many 'little' costs related to poverty and military families. With sequestration, we find ourselves increasingly unable to provide the little extras, counseling supports to children of military families, to maintain our school buildings, and to slowly 'erode' the instructional programs for children with disabilities and children living in poverty." – *Director of Student Services Dale Lambert, Great Falls Public Schools, Montana*

> "Our rural school district is finally showing signs of success, such as an almost 80-percent high school graduation rate, which was as low as 39-percent just a few years ago, and

dramatically fewer students testing far below grade level as compared to the past. . . We're gravely concerned that all of the hard work and courageous action of our Governing Board and leadership team to turn this school district around will not be sustainable if the series of sequestration cuts materialize." – *Business Manager Daniel Fleury, Indian Oasis-Baboquivari Unified School District #40, Arizona*

Conclusion:

It is clear that multiple rounds of federal budget cuts are having a significant impact on federally impacted districts, including the military dependents and Native American children who live there. These districts already understand how to do more with less given the limited local tax base and address the unique challenges of their communities and student population. The number of districts preparing for continued sequestration and budgeting deep cuts increased significantly over last year. Even those districts that have faced a minimal impact to date or have avoided cuts altogether are bracing for tough times ahead.

Those communities most vulnerable to federal reductions – those that rely disproportionately on federal funds, high-poverty districts – will continue to feel the brunt of federal budget cuts. In the end, students suffer. As Congress continues to postpone a responsible, long-term plan to secure our nation's fiscal future, school leaders have to make tough choices in the absence of guidance, information, and resources. Instead of investing in our future, we are shortchanging it. We will continue to face the effects of impending budget cuts in coming years unless sequestration is ended.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO HON. YVETTE ROUBIDEAUX

As we all know, the Supreme Court ruled last year in *Salazar v. Ramah* that the Federal Government must pay each tribe's contact support costs in full. The Department of Health and Human Services [1] has not yet resolved these claims.

Question 1. It has been 17 months since the Supreme Court's decision. What is your plan for expeditiously settling these claims?

Answer. IHS is devoting additional resources and hiring new staff to resolve claims for unpaid contract support costs (CSC) with a primary focus on speedy resolution through settlement whenever possible. Because IHS is not part of a class action, it must analyze each claim individually and comply with the multi-step process required by the Contract Disputes Act (CDA). IHS is working to resolve the claims expeditiously and also believes that the Agency and Tribes working together to resolve the claims will have the most benefit for our ongoing relationship. IHS is also improving internal business practices related to the CSC claims settlement process. IHS is also consistently reviewing methods to enhance collaboration and streamline the process and has offered an alternative claim resolution process that is less burdensome for Tribes, though IHS follows the same type of analysis used under the traditional approach to be fair and consistent with all Tribes.

Question 2. When does the Department expect all claims to be finally resolved?

Answer. Our goal is to resolve the majority of currently pending claims with Tribes that are amenable to settlement as soon as possible.

Question 3. What is the estimated amount that the Department of Health and Human Services owes to tribes?

Answer. The IHS is not able provide a total estimated amount of CSC owed to Tribes at this time. Consistent with the CDA claims process, the Agency must analyze and respond to claims on an individual basis by Tribe by contract term, and to date, the analysis of all claims currently pending has not been completed. In addition, the amounts that may be owed under a particular contract are the subject of ongoing litigation and, in many cases, the Tribes and the IHS disagree on how to determine the amount owed. While Tribes rely on estimates in the annual shortfall reports to support their claims, the IHS is analyzing each claim on a case-by-case basis to determine the amount of unpaid, documented CSC incurred under the contract that was not funded already by IHS.

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[1] The Questions for the Record refer throughout to the Department of Interior. The Indian Health Service (IHS) cannot answer with regard to the Department of Interior and instead responds regarding claims against IHS. Although the questions themselves are typically not revised by an agency when responding, IHS has also corrected the questions to address this issue.

Question 4. How is the Department of Health and Human Services estimating this amount? Is it utilizing the Department's annual contract support costs shortfall reports that it submits to Congress?

Answer. As required by the CDA, the IHS performs an analysis of each individual claim in order to determine the amount of CSC owed to a Tribe for each contract term. The annual shortfall reports provide information on the estimated overall CSC need at a particular point in time as a part of the appropriations process and are based on the amount of IHS funding paid to a Tribe and based on information available to IHS at the time; the reports do not reflect the amount owed under any particular contract. However, at the time of preparation IHS often does not have, for example, the final indirect cost rate negotiated by the Tribe with its cognizant agency or the pass-throughs and exclusions required by that indirect cost rate. As a result, the estimates in the reports cannot be used to determine the exact amount owed to a Tribe. Rather, the annual shortfall reports are used to estimate the aggregate amount of CSC need during the appropriations process. Later, when claims are filed by Tribes under the CDA, IHS analyzes each claim and determines the amount of CSC owed to the Tribes with updated information.

Generally, the process that IHS has been following to settle a CSC claim involves two major steps: financial analysis of the claim and negotiation of the settlement amount. With regard to the financial analysis, all claims undergo the same analysis of a Tribe's costs and funding, and IHS relies on its own staff, as well as contract services for this purpose. The analysis is aimed at identifying each Tribe's actual costs to determine the full amount of unpaid, documented CSC incurred under the contract. In the second step, IHS and the Tribe work collaboratively to settle on the final amount to be paid for the claim. Therefore, the estimates in the annual shortfall report may end up being different from the updated amounts determined by analyses of claims filed in future years, and then the final amounts paid are determined mainly through settlement discussions with the Tribes.

The Indian Self-Determination Act has been hailed as one of the most successful pieces of legislation in the history of federal Indian policy. Providing contract support costs is essential to the proper administration of these contracts.

Question 5. After providing contract support costs to tribes for over 20 years, can you explain why there is still so much ambiguity regarding these costs?

Answer. Based on the law and IHS policy developed in consultation with Tribes, the estimation and calculation of CSC is complex. CSC can seem obscure because of both the common misperception that CSC is equivalent to indirect costs and the inherent timing issues that impact the calculation of the costs.

Under its policy, IHS has agreed to rely, in part, on indirect cost rates to calculate indirect CSC. Indirect cost rates, which IHS does not negotiate and instead are negotiated by a Tribe with its cognizant agency, are used to calculate indirect costs for many entities that receive federal funding. The cognizant agency for Indian Tribes generally is the Department of Interior, while the cognizant agency for nonprofit Tribal organizations generally is determined by calculating which Federal agency provides the most funding.

When indirect costs rates are applied to contracts under the Indian Self-Determination and Education Assistance Act (ISDEAA) to determine indirect CSC, IHS and the Tribes must also account for indirect costs already funded under the ISDEAA agreement. The ISDEAA provides for two types of funding: the "Secretarial amount" (what IHS would have spent to operate the program) and CSC, which consist of both direct and indirect costs. The ISDEAA specifically requires the Agency to ensure that there is no duplication between the CSC paid to the Tribe and the "Secretarial amount" it receives. When a Tribe receives the Secretarial amount from the IHS, several types of overhead costs that the Agency incurred are also often included in that amount. For example, IHS incurred utilities costs in operating a facility and would have transferred the funding for utilities to the Tribe operating that facility. So, for Tribes that choose to use an indirect cost rate as one part of indirect CSC negotiations, the Agency cannot simply apply the indirect cost rate to derive the indirect CSC amount for the Tribe, but must also determine which costs were funded through the Secretarial amount and exclude them from the calculation to avoid duplication. The exact costs involved vary among Tribes, which requires a unique calculation for each Tribe's contract.

In addition, the calculation of indirect CSC often yields a different result depending on the timing of the calculation because of the different information available throughout the ISDEAA process. ISDEAA funding agreements often are negotiated before the fiscal year (and contract performance) begins. The calculation performed prior to contract performance is based primarily on the past year's budget information (since final, audited numbers are not yet available) and the upcoming fiscal

year's budget amounts. These also vary based on which services the Tribe is contracting to perform. The submission of the shortfall report occurs after the fiscal year (and contract performance, in most cases) ends, but before final data for the fiscal year is available to IHS. A calculation performed at this point in time often results in a different number than the amount projected prior to the start of the fiscal year because more up-to-date information is available. Finally, if a Tribe believes it was underfunded for CSC for the fiscal year and subsequently submits a CDA claim, additional information is likely available that allows the parties to rely on final, audited costs information. Although the information available at each of these stages may differ, therefore resulting in different amounts, IHS follows the same process or methodology for calculating the amounts at each stage. While estimates vary over time, at each stage IHS uses a consistent process that was developed in consultation with Tribes.

The House Interior Appropriations bill does not contain the contract support cost cap language proposed by the Administration. Tribes have generally stated that the House approach towards contract support costs is the better one, and that the Senate should drop the Administration's proposal.

Question 6. What does the Administration's proposal actually accomplish, other than extinguishing the government's liability to pay tribes what they're contractually owed?

Answer. To balance funding for CSC and other IHS activities, and in accordance with the Supreme Court's recommendations in *Salazar v. Ramah Navajo Chapter* in June 2012, the President's FY 2014 Budget proposed new appropriations language for both IHS and the Bureau of Indian Affairs (BIA) to provide a specific amount of CSC funding for each ISDEAA contract. The proposal would have protected other budget priorities within the IHS and BIA budgets from being repurposed for CSC funding. Indeed, the Supreme Court recognized in *Ramah* that the cap served that very purpose.[2]

Question 7. Is it good federal Indian policy to prevent tribes from going to Court when the federal government shortchanges tribes from receiving what they're contractually owed?

Answer. The President's FY 2014 Budget was based on one of the options specifically outlined in the Ramah decision to address what the Supreme Court recognized as a "dilemma" when CSC appropriations are insufficient.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN BARRASSO TO HON. YVETTE ROUBIDEAUX

You testified before the Committee on November 14, 2013, at the oversight hearing on "Contract Support Costs and Sequestration: Fiscal Crisis in Indian Country," that the Indian Health Service (IHS) has made approximately 60 settlement offers for past Contract Support Costs (CSC) claims.

Question 1. How many CSC claims are pending in Federal court?

Answer. Past claims for unpaid CSC are made directly to the IHS, which is required to deny the claims due to lack of appropriations to pay the claims and for any other legal grounds that may exist. (Such denial is necessary, as the Judgment Fund is available only after Tribes appeal their claims; the Supreme Court recognized that the agencies do not have appropriations to pay the prior year claims although the Judgment Fund is available to pay those claims.) Tribes then have the option under the CDA and the ISDEAA to appeal their claims to Federal court or the Civilian Board of Contract Appeals (CBCA).

Overall, as of November 2013, there are approximately 1300 claims from about 200 Tribes pending before the Agency. The number of claims can fluctuate on a daily basis, increasing as more claims are filed and decreasing as claims are settled.

With regard to the claims pending in Federal court, 38 Tribes have appealed over 160 claims to Federal court.

Question 2. How many CSC claims are pending in the administrative process?

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[2] The Administration's FY 2014 Budget proposal was not implemented by Congress and CSC was fully funded in the Consolidated Appropriations Act of 2014. The President's FY 2015 Budget also fully funds estimated CSC. This information is provided as a footnote because QFRs are answered with information available at the time of the hearing. As of November 2013 Congress had not passed the FY 2014 Omnibus Bill and the President's FY 2015 Budget had not been released.

Answer. As mentioned above, overall, as of November 2013, there are approximately 1300 claims from about 200 Tribes pending before the Agency. There have been 22 Tribes that have appealed nearly 250 claims to the CBCA.

Question 3. Are these offers all "active" or have any been subsequently rejected by tribes?

Answer. The number of claims indicated above is not equivalent to the number of settlement offers since most claims are in various stages of the required process. Approximately 15 offers made by the IHS have been rejected by Tribes since *Ramah*. The number of settlement offers is provided in the response to the next question.

Question 4. Please provide a list of tribes and settlement years for which these offers correspond.

Answer. Detailed information pertaining to settlement negotiations is confidential under the Federal Rules of Evidence; however, since *Ramah*, and as of November 2013, 3 claims have been formally settled with 2 Tribes for a total of $1.5 million and IHS has made settlement offers to 60 of the 82 claims which have a completed financial analysis.

Question 5. What is your timeline for settling all outstanding claims for past CSC?

Answer. Our goal is to resolve the majority of currently pending claims with Tribes that are amenable to settlement as soon as possible.

In his written testimony submitted for the Committee hearing on November 14, 2013, on "Contract Support Costs and Sequestration: Fiscal Crisis in Indian Country", the President of the National Congress of American Indians, Brian Cladoosby, indicated that there are nearly 1,600 CSC claims pending against the IHS, many of which are still in the administrative process. Mr. Cladoosby, as well as other witnesses, further recommended that a Special Master be appointed to handle these CSC claims more expeditiously.

Question 6. What are your views on this recommendation?

Answer. A court appoints a Special Master to carry out some action on the court's behalf, including investigations and compiling evidence or documents to inform some future action by the court. The appointment of a Special Master would have limited benefit for the CSC claims against IHS, for several reasons. For example, the CSC claims against IHS are at different stages of the CDA process; most claims are not before a Federal court, and the appointment of a Special Master would have limited benefit on claims not before the court that made the appointment. Second, IHS is devoting additional resources to do the necessary investigative work and document gathering to resolve claims for unpaid CSC. The Agency is prioritizing collaboration with Tribes and speedy resolution through settlement whenever possible. IHS is confident that it can resolve the claims expeditiously, thereby making a Special Master unnecessary, and also believes that the Agency and Tribes working together to resolve the claims will have the most benefit for our ongoing relationship.

Question 7. Are there any possible barriers or impediments (legal or otherwise) to using a Special Master for settlement of claims that are still in the administrative process and not yet in Federal court? Please be specific.

Answer. The option for a Special Master arises in Federal court, when the court determines it is appropriate for certain trial proceedings or when both parties agree to the process of appointing such a master to perform certain duties. Because each contract claim is unique and is at a different stage of the multi-step process, use of a Special Master would have limited benefit. For example, appointment of a Special Master by a Federal court would likely impact only claims on appeal to that court and not claims pending in other jurisdictions. Further, it is not clear how a Special Master would expedite the settlement process for CSC claims since the CDA process, including the requirement of analyzing each contract individually, must be followed for settling claims and obtaining payment from the Judgment Fund.

Several witnesses testified at the Committee hearing on November 14, 2013, on "Contract Support Costs and Sequestration: Fiscal Crisis in Indian Country", that, with respect to settling past CSC claims, the IHS has announced that it will not focus on unpaid amounts due for CSC. Instead, the IHS will instead focus on what each tribe spent in determining a settlement amount. However, in *Salazar v. Ramah*, the Supreme Court held that, consistent with longstanding principles of government contracting law, the Federal government is liable for 100 percent of CSC on each tribal contract entered into pursuant to the Indian Self-Determination and Education Assistance Act.

Question 8. Under this approach of examining tribal expenditures, would the IHS consider both Federal funds used by tribes to cover these costs, as well as any tribal funds expended for these costs?

Answer. IHS and Tribes agree that the ISDEAA requires payment of CSC only on Federal funds, awarded as the Secretarial amount, to the Tribes to operate programs, functions, services, and activities (PFSA) under the ISDEAA; if Tribes supplement the Secretarial amount provided by IHS to carry out those PFSA, IHS and Tribes agree that IHS does not pay CSC on those supplemental funds.

When reviewing a CDA claim for additional CSC, the Agency is required to review and analyze the claim submitted by the contractor to determine whether the claim is valid and if any additional CSC is owed to the contractor for the PFSA awarded under the ISDEAA agreement. Because the ISDEAA provides that the Agency pay a Tribe for the CSC it incurred while performing the PFSA awarded under its ISDEAA contract, the IHS analysis of a CSC CDA claim involves determining the total CSC incurred by a Tribe, and the amount of those costs that were not paid by IHS, either through the Secretarial amount or with CSC funding. Tribal funds expended for PFSA, above the Secretarial amount, are not included in the calculation because IHS and Tribes agree that CSC is not payable on those costs. If, however, Tribes supplemented the CSC funding to cover costs that qualify as CSC, IHS's approach of looking at the Tribes' actual costs means that those CSC covered by Tribal funds will be factored into IHS's analysis of the claims.

Therefore, IHS analyzes all costs that were expended by a Tribe that meet the definition of CSC and, consistent with the Supreme Court's decision, is willing to pay all costs that were not funded by IHS so long as the costs meet the definition of CSC.

Question 9. What is the justification for focusing on the amounts that tribes have spent as opposed to the amounts initially negotiated, but not paid to them?

Answer. The ISDEAA provides that CSC are the reasonable costs for activities that a Tribe must carry out under the contract, i.e., CSC are actual costs of activities actually performed. In addition, the Supreme Court's decision in *Ramah* describes CSC as limited to those costs incurred by the Tribe. However, as required by the ISDEAA and in order to ensure that Tribes receive funds timely to support their contracts, the IHS negotiates the amount it will pay in advance of contract performance, based on estimates from budgeted amounts from prior years.

Each ISDEAA contract includes funding IHS would have spent for direct and indirect costs if it operated the programs (the "Secretarial amount"), plus CSC. Tribes do not contest that IHS paid the CSC amounts included in their contracts. Following Ramah, however, Tribes claim additional amounts are owed. IHS is analyzing these claims to ensure that any additional costs meet the statutory definition of CSC.

Question 10. Does this approach retroactively change the manner in which amounts owed for CSC are determined? Please explain how it does or does not.

Answer. The approach used to project CSC in advance of contract performance does not differ from the approach used to determine the amount owed under a CDA claim, though the amounts resulting from the calculations performed at those different points in time may differ. The amount negotiated in advance of contract performance is based on estimates of budgeted amounts. That same calculation often reaches a different result after contract performance, however, and the resulting amount is the CSC owed based on the Tribe's actual costs of performing under the ISDEAA contract.

This approach is consistent with the ISDEAA, as well as with longstanding IHS CSC Policy. The ISDEAA makes it clear that CSC is meant to cover additional, reasonable costs for activities that a Tribe must carry on to ensure contract compliance and prudent management, but that were not transferred as part of the Secretarial amount—either because the Secretary did not carry on the funded activities, or the Secretary funded the activities from resources other than those under contract. IHS's analysis determines the costs that meet that definition but that were not already funded by the Government. The IHS CSC Policy adopts the statutory definition of CSC and sets out a general methodology for calculating CSC. IHS uses this same methodology in the claims process to determine the amounts that are owed for CSC.

Question 11. How does this approach reconcile with the Supreme Court's ruling in *Salazar v. Ramah?*

Answer. The Supreme Court's ruling in *Salazar v. Ramah Navajo Chapter* did not directly address how CSC is calculated or how damages for unpaid CSC should be calculated. Instead, the Court resolved an appropriations question. Although the Supreme Court did not specifically make a finding as to how CSC should be calculated, it did confirm that the United States is liable to "pay the full amount of [CSC] incurred by tribes in performing their contracts."

Your written testimony submitted to the Committee for the hearing on November 14, 2013, on "Contract Support Costs and Sequestration: Fiscal Crisis in Indian Country", states that you have initiated discussions with tribes regarding the accurate method for calculating CSC at the time of contract negotiation or the pre-award phase. You further state that "greater agreement on how to calculate estimates of CSC in the pre-award context will help with more efficiency in all other phases of the CSC process." However, according to Jefferson Keel's testimony, a method for calculating CSC already exists and these amounts are calculated by IHS according to provisions contained in the IHS Manual.

Question 12. Please describe the current method for calculating CSC at the time of contract negotiation?

Answer. The IHS negotiates the amount it will pay in advance of contract performance, based on estimates from budgeted amounts from prior years, the statutory definition of CSC, and IHS CSC policy. The ISDEAA makes it clear that CSC is meant to cover additional, reasonable costs for activities that a Tribe must carry on to ensure contract compliance and prudent management, but that were not transferred as part of the Secretarial amount—either because the Secretary did not carry out the funded activities, or the Secretary funded the activities from resources other than those under contract. The IHS CSC Policy adopts the statutory definition of CSC and sets out a general methodology for calculating CSC. IHS uses this same methodology in the claims process to determine the amounts that are owed for CSC.

Question 12a. Please clarify why a new method is needed.

Answer. The IHS and Tribes have been successful in negotiating CSC estimates in many funding agreements, but some Tribes have raised questions about how to define what types of costs qualify as CSC for inclusion in those estimates.

Although it does not provide a formula for calculating the costs, the ISDEAA defines the costs that qualify for CSC. 25 U.S.C. § 450j-1(a)(2). IHS's current CSC policy provides practical negotiation guidance based on the statutory definition, but more detailed guidance could be beneficial to negotiating the estimates in a consistent manner with all Tribes. For example, additional agreed-upon principles would be helpful for applying the statutory principles of reasonableness, necessity of the activity/costs to ensure contract compliance and prudent management, and eliminating duplication of costs already paid to the Tribe in the Secretarial (106(a)(1)) amount. Differences of opinion on the application of these principles have led to differing estimates and, in the end, prolonged discussions during some negotiations. For example, how to determine indirect costs funded in the Secretarial amount that cannot also be funded as indirect CSC under the ISDEAA's prohibition against duplicative funding.

There also is a need to clarify the difference between indirect cost rates negotiated with a Tribe's cognizant agency, which covers all indirect costs and relies upon a methodology applied to non-ISDEAA contractors as well, versus the negotiation with IHS of indirect CSC for Programs, Functions, Services, or Activities (PFSA) included in ISDEAA contracts. The indirect cost rate that a Tribe negotiates for grants and contracts is related to but not the same as CSC, since some indirect costs are also funded through the Secretarial amount and, under the ISDEAA, those same costs must not also be funded as indirect CSC. For example, while Tribes' indirect cost pools often include rent and utilities, IHS incurs costs for rent and utilities for facilities it operates as well and transfers the funding for those costs as part of the Secretarial amount when a Tribe assumes operation of the facility; it would be duplicative to include the costs again in the CSC calculation. Some Tribes confuse this form of duplication, which is unique to the nature of ISDEAA funding, with the potential for duplication between indirect and direct costs, which the cognizant agency may raise as part of the negotiation of their indirect cost rate. Discussions to clarify or improve everyone's understanding of the estimate of CSC in ISDEAA negotiations would help to resolve some of this confusion. Understanding these differences up front would help the entire contracting process, as well as development of the annual shortfall report.

These principles may also be helpful to reducing litigation in the future. Our experience with the CSC litigation to date shows that we can eventually agree on the amount of CSC that is owed, even though the initial damages calculations by the Tribes and the IHS are often very far apart. We can reduce the need for litigation, as well as the work required to reconcile these calculations in those instances where litigation arises, if everyone can agree on a more accurate method for calculating CSC at the beginning of the process, i.e., at the time of negotiating the contract, because we have reached agreement on how to calculate CSC from the very beginning. Moreover, such agreement will also lead to a more efficient and accurate process with respect to CSC funding and estimation of need. Reaching agreement on the

relevant principles at the beginning of the process will help make every other part of the process go more smoothly.

Question 13. Is the current method unsatisfactory to tribes? If so, how?

Answer. In discussions with the IHS CSC Workgroup, Tribes indicated support for these discussions because they also want to ensure that the CSC estimates in the pre-award or negotiation phase are as accurate as possible, and they want to be reassured that IHS is negotiating in a consistent manner with all Tribes. Agreement on principles for calculation of these estimates will help with both of these goals.

Question 13a. Is the current method unsatisfactory to the IHS? If so, how?

Answer. IHS agrees with Tribes that more agreement on calculation of CSC estimates in the pre-award/negotiation phase would be beneficial.

The Indian Self-Determination and Education Assistance Act requires that annual reports be submitted to Congress on CSC "shortfalls" or need. Presumably, the IHS has, each year, provided these reports to Congress, with shortfall amounts broken down by tribe.

Question 14. Do the amounts provided in these shortfall reports represent the CSC amounts unpaid and due to each tribe for each fiscal year? If not, please clarify and explain what these amounts actually represent.

Answer. The amounts provided in the shortfall reports do not represent the CSC amounts due to each Tribe for each fiscal year, because the timing of the report results in a snapshot or estimate of CSC need at the aggregate level for budget formulation purposes at that particular point in time. It is not used for determining amounts owed to Tribes in litigation, and the report clearly states that it is not intended for that purpose. In fact, although the shortfall data is collected after the end of the fiscal year, final data for at least two of the elements included in the report are not available at the time of the report. One element is the indirect cost rate. Many indirect cost rates reported in the shortfall report are provisional at the time of the report. Fixed carry forward rates may be outdated, or may be labeled for that fiscal year, but reflect actual costs of two years prior to the report and derived from a budgeted indirect cost pool. The other element is the amount of pass-throughs and exclusions reported. The IHS is dependent on Tribes to provide these amounts, and it is frequently a challenge to collect the data needed and/or to validate information provided. Therefore the IHS must attempt to obtain the Tribally-submitted data from the cognizant agency with which the Tribe negotiates its indirect cost rate. Therefore, the shortfall report represents a snapshot or estimate of CSC at the time in order to demonstrate need to inform the appropriations process. The actual amount owed to any particular Tribe that submits a CDA claim is determined based on updated information that is available when the claims are analyzed.

Attachment

IHS CSC Claims Settlement Update—March 2014

As indicated in the IHS Acting Director's testimony during the Senate Committee on Indian Affairs Hearing on the FY 2015 Budget on March 26, 2014, IHS has made significant progress in accelerating the pace of settlement analysis and settlement offers on Contract Support Costs claims. However, the Questions for the Record for the November 14, 2013 Oversight Hearing on Contract Support Costs and Sequestration must include the status as of that date. IHS would like to provide an update to the Committee on the answers to the Questions for the Record with the most current data available on the agency's progress on CSC past claims settlement.

IHS is devoting additional resources and hiring new staff to resolve claims for unpaid contract support costs (CSC) with a primary focus on speedy resolution through settlement whenever possible. Because IHS is not part of a class action, it must analyze each claim individually and comply with the multi-step process required by the Contract Disputes Act (CDA). IHS is working to resolve the claims expeditiously and also believes that the Agency and Tribes working together to resolve the claims will have the most benefit for our ongoing relationship. IHS is also improving internal business practices related to the CSC claims settlement process. IHS is also consistently reviewing methods to enhance collaboration and streamline the process and has offered an alternative claim resolution process that is less burdensome for Tribes, though IHS follows the same type of analysis used under the traditional approach to be fair and consistent with all Tribes.

As a result of these efforts, since November IHS the number of claims analyzed has increased from 82 to 385, and the number of claims for which IHS has extended a settlement offer has increased from 60 to 211.

Overall, there are currently 1,251 claims pending before the Agency. The number of claims can fluctuate on a daily basis, increasing as more claims are filed and decreasing as claims are settled.

With regard to the claims pending in Federal court, 38 Tribes have appealed over 160 claims to Federal court.

There have been 22 Tribes that have appealed nearly 250 claims to the CBCA.

Detailed information pertaining to settlement negotiations is confidential under the Federal Rules of Evidence; however, since *Ramah*, IHS has made settlement offers to 31 Tribes to settle over 200 claims. Since *Ramah*, approximately 34 claims have been formally settled with five Tribes, and an additional 68 offers have been accepted by eight Tribes and are in the process of 1settlement. This is a considerable increase from the three settled claim years reported as ofNovember 2013. The total settlement amount for claims, formally settled or in the process ofsettlement, totals over $133 million.

IHS is committed to continuing progress on claims that are amenable to settlement and to extendsettlement offers to Tribes as soon as possible.

Response to the following written questions was not received before the hearing's print deadline

WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO HON. KEVIN WASHBURN

As we all know, the Supreme Court ruled last year in *Salazar v. Ramah* that the Federal Government must pay each tribe's contact support costs in full. The Department of the Interior has not yet resolved these claims.

Question. It has been seventeen months since the Supreme Court's decision. What is your plan for expeditiously settling these claims?

Question. When does the Department expect all claims to be finally resolved?

Question. What is the estimated amount that the Department of the Interior owes to tribes?

Question. How is the Department of the Interior estimating this amount? Is it utilizing the Department's annual contract support costs shortfall reports that it submits to Congress?

The Indian Self-Determination Act has been hailed as one of the most successful pieces of legislation in the history of federal Indian policy. Providing contract support costs is essential to the proper administration of these contracts, but we have heard from several tribes that the Bureau of Indian Affairs is beginning to more narrowly define how those costs are calculated, sometimes contrary to its own guidance.

Question. After providing contract support costs to tribes for over 20 years, can you explain why there is still so much ambiguity regarding these costs?

The House Interior Appropriations bill does not contain the contract support cost cap language proposed by the Administration. Tribes have generally stated that the House approach towards contract support costs is the better one, and that the Senate should drop the Administration's proposal.

Question. What does the Administration's proposal actually accomplish, other than extinguishing the government's liability to pay tribes what they're contractually owed?

The Administration's budget proposal recommends that Congress cap the contract support costs owed to each specific tribe. If Congress were to accept this request, Tribes would no longer be able to recover unpaid contract support costs through the courts.

Question. Is it good federal Indian policy to prevent tribes from going to Court when the Federal Government shortchanges tribes from receiving what they're contractually owed?

WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO HON. KEVIN WASHBURN

As you know, the Buy-Indian regulations prohibit a Buy-Indian contractor from subcontracting more than 50 percent of the work to a non-Indian firm. In a letter to you earlier this year, I inquired whether a non-Indian company was doing 100 percent of the work on an air ambulance contract awarded to an Indian firm under

the Buy-Indian Act. Your response only addressed whether the Indian firm was Indian owned.

Question. What is the percentage of work being performed by the prime contractor and the amount being performed by non-Indian subcontractors on the Air ambulance contract awarded by the Phoenix Area office?

Question. How does IHS monitor contracts to insure compliance with Buy-Indian regulations?

WRITTEN QUESTIONS SUBMITTED BY HON. JOHN BARRASSO TO HON. KEVIN WASHBURN

Testimony received by the Committee from several witnesses at the hearing on November 13, 2013, on "Contract Support Costs and Sequestration: Fiscal Crisis in Indian Country," indicates there are approximately 9,000 Contract Support Costs (CSC) claims pending with the Bureau of Indian Affairs (BIA). These witnesses recommend that a Special Master be appointed to handle these claims.

Question. What are your views on this recommendation?

Question. In your opinion, would a Special Master be better equipped than the BIA to settle these claims expeditiously?

Question. Are there any possible barriers or impediments (legal or otherwise) to using a Special Master for settlement of claims that are still in the administrative process and not yet in Federal court? Please be specific.

Question. How many CSC claims are pending in Federal court?

Question. How many CSC claims are pending in the administrative process?

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