

# **Proposal to Enact Permanent Mandatory Appropriations for Contract Support Costs Under the Indian Self-Determination and Education Assistance Act**

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Now firmly established by U.S. Supreme Court precedent, the requirement to pay contract support costs under the Indian Self-Determination and Education Assistance Act is a binding legal obligation on the part of the federal government under substantive law – in other words, an *entitlement* – requiring full payment to contracting tribes and tribal organizations. Nevertheless, funding for contract support costs has historically been appropriated on a discretionary basis, leading to decades of implementation challenges and litigation that has twice put the question of the federal government’s liability for unpaid contract support costs before the Supreme Court. It is time to square the appropriations process with the mandatory nature of contract support costs under substantive law and repeated judicial interpretations: funding for contract support costs must be appropriated on a mandatory basis.

## ***Background***

Under the Indian Self-Determination and Education Assistance Act (ISDEAA),<sup>1</sup> a centerpiece legislation of our modern federal Indian policy, Indian tribes and tribal organizations are empowered to enter into binding contracts with the federal government, on a mandatory basis, to operate their own health, education, and social programs and services. In order to ensure that tribal contractors are able to operate the contracted services at the same level as the relevant Secretary would have through the exercise of federal authority and through the utilization of federal resources, Section 106 of the ISDEAA requires that each contract include two types of funding: (1) “program” funds, the amount the Secretary would have provided for the contracted programs, functions, services or activities had the federal government retained responsibility for them;<sup>2</sup> and (2) “contract support costs,” the reasonable administrative and overhead costs associated with carrying out the contracted programs, functions, services or activities.<sup>3</sup>

The United States Supreme Court has twice considered the Government’s responsibility to pay contract support costs to contracting tribes and tribal organizations under ISDEAA contracts. In both instances, the Supreme Court has held that due to the legally binding nature of

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<sup>1</sup> 25 U.S.C. § 450 *et seq.*

<sup>2</sup> 25 U.S.C. § 450j-1(a)(1). These funds are sometimes referred to as the “Secretarial amount” or the “106(a)(1) amount.”

<sup>3</sup> 25 U.S.C. § 450j-1(a)(2) and (3). Contract support costs are critical to the functioning of the ISDEAA, since the 106(a)(1) program amount does not include all costs actually expended by the federal government in the operation of Indian programs but which are necessary for their administration.

an ISDEAA contract a tribal contractor has the right to recover its promised contract support costs in full, even if the contracting agency underpaid those costs due to aggregate restrictions on amounts allocated by the agencies or appropriated by Congress for payment of contract support costs.<sup>4</sup>

In *Cherokee Nation*, Congress had appropriated sufficient legally unrestricted funds in the agency's lump sum appropriation to pay contract support costs due to the plaintiff tribal contractors under the contracts at issue in the case; however, the agency had underpaid those costs due to funding allocation choices based on recommendations in congressional committee reports. The Court held that the government could not avoid its contractual obligation to pay contract support costs under the ISDEAA contracts on the grounds of insufficient appropriations or on the grounds that the agency had to use its legally unrestricted funds to pay the costs of "inherent federal functions," such as the cost of running the agency's central office.<sup>5</sup> In *Ramah*, the Court held that caps on the aggregate amount available for contract support cost payments set by Congress in appropriations acts did not limit the government's liability for failure to fully pay an ISDEAA contractor's contract support costs, so long as the capped amount was sufficient to pay the individual contractor in full and even though the capped amount was not enough to pay all contractors in the aggregate.<sup>6</sup> The Court explained that "[t]he Government's contractual promise to pay each tribal contractor the 'full amount of funds to which the contractor [was] entitled,' §450j-1(g), was therefore binding." The Court continued, citing its earlier decision in *Cherokee*: "We have expressly rejected the Government's argument that 'the tribe should bear the risk that a total lump-sum appropriation (though sufficient to cover its own contracts) will not prove sufficient to pay all similar contracts.'"<sup>7</sup>

Each contracting tribe and tribal organization is, therefore, *entitled* as a matter of substantive law under § 450j-1(g) of the ISDEAA to full payment of contract support costs under mandatory and legally binding contracts entered into pursuant to the ISDEAA. This is the case even if there are insufficient funds available in the discretionary appropriation to make full payment of contract support costs to all tribal contractors because, as the Court in *Ramah* explained, "When an agency makes competing contractual commitments with legally available funds, and then fails to pay, it is the Government that must bear the fiscal consequences, not the contractor."<sup>8</sup>

Despite the mandatory nature of ISDEAA contracts and the entitlement to full contract support costs under those contracts, contract support costs are currently paid out of the Bureau of

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<sup>4</sup> *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005); *Salazar v. Ramah Navajo Chapter*, 567 U.S. \_\_\_, 132 S. Ct. 2181 (2012).

<sup>5</sup> 543 U.S. at 641-642.

<sup>6</sup> 132 S. Ct. at 2190-91.

<sup>7</sup> *Id.* (second alteration in original).

<sup>8</sup> *Id.* at 2192. The Court in *Cherokee Nation* and *Ramah* affirmed this result regardless of language in § 106(b) of the ISDEAA, 25 U.S.C. § 450j-1(b), providing that: "Notwithstanding any other provision in [the ISDEAA], the provision of funds under [the ISDEAA] is subject to the availability of appropriations."

Indian Affairs and Indian Health Service annual discretionary appropriations. This fundamental disconnect between the authorizing statute and the appropriations process has caused decades of problems, pitting funding for contract support costs against funding for Indian programs and services and exposing the federal government to legal liability for underpayments. Further, liability cannot easily be ameliorated by the agencies by simply allocating for “full funding” from their annual appropriations, because contract support cost requirements may change throughout the year.<sup>9</sup> This characteristic of contract support costs makes it difficult for the agencies to determine an amount to allocate for contract support costs in the aggregate at the beginning of the fiscal year, and any discretionary appropriation of a fixed amount for contract support costs would only be an estimate of the amount actually needed to fulfill the entitlement.

### ***Congressional Directive***

In the aftermath of *Ramah*, the latest Supreme Court decision to address contract support costs under the ISDEAA, Congress recognized that funding for contract support costs needs to be reexamined. Accordingly, in FY 2014 the Committees on Appropriations declined to cap aggregate spending for contract support costs in the discretionary Indian Health Service and Bureau of Indian Affairs appropriation accounts and directed in the Joint Explanatory Statement accompanying the FY 2014 Consolidated Appropriations Act as follows:

Instead, the question of contract support cost amounts to be paid from within the fiscal year 2014 appropriation is remanded back to the agencies to resolve, while the underlying contradictions in current law remain to be addressed by the House and Senate committees of jurisdiction. Until such matters are resolved, the House and Senate Committees on Appropriations are in the untenable position of appropriating discretionary funds for the payment of any legally obligated contract support costs. *Typically obligations of this nature are addressed through mandatory spending*, but in this case since they fall under discretionary spending, they have the potential to impact all other programs funded under the Interior and Environment Appropriations bill, including other equally important tribal programs.”<sup>10</sup>

Accordingly, the Committees on Appropriations in the Joint Statement “direct[ed] the Department of the Interior and the Department of Health and Human Services to consult with the Tribes and work with the House and Senate committees of jurisdiction, the Office of Management and Budget, and the Committees on Appropriations to formulate long-term accounting, budget, and legislative strategies to address the situation.”

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<sup>9</sup> The ISDEAA allows tribes to contract for new and expanded programs at any time throughout the year – resulting in new contract support cost requirements that cannot be known at the time the appropriation is made. 25 U.S.C. § 450f. Further, contract support cost payments are based in large part on indirect cost rates negotiated between tribal contractors and the federal government. These rates or the amounts owed under them may change during the year, as tribal contractors’ expenses are likely to vary from past years (upon which current-year estimates are based).

<sup>10</sup> 160 Cong. Rec. H975 (daily ed. Jan. 15, 2014) (emphasis added).

***The core of that solution should be to appropriate funding for legally obligated contract support costs on a permanent, mandatory basis.***

Appropriations for entitlements are normally made on a mandatory basis and are not subject to the discretionary annual appropriations process.<sup>11</sup> The Congressional Budget Office defines “Entitlement” as follows:

A legal obligation of the federal government to make payments to a person, group of people, business, unit of government, or similar entity that meets the eligibility criteria set in law and for which the budget authority is not provided in advance in an appropriation act. Spending for entitlement programs is controlled through those programs’ eligibility criteria and benefit or payment rules.<sup>12</sup>

The Congressional Research Service has similarly stated: “Entitlements are programs that require payments to persons, state or local governments, or other entities if specific eligibility criteria established in the authorizing law are met. Entitlement payments are legal obligations of the federal government, and eligible beneficiaries may have legal recourse if full payment under the law is not provided.”<sup>13</sup>

Contract support costs owed under the ISDEAA are “legal obligation[s] of the federal government to make payments” to ISDEAA tribal contractors. As affirmed by the Supreme Court, tribal contractors “have legal recourse if full payment under the law is not provided.” Accordingly, contract support costs are an existing entitlement under substantive law. The appropriation process has failed to reflect the status of contract support costs as such, however, and that failure is ultimately at the root of the persistent funding problems that have loomed over the otherwise largely successful efforts to diminish “federal domination of Indian service programs” under bold new self-determination and self-governance initiatives.<sup>14</sup>

The House and Senate Committees on Appropriations suggested as much in the Joint Explanatory Statement accompanying the FY 2014 Consolidated Appropriations Act, noting that “appropriating discretionary funds for the payment of any legally obligated contract support costs” is “untenable” and that “[t]ypically obligations of this nature are addressed through mandatory spending.” Appropriating contract support costs as a mandatory entitlement would solve the “underlying contradictions in current law” cited by the Committees by bringing the appropriations process into line with the clear legal requirements of the authorizing statute. In this sense, the mandatory funding proposal is a technical fix that reflects the entitlement already in substantive law. It is also not an entirely new concept. In 2000, even before the *Cherokee* and

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<sup>11</sup> See, e.g., U.S. Congressional Research Service, Entitlements and Appropriated Entitlements in the Federal Budget Process (RS20129, November 26, 2012), by Bill Heniff Jr.

<sup>12</sup> Congressional Budget Office Glossary, available at <http://www.cbo.gov/publication/42904> (updated January 2012).

<sup>13</sup> U.S. Congressional Research Service, Entitlements and Appropriated Entitlements in the Federal Budget Process at 1 (RS20129, November 26, 2012), by Bill Heniff Jr.

<sup>14</sup> See 25 U.S.C. § 450.

*Ramah* decisions, H.R. 4148 was introduced and reported in part “to clarify that contract support costs are an entitlement” and to appropriate necessary amounts to pay for contract support costs when not otherwise provided for.<sup>15</sup> Now, with federal liability twice affirmed by the Supreme Court, it is clearer than ever that the appropriation must be consistent, reliable, sufficient in amount, and reflective of the mandatory nature of contract support cost payments.

### ***The Legislative Proposal***

The draft legislative language presented in this proposal would appropriate funding for contract support costs on a permanent, indefinite basis. The proposal also includes amendment language to exempt funding for contract support costs from any future sequestration of federal appropriations. The language proposed here should be considered draft language for purposes of discussion. It is proposed as a partial solution to the question of contract support cost funding, in addition to other efforts in response to Congress’s directive in the Joint Explanatory Statement, including efforts to streamline and improve estimates of contract support cost need.

Though mandatory funding can function in different ways, in this case a permanent indefinite appropriation is needed to fully address the funding requirements created by the ISDEAA contract support cost entitlement.<sup>16</sup> Specifically, it is impractical to codify a particular annual amount for contract support costs or for the Committees on Appropriations to annually determine an amount, for the same reasons that it is difficult for the agencies to determine how much to allocate for contract support costs from their discretionary lump sum appropriations – namely that the entitlement amount changes throughout the year and cannot be determined with certainty in advance.<sup>17</sup> Accordingly, an indefinite appropriation for “necessary amounts” is the only way to ensure that appropriations are sufficient to pay the full contract support cost entitlement for which the federal government is liable, without tying up additional funding that may turn out not to be needed. Moreover, the appropriation should be permanent, since the ISDEAA entitlement to contract support costs is itself permanent.

The proposal is presented as an amendment to 31 U.S.C. § 1305, which is a miscellaneous permanent appropriation to meet various payment obligations of the federal government. These obligations include payment of interest on the public debt, as well as certain payments required under contracts made under several statutory housing assistance programs, among other things. Because Section 1305 is an existing provision of substantive law creating a

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<sup>15</sup> H. Rep. No. 837, at 3, 7 (2000).

<sup>16</sup> A permanent or “standing” appropriation “does not require repeated action by Congress to authorize its use,” and an indefinite appropriation is for an unspecified amount of money – for example, “such sums as may be necessary” for a given purpose.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-14 (3d ed. 2004) (GAO Redbook).

<sup>17</sup> The Committees on Appropriations appear to have recognized that the determination of contract support costs amounts does not align with the fiscal year appropriations process, and therefore should not remain solely within the jurisdiction of those Committees, when they directed in the Joint Explanatory Statement that the agencies “consult with the Tribes and work with the House and Senate *committees of jurisdiction*, [and] the Office of Management and Budget” as well as the Committees on Appropriations themselves to formulate a long-term solution (emphasis added).

permanent appropriation outside the annual appropriations process, it appears a logical place for a simple amendment adding the contract support cost entitlement. The following draft legislative language could effectuate the amendment:

31 U.S.C. § 1305 is amended by adding a new subsection as follows:

INDIAN SELF-DETERMINATION ACT CONTRACT SUPPORT COSTS

“(11) to make payments required by Subsections 106(a)(2), (3), and (5) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450j-1(a)(2), (3), and (5)) to Indian tribes and tribal organizations for contract support costs arising out of self-determination or self-governance contracts, grants, compacts, or annual funding agreements entered into pursuant to that Act.”

As an alternative, the mandatory funding proposal could be advanced as a freestanding provision with similar language:

There are hereby appropriated for the fiscal year beginning October 1, 2015, and for each fiscal year thereafter, out of any funds in the Treasury not otherwise appropriated, such amounts as may be necessary to make payments required by Subsections 106(a)(2), (3), and (5) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450j-1(a)(2), (3), and (5)) to Indian tribes and tribal organizations for contract support costs arising out of self-determination or self-governance contracts, grants, compacts, or annual funding agreements entered into pursuant to that Act.

Under either option, appropriations for contract support costs should also be exempt from sequestration. Though sequestration exemptions are codified in various locations and there are several possible options to exempt contract support costs, an exemption could be accomplished with an amendment to Section 255 of the Balanced Budget and Emergency Deficit Control Act of 1985, as follows:

Subsection (g) of Section 255 of the Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. § 905(g), is amended as follows: In sub-subsection (1), insert after “Payments to widows and heirs of deceased Members of Congress (00-0215-0-1-801).” the following: “Payments required by Subsections 106(a)(2), (3), and (5) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450j-1(a)(2), (3), and (5)) to Indian tribes and tribal organizations for contract support costs arising out of self-determination or self-governance contracts, grants, compacts, or annual funding agreements entered into pursuant to that Act.”

It should be noted that contract support costs amounts may decrease simply as a result of sequestration or any other reduction applied to the contracted programs, since funding levels for those programs determine the base contract amount on which contract support costs are paid. Accordingly, if program funds are sequestered, there should be no additional sequestration of contract support cost funding.

As a new mandatory spending measure, this proposal is subject to the requirements of the Congressional Budget Act, the Pay-As-You-Go Act of 2010, and House and Senate rules restricting consideration of new mandatory entitlement spending and requiring offsets through other mandatory spending reductions. However, the requirements of those measures are far from insurmountable. The President's FY 2015 Budget Request, while proposing several new mandatory spending measures, projects overall cuts and savings to mandatory spending of approximately \$137 billion over 5 years and approximately \$453 billion over 10 years.<sup>18</sup> In contrast, the estimated total need for contract support costs for FY 2015 (for the Bureau of Indian Affairs and the Indian Health Service) is approximately \$868 million.<sup>19</sup> In terms of the federal budget as a whole, the proposal has no net effect on spending levels since the entitlement to contract support costs already exists and is currently paid out of the agencies' discretionary appropriations. However, by ensuring full funding for contract support costs through mandatory appropriations, the government can avoid the cost of defending legal claims for unpaid costs and payment of those claims from the Judgment Fund.<sup>20</sup>

Contract support costs are already an entitlement under substantive law, as they must be for the ISDEAA to function as intended by Congress. If they are not paid, they are due as damages in a suit to recover unpaid amounts. It is contradictory and problematic, therefore, to appropriate funding for contract support costs on a discretionary basis. The Department of the Interior, the Department of Health and Human Services, and the Office of Management and Budget have been directed to work cooperatively with Tribes and with the House and Senate committees of jurisdiction and Committees on Appropriations to develop strategies to address the issue. The commonsense solution is to bring the appropriation process into line with the authorizing statute and the *Cherokee* and *Ramah* decisions by appropriating funding for contract support costs on a mandatory basis through a permanent, indefinite appropriation in substantive law. This proposal offers a simple, straightforward way to achieve that goal that addresses historical obstacles to full funding of contract support costs with no overall effect on federal spending levels.

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<sup>18</sup> See Office of Mgmt. & Budget, Exec. Office of the President, Budget of the United States Government, Fiscal Year 2015 at 158 (2014).

<sup>19</sup> The amounts requested in the FY 2015 Budget Request to fully fund contract support cost requirements are \$251 million for the Bureau of Indian Affairs and \$617 million for the Indian Health Service.

<sup>20</sup> 31 U.S.C. § 1304.