



# Support for Tribal Governments

Ensuring tribes have the tools for effective governance is critical to fulfilling the promise of the Indian Self-Determination and Education Assistance Act. Key funding mechanisms that support Indian self-determination are contract support costs, steady tribal base funding, and direct funding to tribes as opposed to grant or state pass through funding. To build a more prosperous American future, Congress should continue to fully fund contract support costs and support tribal base funding to allow tribes to exercise their inherent right to self-government.

## Contract Support Costs

The Indian Self-Determination and Education Assistance Act has represented the cornerstone of this nation's federal policy toward tribes for the last forty years. Under the Indian Self-Determination Act, the United States enters into inter-governmental contracts with tribes under which tribes administer federal programs, either through contracts or self-governance compacts, for the benefit of tribal members. In amending the 1975 Act in 1988, Congress observed that the single greatest impediment to successful implementation of the Indian Self-Determination Policy was the consistent failure of the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) to pay full contract support costs associated with the administration of transferred programs. Congress recognized that the failure of the BIA and IHS to pay full fixed contract support costs (CSC) has often led to reductions in programs, amounting to partial termination of the federal government's trust responsibility. Tribal leaders respectfully but urgently call upon the Administration and Congress to honor the nation's current and future contract obligations to tribal nations, to work diligently toward a permanent solution to contract support cost funding, and to implement meaningful contract support cost reforms in consultation and partnership with Indian Country.

## Key Recommendations

### Department of the Interior

#### Interior – Environment Appropriations Bill

- ***Work to secure full CSC Funding without impacting program funding.***

Following the Supreme Court's *Ramah* decision, the Administration proposed "mini-caps" on contract support cost appropriations for FY 2014 that would have capped the amount of CSC available for each individual Indian Self-Determination Act contractor. Congress rejected the mini-cap proposal, which was vigorously opposed by tribes, and ultimately enacted the FY 2014 Consolidated Appropriations Act without any limits on contract support cost spending at the individual or aggregate level. As a result, the entire unrestricted lump-sum appropriations for the IHS and BIA were legally available to pay the agencies' contract support cost obligations.

Congress and the Administration must seek permanent full funding for contract support costs that will not come at the expense of direct program funding or retained tribal shares. All tribes agree that the payment of contract support costs, which is a legal obligation, should not be achieved by reducing direct services to any tribe. Tribes and tribal organizations across the country overwhelmingly support the creation of a permanent, indefinite appropriation for contract support costs, which would ensure full funding for contract support costs on an as-needed basis without impacting the rest of the IHS and BIA budgets.

- ***Promptly settle past claims.***

In June 2012, in the *Ramah* and *Arctic Slope* tribal contracting case decisions, the Supreme Court rejected the federal government's defense of these breach of contract claims and ruled that the government acted illegally in failing to pay tribes and tribal contractors the full contract price due under their Indian Self-Determination Act contracts. This breach covers thousands of contracts by the BIA and IHS extending back over more than twenty years. Rather than acting quickly to resolve these claims, which are supported by years of data documenting the government's underpayments, the agencies insisted that in order to settle these claims they must re-audit contracts and re-calculate indirect cost rates according to retroactively-adopted accounting rules in an effort to re-determine the amount of underpayments. The result has largely been to further delay justice and further burden tribes with slow, expensive, and unnecessary accounting battles, both in the context of individual IHS claims and the BIA *Ramah* class action sampling process. While progress has been made over the last year and many IHS settlements have finally been reached, there are still far too many claims that have not been settled. In the *Ramah* class action against the BIA, the Department of Justice has insisted on expanding the burdensome and expensive statistical sampling process even though the first round of sampling resulted in similar tribal and federal estimates of class damages. On the IHS side, where claims must be settled tribe-by-tribe and year-by-year, progress has been made recently. Still, by the agency's own account, some 600 claims remain unresolved.

Given the wealth of available data about the underpayments compiled by the agencies themselves, settlement of all cases should have taken but a few months; it should not take years. While tribes appreciate the progress that has been made, there must be no further delay. The time to settle all outstanding claims is now. Further, the IHS must approach settlement with all tribes in a consistent and equitable manner, and must not be permitted to rely on conflicting legal precedent to deny any individual tribe the same access to relief granted to other tribes and tribal organizations.

## Department of the Interior

### Interior – Environment Appropriations Bill

#### **Bureau of Indian Affairs**

- *Fully fund Fixed Costs and Tribal Pay Costs.*

Most federal agencies receive annual increases to their Fixed Costs rates each year to address inflationary costs associated with Fringe Benefits and Pay Costs. Historically, tribes have been disadvantaged because they have never received Fringe Benefit Fixed Cost adjustments. Previous Administrations have only partially funded Pay Costs. Partially funding or failing to fund Pay Costs for tribes has devastated tribal communities by causing critical job losses. Over 900 tribal jobs have been lost and an estimated 300 more jobs will be permanently lost on an annual basis if 100 percent Pay Costs are not provided. The tribal losses are being further exacerbated by recent projections of costs that have been significantly underestimated. The Administration needs to include this in their Budget Request to prevent further erosion of jobs in tribal communities.

## Department of the Interior

### Interior – Environment Appropriations Bill

#### **Bureau of Indian Affairs**

- *Provide increases via tribal base funding instead of through grants to tribal governments.*

Grant funding, particularly inside the BIA, is not consistent with the intent of Indian self-determination. Tribal leaders have grown increasingly frustrated by the increase in Indian Affairs funding offered through grants. Allocating new funds via grant opportunities marginalizes and impedes the exercise of tribal self-determination. New BIA funding should be distributed via formulas developed through consultation with all tribes. When tribes are forced to apply for funding through grant opportunities at the BIA, the ultimate result is that federal employees in Washington, DC, not elected tribal leaders, retain program authority. Grants limit the flexibility and local control authorities available to tribes under the Indian Self-Determination Act. Moreover, Congress has historically underfunded programs intended to benefit American Indians and Alaska Natives, with current figures estimating that BIA programs are underfunded by about a billion dollars when compared to need.<sup>22</sup> The funding vehicle used should be one that tribes choose because forcing the use of traditional grant mechanisms appears inconsistent with the Indian Self-Determination and Education Assistance Act.

Similarly, NCAI recommends eliminating the competitive grant funding process at the Department of Justice (DOJ) and utilizing Justice Department appropriations as base funding where tribes and tribal courts themselves determine their own priorities. A major issue with DOJ funding is that it offers competitive funding for DOJ priorities, not tribal priorities. In order to obtain grant funding, tribes must compete against each other under DOJ's priorities and guidelines. In the end, the tribes that have the financial and human resources to employ experienced grant writers ultimately receive funding, while the under-resourced tribes, who often have the highest need, may be left without. Moreover, tribes cannot count on funding continuing beyond the current grant period, and Indian Country has countless stories of successful programs disappearing at the end of a two or three year grant cycle.

The approach instead should be to utilize Justice Department appropriations as base funding where tribes are encouraged to determine their own priorities. The Administration has proposed a seven percent tribal set-aside

across Office of Justice Programs (OJP) programs for the past several years. While this is a welcome step in the right direction, the set-aside should also include DOJ grant funding outside of OJP and should be allocated as flexible base funding.

The co-chairs' to the "Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence" noted how witnesses testified to stories of critical tribal funding cut across sectors—housing, law enforcement, child welfare, juvenile justice, health care, and education—and how the lack of funding negatively impacts the children in those communities. Despite state and federal programs intended to address the needs of Native children and youth, the findings of the report underscored that grant-making systems are cumbersome and resources for tribes are extremely limited. Tribes must compete with one another for limited resources, and the grant application process is subject to unrealistic time frames, overwhelming paperwork, and requirements that place impractical burdens on tribal communities.<sup>23</sup>