

Determination and Education Assistance Act (ISDA), 25 U.S.C. §§ 450–458aaa-18.

2. The multiple claims covered by this appeal and this Complaint encompass:
 - (a) the claim that the Secretary, during each of fiscal years 1995 through 2000, unlawfully failed to pay in full the CSCs which the Secretary acknowledged were due and owing to the Southcentral Foundation; and
 - (b) the claim that the Secretary, in fiscal year 2000, unlawfully failed to calculate correctly, and thus further underpaid, the indirect administrative CSCs the Secretary was required to pay under the ISDA, as construed in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997).

II. JURISDICTION

3. The Board has jurisdiction over this appeal pursuant to 25 U.S.C. §§ 450m-1(a) & (d) of Title I of the ISDA; § 303(d) of the Tribal Self-Governance Demonstration Project Act, 25 U.S.C. § 450f note (1999) (repealed) (incorporating by reference the remedies specified in 25 U.S.C. § 450m-1(a) & (d) of Title I of the ISDA); 25 U.S.C. § 458aaa-10(a) of Title V of the ISDA (incorporating by reference the remedies specified in 25 U.S.C. § 450m-1(a) & (d) of Title I of the ISDA); 41 U.S.C. §§ 605(c)(5), 606 & 607(d) of the Contract Disputes Act; and 43 C.F.R. § 4.100(b).

III. PARTIES

4. The Southcentral Foundation is a not-for-profit corporation organized under Alaska law and headquartered in Anchorage, Alaska. The Southcentral Foundation is a “Tribal organization” as that term is defined by the Indian Self-Determination Act at 25 U.S.C. § 450b(f).

5. Michael O. Leavitt is the Secretary of the Department of Health and Human Services (DHHS) and exercises delegated responsibilities from Congress pursuant to the ISDA

and other applicable law. Dr. Charles Grim is the Director of the Indian Health Service (IHS) and exercises authority delegated to him by the Secretary to carry out the Secretary's responsibilities under the ISDA and other applicable law. As used throughout this Complaint (and unless context commands otherwise), the terms "Secretary," "Director," and "IHS" are used interchangeably.

IV. FACTS AND GENERAL ALLEGATIONS

6. In fiscal year 1995, the Southcentral Foundation operated various Federal health care programs in Anchorage, Alaska pursuant to a combination of ISDA contracts with the Indian Health Service awarded under Title I of the ISDA, 25 U.S.C. §§ 450–450n, and ISDA compacts with the Indian Health Service awarded under Title III of the ISDA, including the Dena A Coy Substance Abuse Treatment Center; various primary care, dental, optometry, mental health and other Federal programs; and certain "Tribal shares" of the Indian Health Service's Headquarters and Alaska Area Office functions. Of these Federal health care programs, the Southcentral Foundation contracted in fiscal year 1995 to operate the Dena A Coy Treatment Center and a portion of IHS's primary care, dental, optometry, mental health and other Federal programs (including a portion of the Tribal shares of IHS's Area and Headquarters offices). In subsequent years the Southcentral Foundation's contracts were expanded to include the Primary Care Center (FY 1997), the Traditional Healing Program (FY 1997), and additional Tribal shares of IHS's Area and Headquarters offices (FY 1996 and FY 1997); the Mat-Su Clinic and the Alaska Native Primary Care Center (FY 1998); and the primary care services portion of the Alaska Native Medical Center (FY 1999). The Southcentral Foundation's contracts during this period included:

Contract No. 243-89-0012 (FY 1995),

Contract No. 243-95-6000 (FY 1995 and FY 1996);

Contract No. 58U950001-01 (FY 1995);

Compact No. ISG950031 (FY 1995 and FY 1996); and

Compact No. 58G-950031 (FY 1997–FY 2000).

Each year these contracts have been supplemented with an “annual funding agreement.”

Collectively, the foregoing contracts, compacts and annual funding agreements are referred to herein as “contracts.”

7. During the period January 1, 1995 through September 30, 2000, the “Compacts” identified in par. 6 of this Complaint were authorized by Title III of the ISDA, known as the “Tribal Self-Governance Demonstration Project [Act],” as amended, formerly reprinted at 25 U.S.C. § 450f note (1999) (repealed by Pub. L. No. 106-260, § 10, 114 Stat. 734 (2000)). The funding provisions of Title III, section 303(a)(6), incorporated by reference the funding provisions of Title I, requiring that the Secretary shall pay “an amount equal to that which the [compacting] tribe would have been eligible to receive under contracts or grants under [Title I of the ISDA], including direct program costs and indirect costs,....” Thus, the Secretary’s funding obligations associated with CSCs under the Compacts described in par. 6 were at all relevant times through FY 2000 controlled by 25 U.S.C. § 450j-1(a)(2), (3) and (5); 25 U.S.C. § 450j-1(g); and related funding provisions of Title I of the ISDA.

8. The provisions of Titles I and III of the ISDA governing the determination and payment of CSCs are materially identical.

9. At all relevant times, the provisions of 25 U.S.C. §§ 450j-1(a)(2), (3) and (5); 25 U.S.C. § 450j-1(g); and related funding provisions of Title I of the ISDA, together controlled the

Secretary's funding obligations under the contracts identified in par. 6 of this Complaint. These are the same provisions that the Supreme Court construed in Cherokee Nation v. Leavitt, 543 U.S. 631 (2005).

10. Title I of the ISDA, 25 U.S.C. §§ 450j-1(a)(2), (3) & (5), requires that the Secretary shall pay to a contracting Tribe "contract support costs" of various categories, and further requires at 25 U.S.C. § 450j-1(g) that "upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under [25 U.S.C. § 450j-1(a)]."

11. The general categories of "contract support costs" (CSCs) to which a contracting Tribe is entitled under the ISDA are:

- (a) "indirect administrative costs, such as special auditing or other financial management costs," Cherokee Nation, 543 U.S. at 635 (citing § 450j-1(a)(3)(A)(ii)) (hereinafter "indirect CSCs");
- (b) "direct costs, such as workers' compensation insurance" for certain annually recurring costs attributable directly to the personnel and facilities employed or used to carry out the Federal IHS programs being contracted under the ISDA, Cherokee Nation, 543 U.S. at 635 (citing § 450j-1(a)(3)(A)(i)) (hereinafter "direct CSCs"); and
- (c) non-recurring one-time "start-up costs," Cherokee Nation, 543 U.S. at 635 (citing § 450j-1(a)(5)) (hereinafter "start-up costs").

The ISDA specifies that these various CSC amounts "shall be added" to an ISDA contract, 25 U.S.C. § 450j-1(a)(2), and further declares that the amounts to be paid "shall include" direct CSCs and indirect CSCs, 25 U.S.C. § 450j-1(a)(3)(A). The ISDA further provides that "[t]he amount of funds required by [25 U.S.C. § 450j-1(a)] * * * (2) shall not be reduced by the Secretary in subsequent years" except in circumstances which the Southcentral Foundation

alleges are not pertinent here. 25 U.S.C. §§ 450j-1(b) & (b)(2).

12. Since at least 1995, IHS has calculated and paid contract support costs associated with ISDA contracts and compacts pursuant to a succession of Indian Self-Determination Memoranda and IHS Circulars (collectively “CSC Circulars”). The CSC Circulars explain how contract support cost requirements are to be determined, and how the IHS appropriations are annually allocated to pay those contract support costs requirements to individual Tribal contractors. IHS calculated and paid CSCs associated with the Southcentral Foundation’s contracts pursuant to the CSC Circulars.

13. The Secretary’s failure to pay “contract support costs” as specified herein was contrary to the Southcentral Foundation’s statutory and contractual rights as articulated by the Supreme Court in Cherokee Nation v. Leavitt, and as further specified, inter alia, in:

- (a) The Southcentral Foundation’s contracts and annual funding agreements;
- (b) 25 U.S.C. §§ 450j-1(a)(2), 450j-1(a)(3), 450j-1(a)(5), 450j-1(b), 450j-1(d)(2), 450j-1(g) of Title I of the ISDA, as amended; and
- (c) Section 303(a)(6) of former Title III of the ISDA.

14. On September 10, 2001, the Pueblo of Zuni filed a class action lawsuit against the Secretary and the United States in the District of New Mexico captioned Pueblo of Zuni v. United States of America, et al., Case No. CV-01-1046 WJ/WPL (D. N.M.) (the Zuni suit). The Zuni suit seeks damages on behalf of all Tribal contractors for the Secretary’s failure during certain years to calculate properly the contract support cost requirements of Tribal contractors (as alleged here in the Second Cause of Action), and further seeks damages for the Secretary’s failure during those same years to pay in full all contract support cost requirements as determined

by the Secretary under IHS's CSC Circulars (as alleged here in the First Cause of Action). On December 28, 2001 the Zuni suit was stayed pending the outcome of litigation which culminated in Cherokee Nation v. Leavitt, 543 U.S. 631 (2005). In March 2005 the stay in the Zuni suit was lifted. As of the filing of this Complaint a Motion for Class Certification is pending and awaiting decision. The Southcentral Foundation is a putative member of the class sought to be certified in the Zuni litigation.

15. On September 30, 2005, the Southcentral Foundation ("SCF") submitted the following contract damages claims to the Secretary involving the Secretary's failure to pay the full amounts of CSCs required by the ISDA and the Southcentral Foundation's contracts over a period of years:

- (a) A September 30, 2005 damages claim under ISDA Compact No. ISG-950031-01, involving IHS's unlawful failure to pay certain direct CSCs and indirect administrative CSCs in connection with SCF's compact with IHS during fiscal year 1995, totaling \$762,699 (hereinafter **Claim 1**);
- (b) A September 30, 2005 damages claim under ISDA Contract Nos. 243-95-6000, 243-89-0012 & 58U950001-01, involving IHS's unlawful failure to pay certain direct CSCs and indirect administrative CSCs in connection with SCF's contracts with IHS during fiscal year 1995, totaling \$762,699 (hereinafter **Claim 1A**) (alternative to Claim 1);
- (c) A September 30, 2005 damages claim under ISDA Compact No. ISG-950031-02 involving IHS's unlawful failure to pay certain direct CSCs and indirect administrative CSCs in connection with SCF's compact with IHS during fiscal year 1996, totaling \$1,483,652 (hereinafter **Claim 2**);
- (d) A September 30, 2005 damages claim under ISDA Compact No. 58G-950031-01 involving IHS's unlawful failure to pay certain direct CSCs and indirect administrative CSCs in connection with SCF's compact with IHS during fiscal year 1997, totaling \$2,305,622 (hereinafter **Claim 3**); and
- (e) A September 30, 2005 damages claim under ISDA Compact No. 58G-950031-02 involving IHS's unlawful failure to pay certain direct CSCs and indirect

administrative CSCs in connection with SCF's compact with IHS during fiscal year 1998, totaling \$4,815,902 (hereinafter **Claim 4**).

- (f) A September 30, 2005 damages claim under ISDA Compact No. 58G-950031-03 involving IHS's unlawful failure to pay certain direct CSCs and indirect administrative CSCs in connection with SCF's compact with IHS during fiscal year 1999, totaling \$2,967,773 (hereinafter **Claim 5**).

The total unduplicated face amount of the claims so submitted was \$12,335,648. On

September 29, 2006, the Southcentral Foundation submitted an additional claim as follows:

- (g) A September 29, 2006 damages claim under ISDA Compact No. 58G-950031-04, involving –
 - (i) IHS's unlawful failure to pay certain direct CSCs and indirect administrative CSCs, as confirmed in IHS's annual CSC shortfall and related "Queue" reports, and
 - (ii) IHS's unlawful failure to properly calculate the indirect administrative CSCs that the SCF was entitled to be paid under the ISDA, as explained in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997),

all during fiscal year 2000 and totaling \$6,066,228 (hereinafter **Claims 6 & 7** respectively);

16. By letter dated November 7, 2005, Burton J. Humphrey, Senior Contracting Officer, Alaska Area Native Health Service, Public Health Service, U.S. Department of Health & Human Services, advised SCF that the foregoing **Claims Nos. 1 & 1A** were under review and that a final decision on said claims would be issued within 180 days from the date of the letter.

17. By letter dated November 8, 2005, IHS Director Grim advised SCF that the foregoing **Claims Nos. 2, 3, 4 & 5** were under review and that a final decision would be issued on said claims within 180 days from the date of the letter.

18. By letter dated March 15, 2006, Burton J. Humphrey, Senior Contracting Officer, Alaska Area Native Health Service, Public Health Service, U.S. Department of Health & Human

Services, advised SCF that the foregoing **Claims Nos. 1 & 1A** were under review and that a final decision on said claims would be issued within 180 days from the date of the letter.

19. By letter dated May 5, 2006, IHS Director Grim advised SCF that the foregoing **Claims 1 through 5** remained under review and that a final decision would be rendered within 180 days from the date of the letter.

20 By letter dated September 7, 2006, Burton J. Humphrey, Senior Contracting Officer, Alaska Area Native Health Service, Public Health Service, U.S. Department of Health & Human Services, advised the Southcentral Foundation that a final decision had been made on **Claims 1 & 1A** and that said claims had been denied.

21. By letter dated December 1, 2006 and received December 6, 2006, IHS Director Grim advised SCF that the foregoing **Claims 6 & 7** were under review and that a final decision would be rendered within 180 days from the date of said letter.

22. On the dates specified in par. 15 of this Complaint, the Southcentral Foundation timely and properly submitted claims to the appropriate contracting officer for the IHS. The agency's contracting officer has rendered a decision on one of the claims (**Claims 1 & 1A**) but has otherwise failed to issue any decision on the remaining claims.

V. CAUSES OF ACTION

FIRST CAUSE OF ACTION

(General Contract Support Costs – Claims 1, 2, 3, 4, 5 & 6)

23. The Southcentral Foundation realleges the preceding paragraphs of this Complaint as if fully set forth herein.

24. During each of fiscal years 1995 through 2000 the Secretary failed to meet his

statutory and contractual obligations to the Southcentral Foundation by failing to pay the Southcentral Foundation the full direct, indirect administrative, and start-up CSCs the Secretary acknowledged the Southcentral Foundation was entitled to receive under the ISDA and the Southcentral Foundation's contracts, as reflected (inter alia) in the Secretary's CSC Circulars, various annual shortfall reports prepared in connection with the Secretary's recordkeeping and reporting requirements specified in 25 U.S.C. § 450j-1(c), and related "Queue" reports.

25. In addition, beginning in fiscal year 1995 and continuing through at least 1998, the Secretary placed the Southcentral Foundation's contract support cost requirements associated with

- (a) the FY 1995 contracted operation of the Dena A Coy Treatment Center, a portion of IHS's primary care, dental, optometry, mental health and other Federal programs and a portion of certain Tribal shares;
- (b) the FY 1996 contracted operation of a portion of certain Tribal shares;
- (c) the FY 1997 contracted operation of a portion of the Primary Care Center, and of the Traditional Healing Program and additional Tribal shares;
- (d) the FY 1998 contracted operation of the Mat-Su Clinic and the Alaska Native Primary Care Center; and
- (e) the FY 1999 contracted operation of the primary care services of the Alaska Native Medical Center,

on the IHS "Queue" or "Priority List" (identified variously, and in part only, as Files Nos. 95-10, 95-24, 96-55, 97-6 and 98-27). So long as such amounts remained on said lists, and pursuant to IHS policy as reflected in the CSC Circulars in effect at the time, IHS did not pay any of such contract support cost requirements to the Southcentral Foundation.

26. The foregoing annual failures to pay are the subject of those portions of the claims

described in subparagraphs 15(a) through (f) of this Complaint that are identified as **Claims 1, 1A, 2, 3, 4, 5 & 6.**

27. The Secretary's annual failure to pay to the Southcentral Foundation the contract support costs as alleged in this First Cause of Action constitutes in each instance a separate breach of statutory rights and contractual rights.

28. In each year in which the Secretary breached his contractual and statutory obligations under the contracts identified in this Complaint as alleged in this First Cause of Action, sufficient appropriations were legally available to the Secretary to pay all amounts due and owing to the Southcentral Foundation under the rule of Cherokee Nation v. Leavitt, 543 U.S. at 637, 641, and Ferris v. United States, 27 Ct. Cl. 542, 546 (1892).

29. In each instance in which the Secretary breached his contractual and statutory obligations under the contracts identified in this Complaint as alleged in this First Cause of Action, the Southcentral Foundation's contracts constituted binding legal obligations made in advance of appropriations, and such contracts were therefore legally binding without regard to subsequent appropriations.

30. Damages for each breach, as alleged in this First Cause of Action, are measured by the amounts required by law to be paid as CSCs; the reasonably foreseeable damages the Southcentral Foundation suffered as a direct result of the Secretary's breach (including the higher amounts of CSCs the Secretary by law would have been required to pay to the Southcentral Foundation in subsequent years under the ISDA's anti-reduction provisions set forth in 25 U.S.C. § 450j-1(b)(2) and other applicable law and policy); reasonably foreseeable damages associated with any adverse carryforward adjustments; and such other reasonably foreseeable damages as

shall be proven at trial.

**SECOND CAUSE OF ACTION
(Miscalculated Rate Claim – Claim 7)**

31. The Southcentral Foundation realleges the preceding paragraphs of this Complaint as if fully set forth herein.

32. During each of fiscal year 2000 the Secretary failed to meet his statutory and contractual obligations to the Southcentral Foundation by failing to pay the Southcentral Foundation the full amount of indirect administrative CSCs to which the Southcentral Foundation was entitled under the ISDA. In this Second Cause of Action the Southcentral Foundation alleges that IHS, pursuant to its CSC Circulars, acted unlawfully by using, as a proxy for the determination of such administrative CSCs, the annual “indirect cost rate” assigned to the Southcentral Foundation by the U.S. Department of the Health and Human Services Division of Cost Allocation (“DCA”). The Southcentral Foundation alleges that the “indirect cost rate” assigned to the Southcentral Foundation was to be used strictly for certain cost-recovery accounting purposes, under guidelines from the Office of Management and Budget (OMB) which caution that such rates are not to be used to determine a federal agency’s funding obligations under contracts or grants. See, e.g., OMB Cir. A-122, 2 C.F.R. § 230.10(b) (“The principles deal with the subject of cost determination, and make no attempt to identify the circumstances or dictate the extent of agency and non-profit organization participation in the financing of a particular project.”) Nonetheless, in fiscal year 2000 IHS, by policy and practice, required that the amount of the Southcentral Foundation’s indirect administrative CSCs to be paid under the ISDA and the Southcentral Foundation’s contracts be determined by application of the

