

No. 08-2262

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

RAMAH NAVAJO CHAPTER, *et al.*,

Plaintiffs-Appellants,

v.

KENNETH L. SALAZAR, *et al.*,

Defendants-Appellees

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
The Honorable Senior Judge C. LeRoy Hansen**

**BRIEF *AMICUS CURIAE* OF NATIONAL CONGRESS
OF AMERICAN INDIANS IN SUPPORT OF APPELLANTS
AND FOR REVERSAL OF THE DECISION BELOW**

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus National Congress of American Indians ("NCAI") is a non-profit organization. NCAI has no parent corporation and, as it has no stock, no publicly held company owns 10 percent or more of its stock.

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STATEMENT OF *AMICUS CURIAE* INTEREST

The National Congress of American Indians ("NCAI") was founded in 1944 and is the largest tribal government organization in the United States. NCAI serves as a forum for consensus-based policy development among its over 250 member tribal governments from every region of the country. NCAI's mission is to inform the public and all branches of the federal government about tribal self-government, treaty rights, and a broad range of federal policy issues affecting tribal governments. NCAI and its members have considerable experience with the history and operation of contracts under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.* ("ISDEAA").

NCAI submits this brief with the consent of all parties to this appeal under the authority of Federal Rules of Appellate Procedure 29(a). NCAI believes the brief will help the Court understand the questions presented in a broader context framed by the specific history of the ISDEAA and the national policy of tribal self-determination. Full payment of contract support costs to Indian tribes under ISDEAA contracts has been in controversy since the ISDEAA became law in 1975 and remains a top priority of NCAI. NCAI supports the position of the Appellants Ramah Navajo Chapter, et al., and urges reversal of the decision of the district court below.

INTRODUCTION

By all accounts, the policy of tribal self-determination embodied in the ISDEAA has greatly improved services to Indians while building tribes' managerial and governmental capacities.¹ The persistent failure of the Bureau of Indian Affairs ("BIA") to fully fund contract support costs, however, undermines self-determination by forcing contracting tribes to either subsidize the federal programs they assume or cut back on services they provide in order to cover unavoidable administrative costs. Ten years ago, amicus NCAI undertook an extensive study of the contract support cost crisis. The study's number one finding was as follows:

The payment of full contract support costs is essential to the success of the Self-Determination Policy, empowerment of Tribal governments and to avoid a contracting *penalty* associated with the transfer of federal programs to tribal operation....

NAT'L CONGRESS OF AM. INDIANS NAT'L POLICY WORK GROUP ON CONTRACT

SUPPORT COSTS: FINAL REPORT at 4 (July 1999) (emphasis in original). Ten years

later, BIA still interprets the ISDEAA as embodying Congressional intent to

¹ See e.g., Miccosukee Tribe of Indians of Florida, Chairman Billy Cypress, Prepared Statement Before the House Resource Committee (Aug. 3, 1999) (describing self-determination as "the most successful Indian policy [ever] adopted by the United States"); S. Hrg. 109-688 at 2 (Sept. 20, 2006) (Statement of Hon. Lisa Murkowski) ("There is little dispute within Indian country that the policy of self-determination ... is probably one of the best, if not the single best thing that this Federal Government has ever done to help our Native people.").

penalize tribal contractors for exercising their rights to self-determination—and the district court below agreed.

Appellants have asked this Court to correct errors of law that result in basic unfairness. Under the district court's interpretation of the ISDEAA, Congress intended not only to penalize tribal contractors compared to direct service tribes, but also to make Indian tribes second-class contractors not entitled to the full indirect cost recovery routinely afforded all other government contractors.

NCAI agrees with Appellants that this interpretation is wrong as a matter of law and basic fairness. Appellants' arguments demonstrate well that the ruling below should be reversed. In this brief, NCAI supplements those arguments by elaborating on (1) the hardships and inequities wrought by contract support cost shortfalls; (2) the *St. Regis* case,² which demonstrates the Secretary's "contract authority" under the ISDEAA; and (3) the *Choctaw* case,³ which shows that recovery of otherwise valid claims is not precluded by the appropriations "caps" on which the Government relies.

² *St. Regis Mohawk Tribe*, HHS Departmental App. Bd., No. A-02-12, Dec. No. 1808 (2002) (attached as Exhibit A).

³ *Appeals of Mississippi Band of Choctaw Indians*, 06-1 BCA ¶ 33253, 2006 WL 1009210 (I.B.C.A.) (2006) (attached as Exhibit B).

ARGUMENT

I. Chronic Contract Support Cost Shortfalls Subject Tribal Programs to Severe Hardships.

The ISDEAA was enacted in 1975 to redress "the prolonged Federal domination of Indian service programs" by allowing tribes to exercise increased control over those programs. 25 U.S.C. § 450(a)(1). To enable tribes to provide these services, the ISDEAA requires that program funding included in the contract "not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract...." 25 U.S.C. § 450j-1(a)(1). This amount, often referred to as the "Secretarial" or "program" amount, does not reflect the full cost of carrying out programs in the contract. Tribes must also carry out administrative activities that the Secretary does not need to carry out because they are done by other federal agencies, for example the Office of Personnel Management, the General Services Administration, the General Accountability Office, and the Department's Office of General Counsel. In addition, Tribes incur costs to carry out ISDEAA contracts that the Secretary does not incur when he carries out the activities directly, such as obtaining insurance, and completing annual audits under the Single Agency Audit Act, 31 U.S.C. § 7501 *et seq.*

To cover these additional administrative costs, Tribes historically were compelled to either divert federal program funds, thus reducing services, or expend

tribal funds, in effect subsidizing the federal program. In 1987, responding to "the overwhelming administrative problems caused by indirect cost shortfalls," S. Rep. No. 100-274, at 12 (1987), Congress amended the ISDEAA by adding a new section 106,⁴ which requires payment of full contract support cost funding. 25 U.S.C. § 450j-1(a)(2), (g); Appellants' Brief at 7-10. The Senate Report accompanying the 1988 amendments emphasized several times that these provisions are not half-way measures meant to reduce diversion of program and tribal funds, but to eliminate such diversion by mandating full funding. *E.g.*, S. Rep. No. 100-274, at 13 ("Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed.").

Full funding is critical because of the devastating effects of contract support cost shortfalls. By definition, contract support costs are "the *reasonable* costs for activities which *must* be carried out by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management." 25 U.S.C. § 450j-1(a)(2) (emphasis added). These are fixed and unavoidable costs, such as insurance, property and personnel management systems, audits, and facilities overhead and maintenance. Faced with contract support cost shortfalls, tribes have limited options, none of them good:

⁴ Indian Self-Determination Amendments of 1987, Pub. L. No. 100-472, § 205 (Oct. 5, 1988), codified at 25 U.S.C. § 450j-1.

(1) Cut Indirect Costs: One option is for tribes to cut administrative costs. However, cost reduction can only go so far before becoming counterproductive. Cost reduction measures reported by tribes range from turning off lights and air conditioning to reducing staff to forgoing equipment purchase and repair. At a certain point, administrative infrastructure (personnel, computer systems, accounting systems) deteriorates, reducing productivity and efficiency and jeopardizing contract compliance. GAO/RCED-99-150, Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to Be Addressed, at 39-40 (1999) ("GAO Report").

(2) Use Program Funding: Another alternative is for tribes to use direct program dollars to cover contract support cost shortfalls. This practice reduces the resources available for already underfunded and much-needed programs and services. The Principal Chief of the Cherokee Nation explained this dilemma to the Senate Committee on Indian Affairs:

The contract support cost problem has caused severe financial strains on the Cherokee Nation's programs and facilities, as it has for many other tribes in the country. What it means in real terms is that the Nation must reduce these critical health, education and other programs to pay for these shortages.

S. Hrg. 108-540, Tribal Contract Support Cost Technical Amendments: Hearing on S. 2172 Before the Senate Comm. on Indian Affairs, at 34 (April 28, 2004) (written statement of Chad Smith).

(3) Use Tribal Resources: A third option is for tribes to cover contract support cost shortfalls with revenues from tribal businesses, trust funds, or other resources. These resources could otherwise be used for economic development, land acquisition, additional services, or other purposes. S. Rep. 100-274 at 8-9 (1987) ("funds derived from trust resources, which are needed for community and economic development, must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility"). Forcing tribes to divert their own funds to administer federal programs not only creates tangible harm, in the form of lost economic opportunities, but it is inappropriate and inconsistent with how other government contractors are treated. As government contracting expert Herbert Fenster testified to the Senate Committee on Indian Affairs in 2004, it would be "unthinkable" for the General Services Administration to suggest that IBM bear the indirect costs of building computers for the government. S. Hrg. 108-540, Tribal Contract Support Cost Technical Amendments: Hearing on S. 2172 Before the Senate Comm. on Indian Affairs, at 20 (April 28, 2004) (statement of Herbert Fenster, citing U.S. CONST. art. I, § 9, cl. 7).

(4) Forgo Self-Determination: A final option is for tribes to forgo assuming federal programs through the self-determination and self-governance programs. The lack of full contract support funding has, according to BIA's own testimony to

Congress, played a significant role in the leveling off of participation in self-determination and self-governance in recent years. *See, e.g.*, S. Hrg. 109-688, Oversight Hearing on Tribal Self-Governance Before the Senate Comm. on Indian Affairs at 129 (Sept. 20, 2006) (statement of George T. Skibine, Acting Deputy Assistant Sec. – Indian Affairs, noting relatively flat rate of participation in self-governance, and reporting that "tribes have indicated that they would increase their overall participation if the issue of contract support cost funding was resolved"); H.R. Hrg. 106-9 at 14 (Feb. 24, 1999) (statement of Assistant Sec. – Indian Affairs Kevin Gover that "[t]he first step" toward expanding self-governance "is definitely 100 percent funding of contract support").

The options described above, either alone or in combination, force tribes to slash administrative capacity, divert program resources to cover administrative expenses, subsidize federal programs with their own scant tribal resources, and/or curtail or forgo self-determination altogether. In effect, tribes are shortchanged and treated as second-class government contractors. Yet the district court's interpretation of the ISDEAA is based on the premise that Congress intended to write these inequities into law, so that tribes, unlike other government contractors, could never recover their full indirect costs. That premise is unfounded, as demonstrated by Appellants' Brief and as further supported in the next sections.

II. The Self-Determination Act Grants the Secretary Contract Authority, as Recognized by the HHS Appeals Board in the *St. Regis* Decision.

Appellants argue correctly that the Secretary has "contract authority," the ability and indeed the duty to enter into binding legal agreements with tribal contractors under the ISDEAA in advance or in excess of appropriations. *See* Appellants' Brief at 37-52; General Accountability Office, II PRINCIPLES OF FEDERAL APPROPRIATIONS LAW at 6-88 to 6-90 (discussing contract authority). While the Secretary's ability to liquidate contract obligations is "subject to the availability of appropriations," 25 U.S.C. § 450j-1(b), the statute commands the Secretary to award the contract itself in advance of appropriations under certain circumstances.

The *St. Regis* decision illustrates this point well. In *St. Regis Mohawk Tribe*, HHS Departmental App. Bd., No. A-02-12, Dec. No. 1808 (2002) ("*St. Regis*"), the Tribe proposed an Annual Funding Agreement ("AFA") for calendar year 1999, a period that spanned federal fiscal years 1999 and 2000. *See* 25 U.S.C. § 450j(d)(1) (requiring, upon tribal election, use of calendar year as basis for contracts or agreements). The Tribe requested payment in a lump sum at the beginning of the year, as authorized by the ISDEAA. *Id.* § 450l(c), section 1(b)(6)(B)(i) of mandatory model contract; *id.* § 450l(b). The Indian Health Service ("IHS") partially declined the Tribe's proposal on the basis that it exceeded the applicable funding level. *See* 25 U.S.C. 450f(a)(2)(D) (allowing Secretary to decline proposal

to extent it exceeds applicable funding level). Because federal FY 2000 began October 1, 1999, and no appropriation for that year had been enacted, IHS argued, the agency could not pay the Tribe's Headquarters tribal shares for the last three months of calendar year 1999. Instead, IHS paid a nine-month lump sum in January, and a three-month lump sum after October 1.⁵

The Department of Health and Human Services ("HHS") Departmental Appeals Board ("DAB") affirmed a ruling by the Administrative Law Judge ("ALJ") that the IHS declination violated the ISDEAA. *St. Regis* was entitled to a lump-sum payment for the full calendar year up front, despite the fact that the contract spanned two federal fiscal years. *St. Regis*, Exh. A at 7. The IHS argued that this would violate the Anti-Deficiency Act by obligating FY 2000 funds in advance of the appropriation, but the DAB rejected this argument. "Since Congress clearly intended that tribes electing to proceed on a calendar year basis would receive on January 1 payments overlapping the next Federal fiscal year, that fact alone indicates that Congress did not intend that the Anti-Deficiency Act would apply to obviate the express statutory language regarding these contracts." *Id.* at 9. Since the contract was otherwise lawful, the DAB concluded, IHS could obligate FY 2000 funds in advance of the appropriation without violating the Anti-Deficiency Act. *Id.*

⁵ IHS continued the same practice in calendar years 2000 and 2001; the Tribe filed claims for each year, and the appeals were consolidated.

The district court below quoted dictum from *Cherokee Nation v. Leavitt*, 543 U.S. 631, 643 (2005), stating that "normally" a subject-to-availability clause means that "an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become *binding* unless and until Congress appropriates funds for that year." *Ramah Navajo Chapter v. Norton*, Civ. No. 90-957, Mem. Op. and Order at 14 (D.N.M. Aug. 31, 2006). Whatever it might "normally" mean, the ISDEAA's availability clause did not preclude recovery of full contract support costs in *Cherokee*, and it did not preclude recovery of full funding in advance of an appropriation in *St. Regis*. In fact, the *Cherokee* decision has been read to confirm the Secretary's contract authority under the ISDEAA regardless of appropriations. See Appellants' Brief at 42 (citing 19 Nash & Cibinic Report No. 29, at 4-5 (2005)). The DAB recognized this contract authority three years earlier in *St. Regis*, a decision fully consistent with *Cherokee*.⁶

⁶ The government briefly discussed *St. Regis* below, but focused entirely on the ALJ's Recommended Decision and ignored the DAB's Final Decision on Review. See Def. Supp. Mem. in Support of Cross-Motion for Partial Summary Judgment at 17-18, Docket No. 970 (Sept. 6, 2005) ("Def. Supp. Mem."). The government quoted a remark made by the ALJ "in passing" (as the government concedes) that the cap constituted "an express restriction on [ISDEAA] funding," yet acknowledged that the ALJ still ruled that the agency could not defer payment for the last three months of the 1999 calendar year until after the federal FY 2000 appropriation was available. In any event, the DAB decision is the authoritative ruling in *St. Regis*, and neither the government nor the district court addressed this decision below.

III. The "Caps" Do Not Preclude Recovery of an Otherwise Valid Obligation, as Shown in the *Choctaw* Case.

The government has argued below, and in other contract support cost cases, that BIA's expenditure of the entire capped appropriation for contract support costs in a given year precludes recovery of any additional amount. *E.g.*, Def. Supp. Mem. at 8 ("These appropriations caps signal the death knell for plaintiffs' monetary claims for years 1994 forward."). That is incorrect, as an otherwise valid claim may be satisfied from the Permanent Judgment Fund, 31 U.S.C. § 1304(a)(3).

In *Appeals of Mississippi Band of Choctaw Indians*, 06-1 BCA ¶ 33253, 2006 WL 1009210 (I.B.C.A.) (2006), the Tribe claimed that BIA errors in calculating and awarding contract support costs in FYs 2000, 2001 and 2002 cost the Tribe \$4,231,391. The BIA contracting officer agreed that BIA failed to include in its calculation of CSC the Tribe's Indian school grants, so the Tribe should have received the full amount it claimed. But the contracting officer further ruled that the contract support cost "caps," in conjunction with the Anti-Deficiency Act, barred BIA from paying the claims until Congress appropriated new amounts to do so. Since BIA expended the total amount it was "not to exceed" in each year, the contracting officer ruled, the agency could not pay more contract support costs to the Tribe for any of those years without exceeding the statutory cap. 2006 WL 1009210 at *1.

The Tribe appealed the contracting officer's decision to the Interior Board of Contract Appeals ("IBCA"), where BIA renewed its argument that the caps prevented paying the Tribe's claims despite BIA's acknowledged mistake. But the IBCA ruled that the Tribe could recover despite the caps, because payment would come not from BIA but from the Judgment Fund. *Id.* at *4, *citing* 31 U.S.C. § 1304(a)(3)(C) (providing for appropriation and payment of necessary amounts to pay judgments, awards or settlements due "under a decision of a board of contract appeals"). Thus if the Tribe was entitled to the funds, as BIA did not dispute, the appropriations caps did not pose any barrier to recovery.

Judge Parrette of the IBCA described contract support costs as "not merely incidental, gratuitous, or surplus funds added to the amounts that BIA would normally expend for program operation. They are, rather, intended to cover the administrative and other expenses necessary for tribal operation of the various self-government programs. The tribes' right to them is clearly contractual as well as statutory." 2006 WL 1009210 at *4. Citing the *Cherokee* case, Judge Parrette held that the Tribe had a statutory and contractual right to contract support costs that the government could not sidestep by invoking the Anti-Deficiency Act and the caps. *Id.* at *5. Thus the IBCA awarded the Tribe \$4,231,391 plus interest.

The *Choctaw* case illustrates that if liability can be established, the caps are no impediment to recovery.

The *Choctaw* decision further illustrates that the government cannot take refuge in a "four corners" argument that the liability of the United States is limited to the amount of contract support costs specified in the contract or AFA for a given year. In *Choctaw*, it was undisputed that BIA paid the entire amount included in the AFA. 2006 WL 1009210 at *5 ("the funds involved were inadvertently omitted [from the AFA] at the time of general disbursement"). Since that amount was less than the amount the Tribe should have received under the ISDEAA and other contractual provisions, BIA breached the contract and violated the statute notwithstanding its payment of the full (but incorrect) amount of contract support costs identified in the AFA. *Id.*⁷

CONCLUSION

The district court's decision fails to account for the unique language and purpose of the ISDEAA, and for that reason vastly oversimplifies and overstates the effect of the "caps." The Tenth Circuit should interpret the statute so as to avoid the historical, and ongoing, injustice of forcing tribes to either subsidize federal programs or incur a self-determination penalty in the form of reduced services due to resources diverted to administration. The district court's decision should be reversed.

⁷ See also *Appeals of Seldovia Village Tribe*, IBCA 3862 & 3863/97 (2003) (holding IHS liable for failing to amend AFA to include additional CSC based on approval of higher indirect cost rate).

Respectfully submitted this 14th day of May, 2009.

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The undersigned hereby certifies as follows:

1. All required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk; and
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2009, I caused to be delivered by United Parcel Service overnight service the original and six copies of the Brief *Amicus Curiae* of the National Congress of American Indians ("Amicus Brief") to the following for filing:

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In addition, on this 14th day of May, 2009, the Amicus Brief was delivered by electronic mail to esubmission@ca10.uscourts.gov.

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