

ASNA Fact No. 3:

In the course of these discussions [during 1995] IHS informed ASNA that it did not expect to have any funding to pay contract support costs associated with ASNA's new contract from funds allocated to and available from the Headquarters-managed Indian Self-Determination ("ISD") Fund. However, IHS advised ASNA that \$500,000 would be made available in fiscal year 1996 on a non-recurring basis for contract support costs from funds allocated to and available from the Alaska Area Office. IHS requested that ASNA prepare a budget for this \$500,000 amount and ASNA did so. AR 3 at 73, 80-81. It was IHS's position that the funds were not legally available to IHS in FY 1996 to pay ASNA more than this amount.

IHS concedes that the principal fact in issue is undisputed: "IHS agrees that it advised ASNA that \$500,000 could be made available in FY 1996 on a non-recurring basis for contract support costs." That should be the end of the matter.

But IHS then quibbles with ASNA's assertion that IHS told it to prepare a budget in accordance with the project funds, or that IHS represented that additional funds were not available. Here, the record is clear that the \$500,000 budget was prepared with specific reference to funds that IHS informed the parties were available. In the contract that was negotiated and executed by IHS, the budget narrative for contract support costs states that "ASNA provided a contract support budget within the \$500,000 for all contract support costs for FY 96." AR 3 at 81. The Model Agreement itself opens with an assertion by IHS that no additional funds are "available," and that it claims no "legal liability" for funds determined to be unavailable after January 26, 1996. AR 3 at 1. The record thus readily supports the factual inference asserted in ASNA's Fact No. 2.¹

¹ Tellingly, Respondent's declarant never denies that IHS informed ASNA that no CSC funds were available beyond the \$500,000 amount.

ASNA Fact No. 4:

During 1995 and early 1996, IHS and ASNA completed negotiations and reached agreement on an annualized amount of the contract support cost requirement associated with ASNA's operation of the IHS Barrow Hospital, totaling \$2,301,842. AR 34 at 10. The amount of contract support costs so calculated was based upon an indirect-like rate of 32%. AR 3 at 64. The foregoing CSC requirement included non-recurring (that is, one time) startup costs; direct contract support costs; and indirect contract support costs. The foregoing sum was determined based upon a full year's operation of the Barrow Hospital and based upon a program award of \$4,663,131. Subsequently, IHS awarded ASNA a contract with an effective date of January 18, 1996, to begin carrying out some of the Barrow Hospital operations. AR 3 at 1 & 21. [underscoring added.]

IHS concedes the amount of contract support costs awarded in FY 96, but disagrees that the amount was not technically determined from an indirect-like "rate." ASNA agrees that the CSC amount was not calculated from a rate, and the underscored sentence in Fact No. 4 should have more accurately stated "The amount of contract support costs so calculated, divided by the direct cost base, was equivalent to an indirect-like rate of 32%."

The balance of Respondent's statement as to FY 96 consists of arguments about legal conclusions, not factual assertions, and thus are too late, beyond Rule 8(g)(3), and warrant no response.²

ASNA Fact No. 35:

On August 12, 1998, IHS paid ASNA \$1,636,833, identified as \$734,570 in "ISD - DCSC" and \$902,263 in "ISD - IDC CSC." AR 6 at 38. The payment document explained:

² As to Respondent's arguments regarding various indirect cost rates, IHS asserts that there is a material issue here involving rates because "ASNA has submitted claims alleging a miscalculation of a rate." IHS Statement of Genuine Issues ¶4 at 3. However, no issue concerning rates can be material to the Appellant's pending Motion for Partial Summary Judgment because that motion expressly does not seek any ruling regarding the miscalculated rate claims.

Amended to add \$1,636,833 Indian Self-Determination Funds. This includes \$902,263 Indirect and \$734,570 Direct Contract Support Costs. The Direct CSC is \$297,059 recurring and \$437,411 non-recurring.

AR 6 at 38. Neither of the amounts specified in this paragraph was specifically mentioned in the Compact or the FY 1998 Annual Funding Agreement.

IHS concedes that the specified amounts were not mentioned in the Compact or the FY 1998 AFA. IHS's follow-on argument – that because the amounts were contained in subsequent amendments, they were “part of the Annual Funding Agreement” after all – does not contest a fact (namely, the fact that IHS was adding funds to an AFA over and above the original amounts stated therein), but rather asserts a legal inference to be drawn from that undisputed fact.

IHS's additional argument based upon *Cherokee* is too late, beyond Rule 8(g)(3), and ordinarily would not merit response but for the fact that IHS flatly misrepresents *Cherokee*. IHS insists that the *Cherokee* litigation is irrelevant here because in *Cherokee* the funding agreements all specified the dollar amounts of the unpaid sums that Cherokee claimed, and because IHS agreed in *Cherokee* that those unpaid sums were actually specified in the agreements. But that is simply not so. The Cherokee FY 1997 funding agreement specified “TOTAL INDIRECT COST FUNDING” of \$1.441 million,³ and IHS actually paid \$1.6 million,⁴ leading IHS to argue in *Cherokee* that “In any event, the \$1.6 million given to Cherokee actually exceeded the \$1.4 million provided in Cherokee's Annual Funding Agreement with IHS.”⁵ The Cherokee funding

³ Jt. App. 188, *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). (Attached hereto is the Supreme Court record excerpt encompassing the funding agreement.)

⁴ *Cherokee Nation v. United States*, 190 F. Supp. 2d 1248, 1254 (E.D. Okla. 2001).

⁵ IHS Mem. in Supp. Summ. Judg. 55-56 n.17, *Cherokee Nation v. United States*, No. 99-092-S CIV (E.D. Okla. Sept. 7, 1999) (Dkt. No. 39).

agreement itself declared “By signing this agreement, the IHS position is that it is not agreeing to the Nation’s assertion that it is entitled to an additional amount of \$2,240,109 for indirect cost.”⁶ On remand, IHS was held liable for an additional “\$2,300,000”⁷ – again, an amount never specified in the contract.

Thus, in the one aspect IHS now alleges is so important – whether the unpaid amount of the Tribe’s CSC entitlement was stated on the face of the contract documents (or, conversely, whether “IHS paid the full amount set forth in the [AFAs]”⁸) – the Cherokee FY 1997 funding agreement and the ASNA funding agreements are functionally identical. Just as the Supreme Court held IHS liable in *Cherokee* for the Tribe’s full CSC entitlement, without regard to the lesser (and fully paid) CSC amount mentioned in the AFA, IHS here is liable to ASNA for ASNA’s full CSC entitlement. That is but the natural consequence of an AFA and contract which state – both expressly and by statutory incorporation – that full CSCs must be added to a contract and paid, subject only to the availability of appropriations.

ASNA Fact No. 44:

FY 1999 Amendment Number 8 stated that the funding agreement was “amended as follows” to increase “Contract Support Costs - Direct” in the amount of “\$72,662” and “Contract Support Costs - Indirect” in the amount of “21,697.” AR 24 at 64. The foregoing Amendment was executed by ASNA and IHS on October 26 and September 30, 1999, respectively. None of the amounts specified in the preceding two paragraphs was specified in the FY 1999 Annual Funding Agreement.

IHS concedes that the specified amounts were not mentioned in the Compact or the FY

⁶ Jt. App. 200, *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005).

⁷ Consent Judgment, *Cherokee Nation v. United States*, No. 99-092-S CIV (E.D. Okla. July 24, 2006) (Dkt. No. 190)

⁸ IHS Statement of Genuine Issues ¶35 at 4.

1999 AFA. As with the Fact No. 35, IHS's response asserts a legal inference to be drawn from undisputed facts, and thus is too late, beyond Rule 8(g)(3), and does not merit a response.

ASNA Fact No. 69:

From November 1995 to early February 1996, Mr. Lee Olson served under an Intergovernmental Personnel Act agreement in the IHS Office of Tribal Activities in Rockville, Maryland. ASNA Exh. 22 at ¶2. During this same period ASNA entered into its first contract for the operation of portions of the IHS Barrow Hospital. Mr. Olson is not a party to these proceedings and has no direct or indirect interest in these proceedings. According to Mr. Olson's sworn statement executed February 8, 2007, and submitted in these proceedings:

Payments to contractors for contract support costs associated with new and expanded contracts were not limited to monies designated in the ISD Fund. In some instances Area Offices found other funds which were paid to contractors, usually on a one-time basis until ISD Fund monies were made available in a later year.

ASNA Exh. 22 at ¶7. Mr. Olson further states in his sworn statement that:

... IHS's practice was to supplement the ISD Fund with additional funds that 'came back' to IHS Headquarters because they had been spent in the preceding year on one-time non-recurring startup costs, and therefore were no longer needed by that contractor for that purpose in the subsequent year. Thus, a given year's ISD Fund (for instance, \$7.5 million) was typically supplemented by an additional several hundred thousand dollars (or more) of non-ISD Fund CSC monies.

ASNA Exh. 22 at ¶7. Mr. Olson further stated in his sworn statement that:

It was my understanding that when IHS signed a contract with a Tribal contractor, it was agreeing to pay the full amount of the contractor's CSC requirement subject only to available appropriations.

ASNA Exh. 22 at ¶8.

IHS concedes that Mr. Olson is not a party to this litigation and was formerly employed by IHS. IHS adds that Mr. Olson is now an employee of Southcentral Foundation, and that Southcentral Foundation has asserted claims against IHS, facts ASNA does not contest.

IHS concedes Mr. Olson's first two quoted statements. IHS disputes the clarity of the third statement and the meaning of the words "full amount," but that is not a dispute of fact. Moreover the sense of Mr. Olson's statement is plain on its face.

The balance of IHS's response does not relate to the truth or accuracy of Mr. Olson's statement at all, but rather reasserts legal arguments about the meaning of contract language and availability of appropriations. As such they are too late, beyond Rule 8(g)(3), and do not merit a response.⁹

ASNA Fact No. 70:

At all relevant times, Mr. Eben Hopson, Jr. served as ASNA's Executive Director. According to Mr. Hopson's sworn statement, Mr. Hopson's understanding was "that IHS and ASNA agreed that ASNA was entitled to be paid its full contract support cost requirement, at least so long as funds to pay that requirement were available to IHS." ASNA Exh. 20 at ¶5. Mr. Hopson further declared that "IHS's consistent position to us was that, so long as funds were available to IHS to pay ASNA, ASNA would be paid up to its full contract support cost requirement." ASNA Exh. 20 at ¶5. Mr. Hopson further declared:

[I]t continued to be our understanding throughout all of our contracts that IHS was funding less than our full contract support cost requirement, not because it did not have a legal obligation to do so under our contracts and the controlling law, but because IHS's duty to pay, we were told, was subject to limited appropriations.

ASNA Exh. 20 at ¶7.

IHS merely reasserts the same legal arguments made as to Fact 69. No further response is necessary.

⁹ IHS also asserts that it cannot confirm or dispute whether Mr. Olson's statement accurately reflects Mr. Olson's understanding (although Mr. Olson would seem to be the best judge of that), nor determine whether the facts are relevant (which is not a valid basis for an objection). In any event, IHS for its own reasons elected not to depose Mr. Olson at the time of briefing on the pending motion. For all these reasons, the Board should accept Mr. Olson's statement as uncontested and accord it whatever weight the Board determines it is entitled.

ASNA Fact No. 97:

According to ASNA Executive Director Eben Hopson's sworn affidavit executed February 9, 2007, it was Mr. Hopson's understanding with respect to the buyback and reconciliation process, and the subsequent settlement of certain claims described here in paragraphs 92-96, that:

At no time during the foregoing resolution process did IHS or ASNA ever raise the issue of contract support costs. In fact, there would have been no reason to raise that issue, because contract support costs were not part of any buyback or withholding arrangements. When it came to contract support costs, ASNA and IHS knew exactly what had been paid.

At the time of the "reconciliations" we were well aware, as was IHS, that there was ongoing class action litigation against IHS over this very issue. In fact, so far as I can recall at every National Self-Governance Conference (which at the time was convened twice a year) the status of all the litigation against IHS over contract support cost issues was always on the agenda and always discussed. I followed those developments closely because ASNA stood to win in the class action lawsuit if those suits were successful. In this and other ways, by the year 2000 I was well aware that some Tribes had been successful against IHS in purs[u]ing various contract support cost claims, although I was also aware that the cases were still ongoing. At no time in the reconciliation did IHS ever raise these issues, and at no time did IHS ask us to waive, release, or in any other manner address contract support cost issues, nor would we have ever agreed to waive or release such claims given the pending litigation.

ASNA Exh. 20 at ¶¶12-13.

IHS repeats its earlier assertion that it cannot test the truth of this statement without discovery (despite its missed opportunity to do so), and then goes on, improperly, to argue its position on the legal effect of the reconciliation statements' language. The undisputed fact that ASNA offers here is that the statements accurately reflect Mr. Hopson's belief and understanding. As with Mr. Olson, the statement can therefore be accorded that weight to which the Board believes it is entitled.

Respectfully submitted this 13th day of November 2007.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed, or caused to be mailed, a true and correct copy of the foregoing document by electronic mail and first class mail to the following parties of record this 13 day of November 2007:

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