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PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

PATRICK FISHER
Clerk

CHEROKEE NATION OF OKLAHOMA;
SHOSHONE-PAIUTE TRIBES OF THE
DUCK VALLEY RESERVATION,

Plaintiffs - Appellants,

v.

TOMMY G. THOMPSON, Secretary of
Health and Human Services; MICHAEL
H. TRUJILLO, Director of the Indian
Health Service, United States Department
of Health and Human Services,

Defendants - Appellees.

No. 01-7106

ALAMO-NAVAJO SCHOOL BOARD;
BRISTOL BAY AREA HEALTH
CORPORATION; LAC COURTES
ORIELLES BAND OF LAKE SUPERIOR
CHIPPEWA INDIANS; RAMAH
NAVAJO CHAPTER; OGLALA SIOUX
TRIBE; RAMAH NAVAJO SCHOOL
BOARD, INC.,

Amici Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
(D.C. NO. 99-CV-92-S)

Lloyd Benton Miller (William R. Perry, Melanie B. Osborne with him on the briefs), Sonosky, Chambers, Sachse, Miller & Munson, Anchorage, Alaska, for Plaintiffs - Appellants.

Jeffrica Jenkins Lee, Attorney, Civil Division, United States Department of Justice, Washington, D.C. (Robert D. McCallum, Jr., Assistant Attorney General, Washington, D.C.; Sheldon J. Sperling, United States Attorney, Muskogee, Oklahoma; and Barbara C. Biddle, Attorney, Civil Division, United States Department of Justice, Washington, D.C., with her on the briefs), for Defendants - Appellees.

Marsha Kostura Schmidt, Hobbs, Straus, Dean & Walker, LLP, Washington, D.C., filed an amici brief on behalf of Alamo-Navajo School Board, Bristol Bay Area Health Corporation, and LAC Courtes Orielles Band of Lake Superior Chippewa Indians.

Michael P. Gross, M.P. Gross & Associates, P.C., Santa Fe, New Mexico, and C. Bryant Rogers, Roth, VanAmberg, Rogers, Ortiz, Fairbanks & Yepa, LLP, Santa Fe, New Mexico, filed an amici brief on behalf of Ramah Navajo Chapter, Oglala Sioux Tribe, and Ramah Navajo School Board, Inc.

Before **MURPHY, ANDERSON, and BALDOCK**, Circuit Judges.

ANDERSON, Circuit Judge.

This case involves the adequacy of funding provided by the United States to plaintiffs, two Native American Tribes, for their performance of contracts operated under the Indian Self-Determination and Education Assistance Act. The Tribes appeal the grant of summary judgment to the United States. We affirm.

BACKGROUND

Under the Indian Self-Determination and Education Assistance Act (“ISDA”), 25 U.S.C. §§ 450-450(n), as amended, the Secretary of Health and Human Services (“Secretary”) may enter into contracts or compacts with Indian tribes (self-determination contracts) to permit the tribes to administer various programs that the Secretary would otherwise administer. The Act further stipulates that the Secretary will provide funding for the administration of those programs. The basic idea behind the ISDA is to promote tribal autonomy and self-determination by permitting tribes to operate programs previously operated by the federal government, but to ensure that they do not suffer a reduction in funding for those programs simply because they assume direct operation of them.

The Indian Health Service (“IHS”) provides primary health care for Indians and Alaska natives throughout the United States. In fiscal year 1994, in accordance with the ISDA, plaintiffs, the Shoshone-Paiute and the Cherokee Nation Tribes of the Duck Valley Reservation, entered into Compacts of Self-Governance and associated Annual Funding Agreements with the Secretary to operate certain IHS programs for their members.

Under § 450j-1(a) of the ISDA, the Secretary is obligated to provide funding for those self-determination contracts or compacts¹ in an amount equal to what he would have provided were IHS to continue to provide health care services itself directly. This is called the “Secretarial amount.” 25 U.S.C. § 450j-1(a)(1). See Ramah Navajo Sch. Bd., Inc. v. Babbitt, 87 F.3d 1338, 1341 (D.C. Cir. 1996) (describing the Secretarial amount as the “amount of funding that would have been appropriated for the federal government to operate the programs if they had not been turned over to the Tribe”).

In addition to the Secretarial amount, the ISDA directs the Secretary to provide contract support costs (“CSC”) to cover the direct and indirect expenses associated with operating the programs. The ISDA does not precisely define what CSC are.² We have observed that “[r]eviewing . . . the [ISDA] as a whole, . . .

¹There is no material distinction for purposes of this appeal between an agreement called a “compact” and an agreement called a “contract.” Accordingly, as the parties have done; we use the terms interchangeably.

²The ISDA provides some general guidance as to what CSC are: “the reasonable costs for activities which must be carried on by a tribal organization as a contractor . . . but which—

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

25 U.S.C. § 450j-1(a)(2). It also provides for the payment of CSC for “direct program expenses for the operation of the Federal program that is the subject of
(continued...)

‘contract support costs’ encompasses ‘indirect costs’ incurred by a tribal organization in carrying out a self-determination contract.” Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1461 (10th Cir. 1997). “Indirect costs” are, in turn, defined as those “incurred for a common or joint purpose benefiting more than one contract objective . . . ,” 25 U.S.C. § 450b(f), as contrasted with “direct program costs,” which are those “that can be identified specifically with a particular contract objective,” 25 U.S.C. § 450b(c). See Shoshone-Bannock Tribes v. Secretary, 279 F.3d 660, 663 n.5 (9th Cir. 2002); Ramah Navajo Chapter, 112 F.3d at 1457-58. As this case demonstrates, the adequacy of the funding provided for tribal indirect costs has proven to be a recurring and troublesome issue. See Ramah Navajo Chapter, 112 F.3d at 1462 (“The legislative history indicates one of the primary concerns of Congress in enacting the [1988] amendments [to the ISDA] was the chronic underfunding of tribal indirect costs.”) (citing S. Rep. No. 100-274 at 8-13 (1987)). See United States General Accounting Office, Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to Be Addressed at p.3 (June 1999) (noting that while “Tribes’ allowable contract support costs have tripled from 1989 through

²(...continued)

the contract,” as well as “any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service or activity pursuant to the contract.” 25 U.S.C. § 450j-1(a)(3)(A)(i), (ii).

1998—increasing from about \$125 million to about \$375 million. . . . Congress has not funded contract support to keep pace with these increases, resulting in funding shortfalls”).

The ISDA provides a further and, in this case, significant caveat to the funding obligations: “Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.” 25 U.S.C. § 450j-1(b); see also 25 U.S.C. § 450j(c) (“The amounts of [self-determination] contracts shall be subject to the availability of appropriations.”). The first clause in § 450j-1(b) is called the “availability clause” and the second the “reduction clause.”

Additionally, every self-determination contract entered into under the ISDA must either contain or incorporate by reference the provisions of a model agreement prescribed by the ISDA. 25 U.S.C. § 450l(a). The model agreement reiterates the availability clause, specifically providing that the amount funded by the Secretary is “[s]ubject to the availability of appropriations” 25 U.S.C. § 450l(c) (describing § 1(b)(4) of model agreement). Accordingly, the compact with the Shoshone-Paiute Tribe contained the following clause:

Funding Amount. Subject only to the appropriation of funds by the Congress of the United States and to adjustments pursuant to [25

U.S.C. § 450j-1] of the Indian Self-Determination and Education Assistance Act, as amended, the Secretary shall provide the total amounts specified in the Annual Funding Agreement.

Appellants' App. at 302. The compact with the Cherokee Nation contained virtually identical language. See id. at 425.

Additionally, the Annual Funding Agreement between the Shoshone-Paiutes and the Secretary included the following provision:

Section 9 – Adjustments.

(a) Due to Congressional Actions. The parties to this Agreement recognize that the total amount of the funding in this Agreement is subject to adjustment due to Congressional action in appropriations Acts or other laws affecting availability of funds to the Indian Health Service and the Department of Health and Human Services. Upon enactment of any such Act or law, the amount of funding provided to the Tribes in this Agreement shall be adjusted as necessary, after the Tribes have been notified of such pending action and subject to any rights which the Tribes may have under this Agreement, the Compact, or the law.

Appellants' App. at 342. The Annual Funding Agreement between the Cherokee Nation and the Secretary stated as follows:

The parties agree that adjustments may be appropriate due to unanticipated Congressional action. Upon enactment of relevant Appropriations Acts, the adjustments may be negotiated as necessary; provided, however, the Nation shall be notified and consulted in advance of any proposed adjustments. It is recognized by the parties that circumstances may arise where funding variances or other changes or modifications may be needed, and the parties shall negotiate same in good faith. Provided, however, this AFA shall not be modified to decrease or delay any funding except pursuant to mutual agreement of the parties.

Appellants' App. at 450.

Recognizing that there could be numerous tribes competing for funding, the ISDA gave the IHS some flexibility in determining how to allocate funds:

“[p]ayments of any grants or under any contracts pursuant to section 450f and 450h of this title may be made in advance or by way of reimbursement and in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this part.” 25 U.S.C. § 450j(b). This case concerns a dispute about the allocation of CSC funds to the plaintiff Tribes for fiscal years 1996 and 1997.

In allocating CSCs for those years, IHS categorized contracts with tribes into two broad groups—“existing” contracts and “new or expanded” contracts.³ Existing contracts were those that a tribe had been operating in a prior year or years. IHS allocated CSCs to existing contracts generally in accordance with the recommendations contained in appropriation committee reports. New or expanded contracts were those involving programs which tribes had never operated before. With respect to these new or expanded contracts, IHS took the ISD Fund Congress had appropriated for the “transitional costs of initial or

³IHS' methodology in awarding CSC funds was explained in an internal agency guideline call the Indian Self-Determination Memorandum 92-2. This memorandum was superseded in 1996 by IHS Circular No. 96-04, which contains essentially the same methodology.

expanded tribal contracts” and established a priority list based on the date the tribe requested funding for a new or expanded contract. Each year IHS would fully pay for CSCs for new or expanded contracts at the top of the priority list, and continue down the list until the ISD Fund was fully depleted. Contracts that had been so funded were removed from the list, and those below it advanced. In practice, the funds for new or expanded contracts were depleted before every tribe on the priority list received its CSC funding for new or expanded programs.

At the end of each year, the IHS would summarize the full CSC needs of each contracting tribe, in the prior year, calculate how much the IHS paid toward those CSC needs, and determine the resulting shortfall, if any. The Director of the Division of Financial Management for the IHS stated that in 1997 there was a CSC funding shortfall of \$81,996,000 and in 1996 a CSC funding shortfall of \$43,000,000. Fitzpatrick Decl. at ¶ 8, Appellants’ App. at 530.

As indicated, this case concerns a dispute about the amount of CSCs provided to the plaintiff Tribes in fiscal years 1996 and 1997.⁴ For fiscal year 1996, the House Committee on Appropriations recommended that approximately \$1.7 billion be appropriated to IHS, with \$153 million to be spent on CSCs for existing self-determination contracts, and \$7.5 million on such costs for new or

⁴Plaintiffs aver that the Shoshone-Paiute tribe was underfunded in 1996 and 1997, and that the Cherokee Nation tribe was underfunded in 1997.

expanded self-determination contracts. See H.R. Rep. No. 104-173, at 97 (1995). As actually enacted, the Appropriations Act for 1996 appropriated the recommended \$1.7 billion, of which approximately \$1.374 billion was unrestricted. Of that \$1.374 billion, however, \$7.5 million “shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act.” Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-189 (1996).

For fiscal year 1997, Congress similarly appropriated a lump sum of approximately \$1.8 billion to IHS for administration of the ISDA, of which \$160,000,000 had been earmarked by the appropriations committee report for CSCs for existing contracts. See S. Rep. No. 104-319, at 90 (1996). As with the 1996 appropriation, in the actual Appropriations Act, Congress appropriated the recommended \$1.8 billion, with \$1.426 billion unrestricted, and; as in 1996, it allocated \$7.5 million to the ISD Fund for new or expanded contracts under the ISDA. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-212, 3009-213 (1996). Thus, neither Act on its face restricted or limited the amount of funds, out of the lump-sum appropriation, available for

CSCs for ongoing programs. Both designated \$7.5 million to “remain available until expended” in the ISD Fund to pay for CSCs for new or expanded contracts.

In fiscal years 1996 and 1997, the requests for CSCs for new and expanded contracts exceeded the \$7.5 million allocated. As a result, full CSC funding for such new and expanded contracts was delayed and/or not paid at all for some tribes, including the plaintiffs. Additionally, plaintiffs allege that CSC funding for their ongoing contracts was inadequate. The Cherokee Nation claims that, in total, it was not paid \$3.4 million in CSC for fiscal year 1997. See First Amended Comp. at ¶¶ 31, 32; Appellants’ App. at 44. The Shoshone-Paiute Tribe claims it was not paid \$3.5 million in CSC for fiscal years 1996 and 1997. See id. at ¶¶ 14, 15; Appellants’ App. at 39-40; Fitzpatrick Decl. at 18, Appellants’ App. at 534-35. Both Tribes assert that, because of these budget shortfalls, they were compelled to make substantial cuts in their programs.

On October 21, 1998, Congress passed the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 314, 112 Stat. 2681-288 (1998), which imposed a mandatory cap on the total amount of CSC funding for new and expanded programs. Section 314 states in part:

Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Law 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or

annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes

The public laws referenced in § 314 included the 1996 and 1997 Appropriations Acts which, as indicated, had appropriated \$7.5 million for CSCs for new and expanded programs. Additionally, the committee reports which preceded those laws had earmarked certain amounts for CSCs for ongoing programs. In 1998 Congress also enacted a one-year moratorium barring the Secretary from entering into further ISDA contracts. See id., § 328; see also Citizen Potawatomi Nation v. Norton, 248 F.3d 993, 1001 (10th Cir.), modified on rehearing, 257 F.3d 1158 (2001).

Alleging that the Secretary failed to fully pay all of their CSCs associated with both the ongoing portions of their compacts with the IHS and the initial and expanded portions of their compacts, the plaintiff Tribes brought administrative claims against the Secretary under the Contract Disputes Act, 41 U.S.C. §§ 601-13. When that failed to resolve the dispute, the Tribes filed this action in March 1999, seeking damages and declaratory relief against the United States, the Secretary, and the Director of the IHS. All parties filed motions for summary judgment, and, on June 25, 2001, the district court denied the Tribes' motions, granted the United States' motion for summary judgment and dismissed the case.

Concluding that the language of the ISDA was clear and unambiguous, the district court reasoned as follows:

This court finds the contracts at issue are conditioned on the IHS having sufficient funding. This court does not agree with the interpretation espoused by plaintiffs that the language in the Self-Determination Contracts which states that contract support costs are “subject to availability of appropriations” limits only the Secretary’s ministerial duty to disburse funds but not her ultimate liability for full contract support costs. . . . To adopt plaintiffs’ interpretation would render the phrase “availability of appropriations” meaningless.

Cherokee Nation v. United States, 190 F. Supp. 2d 1248, 1259 (E.D. Okla. 2001).

The court further found that:

the money appropriated to IHS for fiscal years 1996 and 1997 was already committed to pay for funding of recurring costs and other mandatory obligations. Thus, there were simply insufficient appropriations to pay the contract support costs requested by plaintiffs. Further, the IHS could not use any of its annual appropriations to pay plaintiffs’ contract supports costs without impairing its ability to discharge its responsibilities with respect to other tribes and individual Indians.

Id. at 1260. The court also held that § 314 limited the funds available for CSCs

for new or expanded programs:

Section 314 imposes a \$7.5 million cap on IHS’ payments each year to tribes for contract support costs for their new and expanded programs from 1994 through 1998. This amount had already been disbursed for the years in question. Section 314 bars further payments for those years since no appropriations were available.

Id. at 1262. Finally, the court rejected plaintiffs' argument that, regardless of the level of appropriations, the government was nonetheless liable to them under contract principles for their full CSCs.

Plaintiff Tribes appeal, arguing: (1) sufficient appropriations were legally available such that the Secretary was able to and should have paid plaintiffs' full CSCs for fiscal years 1996 and 1997 and neither the availability-of-appropriations clause nor the reduction clause contained in 25 U.S.C. § 450j-1(b) provide a defense to that obligation; (2) section 314 does not excuse the failure to pay because it would amount to a retroactive extinguishment of vested contractual and statutory rights, thereby, at a minimum, exposing the government to liability in damages; and (3) plaintiffs' contracts under the ISDA obligated the IHS to secure adequate appropriations to satisfy its contractual obligations.

We review the grant of summary judgment *de novo*, applying the same standard as did the district court. Ramah Navajo Chapter, 112 F.3d at 1460. Summary judgment is appropriately granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "We examine the factual record and reasonable inferences therefrom in the light most favorable to the nonmoving party." Ramah Navajo Chapter, 112 F.3d at 1460.

