

DEPARTMENT OF HEALTH AND HUMAN SERVICES

STATEMENT

OF

CHARLES W. GRIM, D.D.S., M.H.S.A.
ASSISTANT SURGEON GENERAL
DIRECTOR, INDIAN HEALTH SERVICE

ON

S. 2172, THE "TRIBAL CONTRACT SUPPORT COST AMENDMENTS OF 2004"

BEFORE

COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

April 28, 2004

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Mr. Chairman and Members of the Committee:

Good morning. I am Dr. Charles W. Grim, the Director of the Indian Health Service. Today, I am accompanied by Mr. Douglas Black, Director of the Office of Tribal Programs and Mr. Ronald Demaray, Director, Self-Determination Services. The Department of Health and Human Services (Department) is pleased to have this opportunity to present testimony on S. 2172, the "Tribal Contract Support Cost Technical Amendments of 2004."

The bill before us today, S. 2172 seeks to address some of the more significant problems that Tribes and the Administration have grappled with for several years -- notably, the issue of contract support costs (CSC) funding.

Our position is clear: We believe strongly that CSC funding enables Tribal governments and other Tribal organizations contracting and compacting under the Indian Self-Determination and Education Assistance Act (ISDEAA or Act) to develop the administrative infrastructure critical to their ability to successfully operate their health programs.

As the principal authors of the Indian Self-Determination and Education Assistance Act, this Committee is well aware that a primary goal of the ISDEAA is to maintain the "...Federal Government's unique and continuing relationship with, and responsibility to, individual

Indian Tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is 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.” (Section 3(b), ISDEAA). One integral tool in carrying out that policy is the provision of Tribal contract support costs. We believe the Department has implemented this landmark legislation in a manner consistent with the intent of the Congress when it passed this authority that reaffirms and upholds the government-to-government relationship between federally recognized Indian Tribes and the United States.

At present, the share of the IHS budget allocated to Tribally operated programs is in excess of 50% of total IHS program funding. Approximately \$1.5 billion annually is now being transferred through self-determination agreements to Tribes and Tribal organizations. Contract support cost funding represents approximately 19%¹ of this amount, providing the average Tribe with approximately 81%² of its total negotiated CSC amount. The assumption of programs by Tribes has been accompanied by significant downsizing at the IHS headquarters and Area Offices and the transfer of these resources to Tribes.

Contract support costs are defined under the ISDEAA as an amount for the reasonable costs for those activities that must be carried out by the Tribal contractor to ensure compliance with the terms of the contract and prudent management. They include costs that either the

¹ Funding awarded to Tribes in FY 2003 exceeded \$1.5 billion while CSC funding provided was \$269 million.

² Total negotiated CSC estimates in FY 2003 were in excess of \$350 million while funding appropriated for CSC was \$269 million with an additional \$16 million of Tribal Shares available for CSC.

Secretary never incurred in his direct operation of the program or are normally provided by the Secretary in support of the program from resources other than those under contract. It is important to understand that, by definition, funding for CSC is not automatically included in the program amounts contracted by Tribes. The ISDEAA directs that funding for Tribal CSC be added to the contracted program to provide for administrative related functions necessary to support the operation of the health program under contract or compact.

The Department has been an active participant with Tribes in furthering the Federal Government's administration of CSC by developing a comprehensive CSC policy to implement the statutory provisions of the ISDEAA. In fact, IHS and Tribal representatives met earlier this month to further refine that policy and to discuss current issues associated with the funding of Tribal CSC. Generally, Tribes have been supportive of the IHS and our efforts to implement the ISDEAA and to distribute available CSC funding.

While we welcome the efforts of this Committee to address these CSC issues, the Department has serious concerns with this bill. The amendments proposed in S.2172 are not simply "technical" amendments. These are proposed changes to current law with far-reaching consequences for programs subject to the Act and for all other Federal programs that provide funding for Indian Tribes. Because of the legislation's potentially far-reaching implications for Federal agencies not here today, we respectfully request that the Committee keep the hearing record open so that such agencies may submit written statements about issues relating to the bill.

At this time, I will share our key concerns with S. 2172.

Let me begin by stating that from the perspective of the Department and, I believe, that of the Tribes, the single most significant aspect of this legislation is section 3(a)–(e) (Amendments Clarifying Contract Support Cost Entitlement). Provisions in titles I, IV, and V of the ISDEAA currently provide that funding for contract support costs is "subject to the availability of appropriations". Section 3 strikes this "subject to..." language and adds new language authorizing appropriations for CSC. We assume from the section heading that the intent of these amendments is to create an entitlement to full funding of contract support costs. We do not believe the amendments succeed in establishing an entitlement for this funding, though they could be read as providing a priority for funding for contract support costs over funding for other Tribal programs. As a policy matter, we cannot support the creation of a CSC entitlement, as it would address only one component of health services to Tribes and would benefit only those Tribes that choose to contract. We also believe the lack of clarity in this provision would result in further debate and more litigation over Tribal CSC.

We believe that section 3, even if it were amended to clearly accomplish its intent, would result in significant adverse budget implications for IHS, Tribes to whom IHS provides health services, and other affected Federal programs. Contract support funding, like all IHS funding, is categorized as domestic discretionary funding and is, therefore, subject to annual appropriations.

This legislation would **authorize** the appropriation of full funding of CSC but the level of CSC funding would appear to remain part of the discretionary budget. We are concerned that additional dollars needed to provide full CSC funding would have to come from existing or

future appropriated IHS funds and supersede other critical priorities for budget increases for Tribal health programs, including funding for the provision of critical health care services and maintenance of the IHS service delivery infrastructure.

We believe that the costs of the funding under section 3, relative to the shifting of funding away from other critical healthcare initiatives, would be prohibitive. For example, funding the total negotiated CSC request in 2003 would have required an additional \$65 million. When Congress authorized the ISDEAA, it wisely directed that CSC funding, indeed the funding for all ISDEAA programs, is “subject to the availability of appropriations”. Striking that language from the ISDEAA, as proposed in S.2172 would create budgetary confusion and place the provision of direct health care by both the Tribes and the IHS at great risk. For these reasons, the Department cannot support the amendments made by section 3.

Section 2 of S. 2172 reaches beyond IHS within the Department of Health and Human Services and beyond the Departments of Health and Human Services and the Interior by proposing a new section 106A(a) to the ISDEAA that refers to other Federal agencies’ requirements to pay indirect costs (IDC). The intent of this section is to authorize Tribes to recover the full funding of their indirect cost need, consistent with their indirect cost rate agreement established with the cognizant Federal agency. Again, we do not believe this amendment establishes this authority. For those other Federal agencies, the intended requirement to fully fund CSC for their programs would likely create significant budgetary and programmatic limitations by diverting funds to pay for administrative costs. For example, non-IHS programs within the Department of Health and Human Services would be required to pay Tribes full CSC at a rate exceeding other non-Tribal grantees, and these increased expenditures would reduce the amounts available for key programs such as the

Head Start Program. The Department cannot support the intent to establish these requirements under this proposed section.

We are also concerned about the potential conflict of proposed section 106A(a)(2), which provides that additional amounts are not authorized to be paid under this authority subject to the “except as otherwise provided by law...” proviso in section 106A(a)(1), and section 4(a) which provides that the provisions of this Act supercede any conflicting provision of law.

Section 106A(b) again reaches beyond IHS within the Department of Health and Human Services and beyond the Departments of Health and Human Services and the Interior by authorizing Tribes to utilize funds provided by other Federal agencies in accordance with section 106(j) of the ISDEAA. We ask whether it was the Committee’s intent to cite section 106(k) as opposed to section 106(j). Section 106(j) pertains to the authority of Tribes to use funds provided under an ISDEAA award to meet matching requirements under other Federal or non-Federal awards. Section 106(k) authorizes Tribes to use ISDEAA funding, without the requirement of prior Secretarial approval, for any of the twelve (12) specific costs listed. In any event, the Committee may wish to consult with the National Business Center in the Department of the Interior concerning the necessity or appropriateness of this proposed new section.

Section 4(a) provides that this legislation supersedes conflicting law, which raises questions concerning its effect on annual appropriation language and the “[e]xcept as otherwise provided by law” proviso in section 2.

Section 4(b) provides an exception to section 4(a) to require that the implementation of these amendments not be construed to alter the ruling of the U.S. Court of Appeals for the Federal Circuit in the Thompson v. Cherokee Nation case, notwithstanding conflicting opinions in both the 9th and 10th U.S. Circuit Courts of Appeals. The Committee should be made aware that the Cherokee decision in the U.S. Court of Appeals for the Federal Circuit and a related Cherokee decision in the 10th Federal Circuit Courts of Appeals are under review by the U.S. Supreme Court.

The IHS is committed to Indian self-determination and we believe our record in promoting the intent and spirit of the ISDEAA speaks for itself. We enthusiastically support Tribes in their varied efforts to assume programs under the ISDEAA. Our goal is to work together in harmony rather than under the constant possibility of litigation.

This concludes our comments on S. 2172, the "Tribal Contract Support Cost Amendments of 2004." Thank you for this opportunity to discuss contract support costs in the IHS. We would be happy to answer any questions that you may have.