

No. 02-1286

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

TOMMY G. THOMPSON, Secretary of Health and Human Services,

Appellant,

v.

CHEROKEE NATION OF OKLAHOMA,

Appellee.

APPEAL FROM THE DEPARTMENT OF INTERIOR
BOARD OF CONTRACT APPEALS IN NOS. 3877-3879/89
ADMINISTRATIVE CHIEF JUDGE BERNARD V. PARRETTE

APPELLEE'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

ARGUMENT 1

CONCLUSION 9

TABLE OF AUTHORITIES

Cases	Page
<i>Blackhawk Heating & Plumbing Co. v. United States</i> , 622 F.2d 539 (Ct. Cl. 1980)	6, 8
<i>Ramah Navajo School Board v. Babbitt</i> , 87 F.3d 1338 (D.C. Cir. 1996)	2
<i>United States v. Winstar</i> , 518 U.S. 839 (1996)	7
 Statutes	
25 U.S.C. § 450j-1(b)(1)	9
25 U.S.C. § 450j-1(b)(3)	9
25 U.S.C. § 450j-1(b)(4)	9
 Rules	
Fed. R. Evid. 201(b)	4
Fed. R. Evid. 201(d)	4
Fed. R. Evid. 201(f) Advisory Comm. Note	4
 Administrative Decisions	
<i>LTV Aerospace Corp.</i> , 55 Comp. Gen 307 (1975)	6
<i>Matter of Forest Service</i> , B-231,711, 1989 WL 240615 (Comp. Gen. Mar. 28, 1989)	6, 10

Other Materials

Department of Health and Human Services, Indian Health Service,
“Justification of Estimates for Appropriations Committees”
Fiscal Year 1996 4, 5, 7, 9

Department of Health and Human Services, Indian Health Service,
“Justification of Estimates for Appropriations Committees”
Fiscal Year 1997 4, 5, 7, 9

Department of Health and Human Services, Indian Health Service,
“Justification of Estimates for Appropriations Committees”
Fiscal Year 1998 4, 5, 7, 9

U.S. General Accounting Office, PRINCIPLES OF FEDERAL
APPROPRIATIONS LAW (“APPROPRIATIONS LAW”)
(*available on Westlaw under “GAO REDBOOK”*) 8, 10

ARGUMENT

At the Oral Argument held April 9, 2003, the Court directed the parties to answer the following question:

Judge Dyk: The question is were there funds that the Secretary could have used to satisfy these contract obligations that were not obligated under contracts with other tribes or otherwise restricted by the appropriations legislation.¹

As discussed below, both the record and judicially-noticeable public documents reflect that no more than 35% to 43% of the Indian Health Service's ("IHS's") entire appropriation was obligated to tribal contracts in any one of the three subject years. These same sources show that, depending on the year, only 52% to 57% of the IHS appropriation was either committed to those tribal contracts or otherwise restricted by

¹ Supp. Add. 25 (Appellee's transcription of the April 9, 2003 oral argument). When the Court first discussed its request, the panel said this:

Judge Clevenger: [T]he panel would like to have supplemental briefing from both sides to be submitted . . . on this point about whether there were funds available. We're talking about whether, in the given year, was there money that the Secretary could have used to pay the bills that you submitted to it.

[counsel interruption]

Judge Dyk: Without violating the contract obligations to other tribes.

Id. at 18. *See also id.* at 10 (Judge Clevenger) (questioning whether the Secretary may have "made a mistake and entered into too many contracts, if you will").

unrelated statutory earmarks. With respect to the legal availability of appropriations, these materials thus definitively refute any suggestion that IHS was limited in reprogramming its lump-sum appropriation to pay Appellee's contracts because of competing obligations to other contractors or other mandatory programs.

1. The issue addressed in this Supplemental Brief arises late in the day only because Appellant's colloquy with the Court suggested, for the first time ever, that in fiscal years 1994, 1995 and 1996 IHS faced a situation where the agency had over-committed itself to pay more to tribal contractors than was contained in its unrestricted lump-sum appropriation.² As the record and incontrovertible public facts reflect, however, such a claim cannot be sustained.

Although the Secretary below never offered any proof on this point with regard to two of the three fiscal years at issue, the Secretary's limited proof for FY1996 is sufficiently revealing. The affidavit of Daniel J. Cesari states that of IHS's non-earmarked FY1996 adjusted appropriation of "\$1,375,245,000,"³ a total of only

² Were this true, the situation would be comparable to that faced by the court in *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). Rather than simply refusing to pay some contractors over others, the agency would have been required to "impos[e]... a *pro rata* reduction among all the eligible Tribes" within the available appropriation amount. *Id.* at 1348.

³ JA 451, ¶ 6 (explaining adjustments); *see also* JA 458 (line (A), col. 13).

“\$606,470,534” was committed to contracts under “Title[s] I & III” of the ISDA.⁴ By declarant Cesari’s reckoning, the balance of \$768,774,476 was neither committed to such contracts nor earmarked. As Appellee noted at oral argument, Supp. Add. 16, these contract commitments represent only about 35% of FY1996’s entire appropriation (including earmarks). *See also* JA 478-79, ¶15 (similarly declaring that in FY1996 only “35% [of the agency’s field “service units”] were operated by Tribes and tribal organizations which had entered into self-determination contracts and compacts”). Thus, any suggestion that the total IHS FY1996 appropriation was over-committed by excess agency commitments to tribal contracts is affirmatively disproved by the limited evidence the Secretary offered below.

2. Appellant’s speculation is also disproved by other public records. Each February the President submits a proposed Budget to Congress for the coming year. The President’s Budget covers every federal agency, and each agency in turn develops its own Congressional Budget Justification. Each Justification sets forth details supporting the President’s Budget, including how the agency plans to spend its appropriations in the current year, and how it spent them in the immediately preceding year.

⁴ JA 458 (line (F), col. 13); *see also* JA 452-53, ¶7 (explaining this part of the JA 458 table). For a discussion of Titles I and III, *see* Answering Br. 10 n.22.

In the case of IHS, the Department of Health and Human Services (“DHHS”) annually submits to Congress IHS’s “Justification of Estimates for Appropriations Committees” (hereafter “IHS Budget Justification”). *See* Supp. Add. 26-34 (attaching excerpts of FY1996 through FY1998 IHS Budget Justifications).⁵ What is most significant here, given the Court’s question, is that each IHS Budget Justification reports on IHS’s appropriations expenditures in the most-recently concluded fiscal year by separating out the agency’s expenditures on tribal contracts from all other agency expenditures. Thus, the FY1996 IHS Budget Justification details IHS’s FY1994 spending in a convenient one-page Table that separates out IHS spending on tribal contracts from all other IHS spending that year. Supp. Add. 27. The FY1997 and FY1998 Budget Justifications contain similarly detailed Tables reporting on all IHS tribal contract spending in FY1995 and FY1996, respectively. Supp. Add. 30, 33.

These annual IHS Budget Justification Tables permit one to determine the portion of the IHS “Services” appropriation⁶ that was committed each year either to

⁵ Such DHHS official publications, widely available to the public, are judicially noticeable under Fed. R. Evid. 201(b) and (d). *See also* Advisory Comm. Note to Rule 201(f) (“judicial notice may be taken . . . on appeal”). IHS now posts these Justifications on its website. *See* <http://www.ihs.gov/PublicInfo/PublicAffairs/PressReleases/PressRelease2002/Release3IHS2003BudgetJustificationDocs.asp>.

⁶ Only the IHS “Services” appropriation is at issue here. The agency’s separate “Facilities” appropriation is not.

tribal contracts or by restrictive appropriations Act earmarks, and correspondingly the portion of the IHS appropriation that was not so committed. As more fully discussed below, these documents show that unrestricted funds were available to pay Appellee's contract support costs in each of the years at issue.

For the Court's convenience, Appellee has prepared a chart, based upon the IHS Budget Justification Tables, entitled "PORTION AND PERCENTAGE OF IHS'S SERVICES APPROPRIATION NEITHER UNDER TRIBAL CONTRACT NOR EARMARKED IN APPROPRIATIONS ACTS" ("Chart"). Supp. Add. 35-36. The Chart restates the amounts IHS paid to tribal contractors each year under the Indian Self-Determination Act. Supp. Add. 35 at line 3. It also accounts for all remaining funds each year that were restricted in the Appropriations Acts. *Id.* at lines 5 and 6. As the Chart reflects, during the three years at issue here between 35% and 43% of IHS's "Services" appropriation was obligated to tribal contracts. *Id.* at line 4. When non-contracted earmarked funds are factored in as also unavailable for reprogramming to other purposes (including payment of Appellee's contracts), the Chart further demonstrates that the Secretary's combined contract payments and restricted earmarks still only consumed between 52% and 57% of his entire lump-sum appropriation in the three fiscal years, *id.* at line 9, leaving between \$737,117,000 and \$795,172,000 in legally-available funds subject to reprogramming to pay each of Appellee's contracts. *Id.* at

line 7. *See Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539 (Ct. Cl. 1980).

IHS's own Budget Justifications to Congress thus provide a complete answer to the Court's inquiry. Each year over three-quarters of a billion dollars were neither committed to tribal contractors nor restricted by annual appropriations Act earmarks. Thus, the Court is not faced with anything like the hypothetical situation discussed at oral argument (where the Secretary has "a billion dollars and the Secretary enters into contracts that pledge out 2 billion dollars"). Supp. Add. 15 (Judge Clevenger).

3. The foregoing discussion reaffirms the Cherokee Nation's opening proposition: (1) each year the agency had a lump-sum appropriation "to carry out the Indian Self-Determination Act" that contained no caps on tribal contract payments; (2) each year the entire portion of the appropriation that was neither statutorily earmarked to restricted purposes or committed to other tribal contracts was legally available to pay the Appellee's contracts;⁷ (3) each year these unrestricted amounts exceeded three-quarters of a billion dollars; (4) accordingly under *Blackhawk*, each year the Cherokee Nation's right to be paid vested in full as a matter of basic appropriations law; and (5) as government counsel candidly conceded at oral argument, Supp. Add.

⁷ *See LTV Aerospace Corp.*, 55 Comp. Gen 307 (1975) and *Matter of Forest Service*, B-231711, 1989 WL 240615, at *2 (Comp. Gen. Mar. 28, 1989).

13, under *United States v. Winstar*, 518 U.S. 839 (1996), vested contract rights could not later be annulled by Congress.

4. The foregoing discussion fully answers the Court’s question. Before closing, however, we wish to discuss briefly the Secretary’s Supplemental Brief. (With the exception of a chart prepared by government counsel, the parties have cooperated in sharing with one another the documentary materials each would be presenting to the Court.)

The Secretary’s presentation unfortunately does not come close to answering the Court’s question. Recall that when government counsel stated her misunderstanding that “You would like to have a brief addressing the question of whether or not there are actually any funds left over in each one of these fiscal [years],” Judge Clevenger corrected counsel by adding “[that are] not otherwise pledged to contract obligations.” Supp. Add. 24. But the Secretary’s brief does not address the amounts “not otherwise pledged to contract obligations.” Instead, the Secretary’s new proof returns to the same theme unsuccessfully advanced below: that each annual appropriation was eventually spent on something.⁸ (We use the word “spent” loosely,

⁸ *But see* Answering Br. 17 and Add. 259, 264, 268 (President’s Budgets reporting “unobligated balance[s] available” years later); JA 482-83, ¶ 26 (noting “\$1,406,176 unobligated from its [IHS] appropriation for fiscal year 1996 at the end of the fiscal year”); IHS Budget Justification Tables for FY1994, FY1995, and

because some of the hundreds of millions of dollars the Secretary's documents show as "unpaid obligations" may well have later been "deobligated," and so not actually spent at all.⁹) But more to the point, the issue of full spending is legally irrelevant. If the Cherokee Nation's contract rights vested – that is, if (as demonstrated above) Congress enacted appropriations legally available each year to pay the Cherokee's contracts in full at the time the payments were due – under *Blackhawk* the Secretary's decision to spend his appropriation in other ways, instead of "reprogramming" to the extent necessary to pay these contracts, is simply no defense. So long as Congress did not alter the legal availability of the appropriation before each payment was due, under *Blackhawk* the payment rights vested.

Alternatively, the Secretary's new documents may be intended to go beyond the Court's narrow question and shore up the government's insufficient showing under the ISDA's "reduction clause." But if so, it again fails on the precise same counts the proof below failed, *see* Answering Br. 49-54, for: (1) it fails to answer how using unrestricted annual increases in appropriations could have forced reductions in ongoing programs serving other tribes; (2) it fails to fully disclose which portion of the

FY1996, reporting the same left-over sums as the President. Supp. Add. 28, 31, 34.

⁹ APPROPRIATIONS LAW, at 7-51 - 52. *See, e.g.*, SF 133 for period ending Sept. 30, 1994 (FY1994), dated 11/8/94 (sheet 13 of 77, line 13C), indicating \$296,388,162.75 as the "Net unpaid obligations, Obligated balance."

agency's annual spending was not on a program serving other tribes; and (3) it fails to answer how using leftover year-end unobligated balances would have forced reductions anywhere. Indeed, on the second point the same IHS Budget Justifications (like the proof below) reveal that IHS annually held back between \$43,588,000 and \$49,471,000, not for "programs serving a tribe" (the language of the "reduction clause"), but for its own federal functions – its so-called "Direct Operations"¹⁰ – conduct that both falls outside the narrow "reduction clause" and violates the direct statutory prohibitions on contract reductions set forth in 25 U.S.C. §§ 450j-1(b)(1), (3) & (4). And on the third point, even the Secretary's cryptic documents continue to show substantial "[u]nobligated balances available" at the close of each year.¹¹

CONCLUSION

The Secretary's proof below and his own public documents show that the Secretary's defense of unavailable appropriations fails, and that the Cherokee Nation's contract rights vested fully upon enactment of each appropriation. There were no caps on contract payments for "ongoing" contract support costs. And as the

¹⁰ Supp. Add. 27, 30, 33 (lines entitled "Direct Operations"); *see also* JA 487 (line entitled "Direct Operations", column entitled "FY1996 Appropriation") (identifying \$42,970,296 allocated to this purpose as of September 30, 1996).

¹¹ *See, e.g.*, SF 133 for period ending Sept. 30, 1994 (FY1994), dated 11/8/94 (sheet 13 of 77, line 9A) ("\$6,841,390.01").

Secretary correctly concedes (and consistent with the views of the Comptroller General and the General Accounting Office (“GAO”), Office of Legal Counsel), there were also no caps on contract payments for “new” contract support costs.¹²

For the foregoing reasons, and those set forth in Appellees’s prior submissions, the Board’s decision below should be affirmed.

Respectfully submitted this 24th day of April 2003.

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¹² As discussed at oral argument, this is because the term of art “shall remain available” does not create a cap. The Tenth Circuit’s contrary conclusion erred by relying on a different term of art in appropriations law, while also overlooking that the cited GAO authority references approvingly the Comptroller General’s conclusion that the same term of art at issue here is “neither [a] maximum nor minimum limitation on [the] amount available for a particular object.” APPROPRIATIONS LAW, at 6-8 (citing *Forest Service* as “B-231711”) (Supp. Add. 38). And without any cap, the rule that a specific appropriation takes precedence over a more general appropriation (Reply Br. 7 n.4) is irrelevant, as is the ‘excess contracting’ hypothetical disproved herein.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Supplemental Brief has been served on the following attorneys or parties of record this 24th day of April 2003 by overnight mail:

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