

FILED

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

1 CALIFORNIA RURAL INDIAN)
 2 HEALTH BOARD, et al.)
 3)
 4 Plaintiffs,)
 5)
 6 v.)
 7)
 8 DONNA SHALALA, Secretary)
 9 UNITED STATES DEPARTMENT OF)
 10 HEALTH & HUMAN)
 11 SERVICES, et al.)
 12)
 13 Defendants.)

No. C-96-3526-DLJ

ORDER

10 On November 17, 2000, the Court heard argument on the
 11 parties' cross-motions for summary judgment. John R. Shordike
 12 appeared on behalf of plaintiffs. Karen K. Richardson appeared
 13 for the United States Department of Health and Human Services.
 14 Having considered the arguments of counsel, the papers
 15 submitted, the applicable law, and the record in this case, the
 16 Court hereby RULES as follows.

I. BACKGROUND

18 Plaintiffs comprise and represent more than half of the
 19 federally-recognized Indian Tribes residing in California.
 20 Four of the six plaintiffs in this suit are tribal
 21 organizations that were established to serve the health care
 22 needs of numerous California Indian tribes. They are the
 23 California Rural Indian Health Board ("CRIHB"), Riverside-San
 24 Bernadino County Indian Health Council ("RSBCIH"), Southern
 25 Indian Health Council ("SIHC"), and the Indian Health Council
 26 ("IHC"). The other two plaintiffs, the Sycuan Band of Mission
 27 Indians ("Sycuan") and the Yurok Tribe ("Yurok"), are
 28 federally-recognized American Indian Tribes located in

United States District Court
For the Northern District of California

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1 California.

2 Plaintiffs bring this action against the administrators of
3 the United States Department of Health and Human Services
4 ("HHS") and the Indian Health Service ("IHS") (collectively
5 "the Agencies") under 25 U.S.C. § 450 et seq., the Indian Self-
6 Determination and Education Assistance Act ("ISDA"). IHS
7 provides for primary health care services for Native American
8 populations through three separate mechanisms. See S.Rep.No.
9 102-392, 102d Cong., 2d Sess., at 2-4 (1992), reprinted in 1992
10 U.S.C.C.A.N.3943. First, IHS contracts with tribal governments
11 and tribal groups pursuant to ISDA to allow those tribes to
12 operate independent health care delivery programs previously
13 provided by IHS--these are the "self-determination" contracts
14 at issue in this suit. Second, IHS provides health care
15 services to Native Americans directly where tribes are not
16 self-determination contractors. Third, IHS funds contracts and
17 grants for urban Indian organizations operating health
18 programs. Id. IHS has twelve regional offices across the
19 country. The office implicated most by this suit is the
20 California Area Office ("CAO"). IHS also has a Headquarters
21 Office in Rockville, Maryland.

22 A. Indian Self-Determination and Education Assistance Act

23 Enacted in 1975, the ISDA authorizes IHS to award to
24 tribal organizations amounts that IHS would otherwise have
25 spent on programs servicing Native American populations, so
26 that the tribal organizations may administer the programs
27 themselves. Under Title I of the Act, the Secretaries of HHS
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1 and the Department of the Interior are directed to enter into
2 "self-determination contracts" with tribal organizations to
3 "plan, conduct, and administer programs or portions thereof."
4 25 U.S.C. § 450f(a)(1)(E). Through self-determination
5 contracts, tribal organizations may elect to provide directly
6 to their members most of the services formerly provided by
7 IHS.¹ Funding for self-determination contracts is provided by
8 Congress through the Indian Health Care Improvement Act and the
9 Snyder Act in two lump-sum appropriations.

10 1. The contracting process

11 The contracting process begins when a tribal organization
12 submits a proposal for a self-determination contract, or a
13 proposal to amend or renew an existing self-determination
14 contract, to the Secretary of HHS for review. The ISDA directs
15 the Secretary, within ninety days after receipt of the
16 proposal, to approve the proposal and award the contract unless
17 the Secretary provides written notification to the applicant
18 that contains a specific finding that clearly demonstrates, or
19 that is supported by a controlling legal authority, that

- 20 (A) the service to be rendered to the Indian
21 beneficiaries of the particular program or function to be
22 contracted will not be satisfactory;
- 23 (B) adequate protection of resources will not be assured;
- 24 (C) the proposed project or function to be contracted for
cannot be properly completed or maintained by the proposed

25 ¹ There are two exceptions. Grants to Indians to enter the
26 health professions, see 25 U.S.C. §§ 1611-1614, and
27 management of the Catastrophic Health Emergency Fund, see
28 25 U.S.C. § 1621a, remain the province of IHS.

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contract;

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a); or

(E) the program, function, service or activity (or portion thereof) that is the subject of the proposal is beyond the scope of the programs, functions, services or activities covered under [section 450f(a)(1)] because the proposal includes activities that cannot lawfully be carried out by the contractor.

25 U.S.C. § 450f(a)(2).

If the Secretary declines to enter into an ISDA contract, the Secretary must (1) state objections in writing to the tribe within sixty days, (2) provide assistance to the tribe or tribal organization to overcome the stated objections, and (3) provide the tribe with a hearing and the opportunity for appeal. See 25 U.S.C. § 450f(b).

2. Funding of contracts

The ISDA strictly limits the situations in which the Secretary may reduce the amount of funds provided under self-determination contracts. See 25 U.S.C. § 450j-1(b). On the other hand, the ISDA also states that the provision of funds "is subject to the availability of appropriations." Id. Further, the ISDA states that "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." Id.

The amount of funds provided under the terms of self-determination contracts "shall not be less than the appropriate Secretary would have otherwise provided for the operation of

1 the programs or portions thereof for the period of the
2 contract. . . " 25 U.S.C. § 450j-1(a)(1). This amount is
3 commonly called the "base amount" or "secretarial amount."

4 Until 1988, self-determination contractors received a
5 "base amount" or "secretarial amount" to fund the direct
6 operation of health care programs. The administrative
7 component of that program, in contrast, remained the province
8 of IHS. In 1988, Congress amended the ISDA to authorize the
9 Secretary to enter into Tribal Self-Governance Agreements,
10 whereby the tribes assumed responsibility not only for direct
11 operation of health care programs, but for the administration
12 of those programs. See 25 U.S.C. § 458aa.² As a result,
13 Congress provided additional funding under each self-
14 determination contract to include "contract support costs,"
15 defined as "an amount for the reasonable costs for activities
16 which must be carried on by a tribal organization as a
17 contractor to ensure compliance with the terms of the contract
18 and prudent management." 25 U.S.C. § 450j-1(b).

19 Contract support costs include two categories of expenses
20 at issue in this case, "direct costs" and "indirect costs."
21 "Direct costs" include initial startup expenses for a health
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23 ² According to the Congressional Declaration of Policy,
24 one of the purposes of this section is to permit "an
25 orderly transition" from federal domination of programs
26 and services to Indian tribes with "meaningful authority
27 to plan, conduct, redesign, and administer programs,
28 services, functions, and activities that meet the needs of
the individual tribal communities." See id.

1 care program, unemployment taxes, or workers compensation
2 insurance--these are costs attributable to a particular
3 program. See 25 U.S.C. § 450j-1(a)(3)(A)(i). Indirect costs
4 are costs not attributable to any particular IHS program, such
5 as overhead expenses for facilities and equipment or data
6 processing. See id. at (ii).

7 Congress again amended the ISDA in 1994 with the Indian
8 Self-Determination and Contract Reform Act of 1994, Title I,
9 Public Law 103-413. The 1994 amendments make numerous changes
10 to the ISDA. See Senate Report No. 103-374, P.L. 103-413,
11 Indian Self-Determination Act Amendments of 1994 (Section by
12 Section Analysis). The 1994 amendments enabled tribes to
13 contract with IHS to take over administrative functions one
14 level higher, at the level of the Rockville, Maryland
15 Headquarters Office. Since Headquarters' administrative
16 components support all IHS health care programs and all tribes,
17 under the 1994 amendments a self-determination contractor takes
18 over only the portion of the administrative components
19 supporting the particular program that the contractor has
20 agreed to operate. That amount is referred to as the
21 "headquarters tribal share" or "tribal share." As a result,
22 the base or secretarial amount since 1994 includes funds for
23 operation of a particular program, as well as any connected
24 headquarters tribal share.

25 3. Other Relevant ISDA Amendments

26 The 1988 amendments to ISDA conferred original
27 jurisdiction on the federal district courts over any civil
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1 action or claim arising under the ISDA. See 25 U.S.C. § 450m-
2 1(a). This provision authorizes the district courts to order
3 money damages or injunctive relief for any claim against the
4 Secretary arising under self-determination contracts. Id.

5 The 1988 amendments also added a provision requiring that
6 unless the parties agree otherwise, any self-determination
7 contract must contain or incorporate the provisions of the
8 model agreement set forth in 25 U.S.C. § 4501.

9 Finally, Congress limited the authority of the Secretaries
10 to promulgate rules and regulations under the ISDA:

11 Except as may be specifically authorized in this
12 subsection, or in any other provision of this subchapter,
13 the Secretary of the Interior and the Secretary of Health
14 and Human Services may not promulgate any regulation, nor
impose any nonregulatory requirement, relating to self-
determination contracts or the approval, award, or
declination of such contracts. . . .

15 25 U.S.C. § 450k(a)(1).

16 B. Procedural History

17 On September 27, 1996, plaintiffs filed their Complaint in
18 this case, alleging ten separate violations of the ISDA. On
19 August 25, 1998, the Court granted defendants' motion for
20 summary judgment on plaintiffs' First, Third, Fourth, Sixth,
21 Seventh, and Eighth Claims. Plaintiffs' Second, Fifth, Ninth,
22 and Tenth Claims survived, and are the subject of the instant
23 cross-motions for summary judgment.

24 Following the Court's grant of partial summary judgment,
25 defendants submitted a status conference statement in which
26 they stated they were prepared to supplement the administrative
27 record so as to enable the Court to resolve the plaintiffs'
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1 surviving claims. Defs.' Status Conf. Statement at 2. On
2 October 29, 1998, the Court ordered defendants to file the
3 supplemental information identified in their status conference
4 statement. The Court also granted plaintiffs the opportunity
5 to engage in additional discovery relating to the remaining
6 claims.

7 One of the four claims remaining in this litigation, the
8 Fifth Claim, concerns the question of whether defendants have
9 violated ISDA by failing to timely and fully pay the qualified
10 contract support costs ("CSC") of ISDA contractors. Complaint
11 ¶ 67. On December 2, 1998, defendants filed a motion for leave
12 to modify the scope of the supplemental information that they
13 were to provide with regard to this claim. Defendants asserted
14 that newly enacted federal legislation, section 314 of the
15 Omnibus Consolidated and Emergency Supplemental Appropriations
16 Act, 1999, Pub. L. 105-277, 105th Cong., 2d Session (H.R. 4328)
17 ("section 314"), mooted many of the factual questions the
18 supplemental information was supposed to answer.

19 In its Order of April 26, 1999, the Court articulated the
20 uncertainties regarding the applicability of section 314 to
21 plaintiffs' CSC claim, and found that ruling on the impact of
22 section 314, or its constitutionality, would be premature at
23 that time. As a result, the Court found that the passage into
24 law of section 314 did not preclude plaintiffs from conducting
25 discovery relating to their CSC claim.

26 Plaintiffs and defendants now bring cross-motions for
27 summary judgment. Defendants seek summary judgment on all
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1 remaining claims (Second, Fifth, Ninth and Tenth). Plaintiffs
2 seek summary judgment on the Second and Fifth claims. The
3 motion is now before the Court.

4 C. Standard of Review

5 In its Order of April 24, 1997, this Court found that the
6 determination of the appropriate standard of review under the
7 ISDA was a matter of first impression. After reviewing the
8 text of the Act and its legislative history, the Court
9 concluded that Congress anticipated review under the
10 Administrative Procedures Act ("APA") rather than review de
11 novo. See Order of April 24, 1997 at 3; see also Yukon-
12 Kuskokwim Health Corp. v. Shalala, Case No. CV 96-155 (D.Alaska
13 April 15, 1997) (employing the APA standard of review for
14 challenge under ISDA); but see Shoshone-Bannock Tribes v.
15 Shalala, 988 F.Supp. 1306, 1313-1314 (D.Or. 1997) ("Shoshone-
16 Bannock I") (reviewing ISDA claims de novo).

17 Under the APA, the Court must uphold an agency decision
18 unless the plaintiff can show that the decision was "arbitrary,
19 capricious, an abuse of discretion, or otherwise not in
20 accordance with the law." See 5 U.S.C. § 706(2)(A).

21 D. Summary Judgment

22 The Federal Rules of Civil Procedure provide for summary
23 adjudication when "the pleadings, depositions, answers to
24 interrogatories, and admissions on file, together with the
25 affidavits, if any, show that there is no genuine issue as to
26 any material fact and that the party is entitled to a judgment
27 as a matter of law." Fed. R. Civ. P. 56(e).

1 In a motion for summary judgment, initially it is the
2 moving party's burden to establish that there is "no genuine
3 issue of material fact and that the moving party is entitled to
4 judgment as a matter of law." Fed. R. Civ. P. 56 (c); British
5 Airways Board v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978).
6 Subsequently, "[i]f the party moving for summary judgment meets
7 its initial burden of identifying for the court those portions
8 of the materials on file that it believes demonstrate the
9 absence of any genuine issues of material fact," the burden of
10 production then shifts so that "the non-moving party must set
11 forth, by affidavit or as otherwise provided in Rule 56,
12 'specific facts showing that there is a genuine issue for
13 trial.'" T.W. Elec. Service, Inc. v. Pacific Elec. Contractors
14 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp.
15 v. Catrett, 477 U.S. 317 (1986)); Kaiser Cement Corp. v.
16 Fischbach & Moore, Inc., 793 F.2d 1100, 1103-04 (9th Cir.),
17 cert. denied, 479 U.S. 949 (1986).

18 A moving party who will have the burden of proof at trial
19 is entitled to summary judgment only when the evidence
20 indicates that no genuine issue of material facts exist. Fed.
21 R. Civ. P. 56(c); Celotex, 477 U.S. at 325. A moving party who
22 will not have the burden of proof at trial need only point to
23 the insufficiency of the other side's evidence, thereby
24 shifting to the non-moving party the burden of raising genuine
25 issues of fact by substantial evidence. T.W. Electric, 809
26 F.2d at 630 (citing Celotex, 477 U.S. at 323); Kaiser Cement,
27 793 F.2d at 1103-04.

1 In judging evidence at the summary judgment stage, the
2 Court does not make credibility determinations or weigh
3 conflicting evidence, and draws all inferences in the light
4 most favorable to the non-moving party. T.W. Electric, 809
5 F.2d at 630-31 (citing Matsushita Elec. Indus. Co., Ltd. v.
6 Zenith Radio Corp., 475 U.S. 574 (1986)); Ting v. United
7 States, 927 F.2d 1504, 1509 (9th Cir. 1991).

8 II. DISCUSSION

9 A. IHS's Forward Funding Policy (Second Claim)

10 Plaintiffs and defendants cross-move for summary judgment
11 on the Second Claim of plaintiff's complaint, that defendants
12 violated ISDA by utilizing a policy of "forward funding" of
13 ISDA contracts. The forward funding policy is the practice by
14 which the California Area Office of IHS ("CAO") awarded
15 contractors only eleven months of base contract funding for a
16 fiscal year rather than a full twelve months, with the twelfth
17 month's funding to be made up in the succeeding fiscal year.
18 Plaintiffs point out that this Court determined by its August
19 25, 1998 Order that the forward funding policy of the IHS
20 violates ISDA. Plaintiffs concede that the CAO stopped this
21 practice some time in 1998, but claim that they are due
22 interest earnings lost as a result of the practice as it
23 applied to them before that time.

24 Plaintiffs offer the declarations of the comptrollers of
25 RSBCIH, CRIHB, IHC, and Sycuan which calculate lost interest
26 earnings on delayed payments of base (or secretarial) amounts.
27 Notably, plaintiffs also include in their calculations amounts
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