



Tribal government flags displayed at the 70th Annual Convention of the National Congress of American Indians. Photo credit: NCAI

## 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. To build a more prosperous American future, the following policy changes are essential.

### Key Recommendations

#### **DEPARTMENT OF THE INTERIOR**

*Interior – Environment Appropriations Bill*

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

- *Increase funding for Tribal Priority Allocations.*

Tribal priority allocations are a critical funding area for tribal governments because they cover such needs as economic development, welfare assistance, and natural resource management. Yet, for two decades, inadequate funding for Tribal Priority Allocations has hindered tribes from fully exercising their right of self-governance. Severe underfunding has contributed to an array of social injustices in tribal communities: insufficient law enforcement resources have led to unacceptable crime rates; a \$40 billion dollar construction backlog is impeding safe and efficient transportation systems for tribal nations; and the failure to adequately fund Indian education has resulted in disparate rates of educational attainment for Native children.

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## DEPARTMENT OF THE INTERIOR AND DEPARTMENT OF HEALTH AND HUMAN SERVICES

### *Interior – Environment Appropriations Bill*

- Fully fund Contract Support Costs at the Bureau of Indian Affairs, consistent with the 2012 Supreme Court decision in the *Salazar v. Ramah Navajo Chapter* case.

In 2012, the US Supreme Court, in *Salazar v. Ramah Navajo Chapter*, affirmed that tribes contracting and compacting under the Indian Self-Determination and Education Assistance Act of 1975 are entitled to full contract support costs (CSC), as a matter of basic contract law.

Under contracts or self-governance compacts, tribes administer a vast array of governmental services, including providing healthcare, law enforcement services, education, housing, and land and natural resource management, as well as providing many other vital social service programs. Program flexibility has allowed tribes to determine internal priorities, redesign programs, and reallocate financial resources to effectively and efficiently address the needs of their respective communities. Tribal communities rely on these programs to help provide the very basic requirements of food, clothing, and shelter. However, the greatest impediment to the successful administration of these trust programs has been the failure of the federal government to fully fund contract support costs.

When contract support costs are not paid, tribes cannot fill vital positions in areas such as health care and law enforcement. Many are compelled to divert resources from other programs and services to cover these expenses, placing a great economic burden on the tribes and jeopardizing the health, welfare, and safety of their communities. When the federal government fails to pay these costs, the government is both breaching its contract obligations and failing to honor its trust responsibility. The Supreme Court has affirmed, twice, that these contractual obligations must be fulfilled. In this way, critical jobs that serve tribal nations can be restored and the promise of tribal self-determination and self-governance more fully realized.

Agencies should join with the tribes in advocating for appropriations sufficient to fully fund all tribal contract support cost requirements. This would avoid litigation, retain and create jobs in some of the poorest locations in the country, and make good on President Obama's promise that those populations most vulnerable will sacrifice the least.

- Resolve BIA CSC claims.

In the wake of the Supreme Court's *Ramah Navajo* decision, the Bureau of Indian Affairs has acknowledged the government's liability for CSC shortfalls in years past. Discussions with both the agency and the Department of Justice have turned to establishing a framework for settling claims for past CSC underpayments on a class-wide basis that will cover all tribes and tribal organizations. Attorneys and financial experts for both sides are undertaking extensive work in an attempt to achieve agreement on a settlement figure. The Justice Department should place the very highest priority on settling these 19-year-old claims as swiftly as possible.

- *Resolve IHS CSC claims.*

The Indian Health Service has also acknowledged the government’s liability for CSC shortfalls in years past, but is dealing with claims on a tribe-by-tribe basis, rather than a class-wide basis. The IHS has stated publicly that recovery for past CSC shortfalls should be determined by subtracting the CSC paid in a given year from the CSC actually incurred in that year. This is not the correct way to address this problem. Faced with CSC funding shortfalls, contractors naturally spent less because they were paid less. The Supreme Court has affirmed that tribes should have been fully paid, and IHS should resolve all outstanding claims based upon what it would have paid each tribe and tribal organization at the time it awarded its contracts. The ‘cost-incurred’ model for calculating the government’s liability rewards the federal government for underpaying tribes, and penalizes tribes for fiscal prudence. Most fundamentally, it confuses what was spent with what was owed. IHS should abandon the ‘costs-incurred’ model and use the annual IHS shortfall reports as a starting point for calculating damages in settlement. As with the BIA claims, IHS and the Justice Department should place the very highest priority on promptly settling the thousands of outstanding claims.

## **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.