

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TUNICA-BILOXI TRIBE OF LOUISIANA;
RAMAH NAVAJO SCHOOL BOARD, INC.,

Plaintiffs,

v.

UNITED STATES of AMERICA;
TOMMY G. THOMPSON, Secretary of the
United States Department of Health and Human
Services; GALE A. NORTON, Secretary of the
United States Department of the Interior,

Defendants.

Case No. 1:02CV02413
The Honorable Reggie B. Walton

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL
RECONSIDERATION OR CLARIFICATION OF DECEMBER 9, 2003.
MEMORANDUM OPINION AND ORDER**

Defendants, by and through undersigned counsel, hereby submit this Opposition to
Plaintiffs' Motion for Partial Reconsideration or Clarification of December 9, 2003
Memorandum Opinion and Order (hereinafter "Plaintiffs' Motion" or "Pls.' Mot.").

INTRODUCTION

A quick review of Plaintiffs' Motion reveals that it merely rehashes their claims and
arguments already considered and rejected by this Court. Nothing in Plaintiffs' Motion comes
close to undermining the Court's dismissal of their claims related to a purported duty on the part
of the Secretary of the U.S. Department of Health and Human Services to request a certain
amount of appropriations for indirect contract support costs ("CSC") in any particular fiscal

year.¹ As the Court determined, there is no support for reading a contractual or trust duty into the Indian Self-Determination and Education Assistance Act ("ISDA") or Plaintiffs' self-determination contracts.

In its Memorandum Opinion of December 9, 2003, the Court dismissed Plaintiffs' claims of breach of the duty of good faith and fair dealing and breach of trust on two alternate and independent grounds. The Court first recognized the fundamental causation and redressability problems inherent in Plaintiffs' claims, and thus its own lack of subject matter jurisdiction to adjudicate them. On the merits, the Court recognized that the ISDA does not support any theory, contractual or fiduciary, under which the Secretary was required to request a particular amount of appropriations to fund indirect CSC.²

I. THE COURT CORRECTLY DETERMINED THAT PLAINTIFFS LACK STANDING TO CLAIM THAT THE SECRETARY SHOULD HAVE SOUGHT ADDITIONAL APPROPRIATIONS FROM CONGRESS.

A plaintiff can establish standing to sue only by alleging (1) an injury in fact that is concrete and particularized and not hypothetical, (2) a causal connection between the injury and

¹ For purposes of Defendants' Motion to Dismiss, it was assumed, but not admitted, that the Secretary did not ask for sufficient appropriations in each fiscal year. This assumption applies equally to this Opposition.

² As such, the Court did not need to address the additional defenses raised by Defendants in their original Motion to Dismiss, the first of which was that implying a duty to ask Congress for appropriations for CSC would violate the constitutional separation of powers by improperly intruding on the President's Article II powers under the Take Care Clause and the Recommendations Clause. See U.S. Const., art. II, § 3. (Defs.' Mem. at 43 n.26.) The Court also did not reach Defendants' assertion that there was no subject matter jurisdiction to award money damages arising from a breach of trust claim in this Court. See 25 U.S.C. § 450m-1(a) (no jurisdiction for trust claims); 41 U.S.C. § 602(a) (same); see also United States v. Navajo Nation, 537 U.S. 488, 507, 123 S. Ct. 1079, 1092 (2003) (explaining that the United States is immune from suit absent an explicit waiver by Congress); United States v. Mitchell, 445 U.S. 535, 538, 100 S. Ct. 1349, 1351 (1980) (same). (Defs.' Mem. at 43.)

the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992); UIS Ecology, Inc. v. United States Dep't of the Interior, 231 F.3d 20, 24 (D.C. Cir. 2000). As this Court recognized, any past injury alleged in this case was caused by insufficient funding and not by the Secretary's (or the President's) alleged failure to ask for a certain amount of funds. (Mem. Opin. at 39-40.) The Constitution vests Congress alone with the authority to make appropriations. See U.S. Const., art. I, § 9, cl. 7. Thus, there is no causal connection between the alleged injury (insufficient funds for their ISDA contracts) and the conduct complained of (the failure to request sufficient appropriations to fund Plaintiffs' CSC).

It is also notable that Congress has been aware of the amount of the shortfall in CSC appropriations in each fiscal year at issue in this case. The ISDA requires the Secretary to prepare and submit reports to Congress of the amount of CSC shortfall. See 25 U.S.C. § 450j-1(c)(2). As such, Plaintiffs' musing, "[W]ho can say what Congress might have appropriated if given an adequate request," (Pls.' Mot. at 5), adds nothing to their argument. In fact, it recognizes the precise causation and redressability problem underlying their claims, which is that it cannot be predicted to any degree of certainty what Congress might do with respect to funding under any circumstances, and it is by no means inevitable that Congress would have appropriated additional indirect CSC funds had the Executive Branch requested them.³

³ Plaintiffs' allegation that the Secretary "deliberatively" failed to request sufficient funds for Plaintiffs' contracts is of no consequence. (Pls.' Mot. at 2, 5.) As stated above, Congress acts independently of any appropriations requests made by the Executive Branch and, moreover, was fully aware of the shortfall in CSC funding.

II THE COURT CORRECTLY, AND WITHOUT ANY INCONSISTENCY, REJECTED PLAINTIFFS' DUAL THEORIES THAT THERE WAS A DUTY ON THE PART OF THE SECRETARY TO REQUEST ADDITIONAL APPROPRIATIONS.

The Court also correctly rejected, on the merits, any claim or duty on the part of the Secretary to request a certain amount of appropriations from Congress. In their Motion, Plaintiffs state that there were some inconsistencies in the Court's ruling. They rest their first claim of inconsistency on the Court's statement that "these [breach of the implied covenant of good faith and fair dealing] claims will not be dismissed." (Mem. Opin. at 16.) It is quite obvious that the Court declined to dismiss Plaintiffs' claims of breach of the implied covenant of good faith and fair dealing on failure to exhaust grounds, but did dismiss them for lack of standing and on the merits.

Plaintiffs also argue that there is an inconsistency with respect to the dismissal of their breach of trust claims. (Pls.' Mot. at 2.) They incorrectly state that the Court found "trust duties attendant to Plaintiffs' contracts." (Pls.' Mot. at 2.) Although it is accurate that the Court discussed whether a special relationship existed between the United States and Indian Tribes, sometimes called a "trust relationship," it specified that even if it recognized such a relationship, the "recognition [would not] necessarily translate into a duty on the part of the Secretary to request additional appropriations from Congress." (Mem. Opin. at 38.) This holding is entirely consistent. Even when a statute creates a trust, the same statute will not necessarily support the inference of a particular fiduciary duty. See, e.g., United States v. Navajo Nation, 537 U.S. 488, 507-11, 123 S. Ct. 1079, 1092-94 (2003) (holding that although the Indian Mineral Leasing Act created a bare trust, there were no attendant fiduciary duties).

The facts of this case are even further afield from the facts presented in Navajo Nation, where the United States actually had some control over tribal property.⁴ In contrast to the statute at issue in Navajo Nation, the ISDA involves the distribution of public, not tribal, funds. See, e.g., Reuben Quick Bear v. Leupp, 210 U.S. 50, 77, 28 S. Ct. 690, 694-95 (1908) (distinguishing public funds from trust or tribal funds and stating that the former “relates to public moneys belonging to the government” and the latter “belong to the Indians”). As such, the Court correctly determined that there was no fiduciary duty on the part of the Secretary to ask Congress for additional CSC funding.

Moreover, the Court’s rejection of a duty to request additional appropriations does not in any way render “good faith in the context of the trust relationship . . . meaningless.” (Pls.’ Mot. at 5.) The Court merely held that there was no reading of the ISDA that could support a specific duty on the part of the Secretary to ask for a certain amount of funding for indirect CSC. This is a far cry from stating that the Secretary is not subject to the implied covenant of good faith and fair dealing. The Court recognized that the implied covenant “must attach to a specific substantive obligation, mutually assented to by the parties.” Price v. United States, 46 Fcd. Cl.

⁴ As Defendants explained in their Motion to Dismiss, a trust between the federal government and Indian tribes arises when a federal statute provides for government control over tribal property. See Cobell v. Norton, 240 F.3d 1081, 1098-99 (D.C. Cir. 2001); see also United States v. White Mountain Apache Tribe, 537 U.S. 465, 474-75, 123 S. Ct. 1126, 1133 (2003) (recognizing a trust because a federal statute expressly stated that real property was to be “held by the United States in trust for the White Mountain Apache Tribe”); United States v. Mitchell, 463 U.S. 206, 225-28, 103 S. Ct. 2961, 2972-74 (1983) (holding that a fiduciary relationship was created by various federal statutes giving the government full responsibility to manage Indian resources for their benefit). The ISDA does not authorize the Secretary to assume control over or to manage Plaintiffs’ property in any way; there is no trust corpus. Instead, the ISDA directs the Secretary to distribute federal (taxpayer) funds for the purpose of paying indirect CSC incurred by self-determination contracts.

640, 651 (2000), aff'd, No. 00-5085, 2001 WL 528120 (Fed. Cir. 2001) (citations and internal quotation marks omitted). The covenant does not permit a court to impose additional duties. See id.; see also United States v. Basin Elec. Power Coop., 248 F.3d 781, 796 (8th Cir. 2001) (holding that good faith should not construed to “give rise to new obligations not otherwise contained in the contract’s express terms.”) (citation and internal quotation marks omitted), cert. denied, 534 U.S. 1115, 112 S. Ct. 924 (2002). As the Court held: “The text of the ISDA makes clear that Congress did not intend to obligate the Secretary to distribute funds that have not been allocated to him under the Act.” (Mem. Opin. at 38.)

Ignoring the Court’s clear holding, Plaintiffs again cite to S.A. Healy Co. v. United States, 576 F.2d 299 (Cl. Ct. 1978), and San Carlos Irrigation & Drainage Dist. v. United States, 23 Cl. Ct. 276 (1991), neither of which involves the implied covenant of good faith and fair dealing or a trust duty. As in this case, at the heart of those cases was the interpretation of “availability” clauses and whether they prevented the recovery of claimed contractual damages (i.e., which party should bear the risk when Congress fails to appropriate sufficient appropriations). But unlike the conclusions in Healy and San Carlos, the “availability” clause at issue in this case already has been interpreted by this circuit and three others to limit the amount of funds a tribe can receive to the availability of appropriations (i.e., the tribes, acting in the place of a federal agency, bear the risk of insufficient appropriations).⁵ See Ramah Navajo Sch. Bd.

⁵ Healy and San Carlos have no applicability to the ISDA and Plaintiffs’ contracts for many other reasons. First, there is no indication that the contracts at issue in those cases arose under a statute that itself specified that funding was limited by the availability of appropriations. Second, in contrast to the contracts in those cases, self-determination contracts are not government procurement contracts, i.e., contracts entered into for the purchase of goods or services for the benefit of the federal government. They are governmental funding arrangements under which the Tribes are substituted for a federal agency both in furnishing governmental services and in

Inc. v. Babbitt, 87 F.3d 1338, 1345 (D.C. Cir. 1996); Cherokee Nation v. Thompson, 311 F.3d 1054, 1065 (10th Cir. 2002), pet. for cert. pending, No. 02-1472 (filed Apr. 3, 2003); Shoshone-Bannock Tribes v. Secretary, Dep't of Health & Human Servs., 279 F.3d 660, 666-67 (9th Cir. 2002); Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't, 194 F.3d 1374, 1378-79 (Fed. Cir. 1999). But see Thompson v. Cherokee Nation, 334 F.3d 1075 (Fed. Cir. 2003), pet. for cert. pending, No. 03-853 (filed Dec. 11, 2003). No other funds, from the Judgment Fund or otherwise, are available. See id. This Court already has held that there is no “entitlement [to CSC] that exists independent of whether Congress appropriates money to cover it.” (Mem. Opin. at 40) (quoting Shoshone-Bannock, 279 F.3d at 665).

III. THE COURT EASILY CAN DISREGARD PLAINTIFFS' WEAK ATTEMPT TO REPACKAGE THEIR ARGUMENTS.

Plaintiffs also appear to argue that their assertion of a contractual and fiduciary duty was made merely to prevent the Secretary from using the unavailability of appropriations as a defense and was not a separate claim for relief. (Pls.' Mot. at 2.) This contention is belied by their Complaint, which seeks relief related to a contractual and fiduciary duty on the part of the Secretary to request from Congress “sufficient appropriations to meet its contractual obligations.” (2d Am. Compl. ¶¶ 36, 40, 42-46.) But it makes no difference; the Court has determined that there was no duty on the part of the Secretary to ask for additional appropriations. As such, the Secretary is not, and could not under the ISDA be, barred from raising a defense of insufficient appropriations.

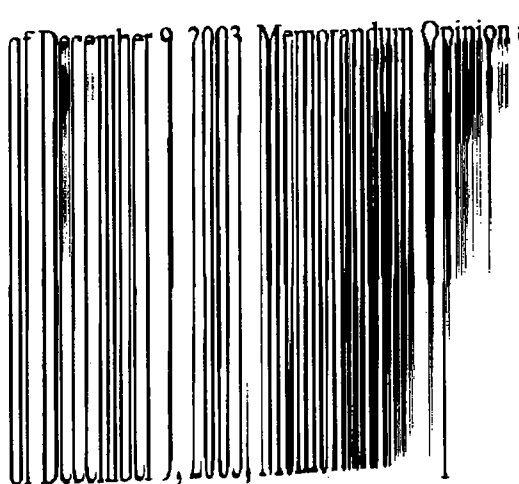
receiving federal funding for that purpose. See, e.g., 25 U.S.C. § 450f(d). In the same way that a federal agency is constrained by the availability of appropriations and the need to allocate funds among competing needs, the ISDA's availability clause makes the same principle applicable to the tribes operating in the federal agency's stead.

Plaintiffs also state that the Court did not understand their claim and construed it as seeking prospective relief instead of as an alternative theory for requesting money damages for insufficient funding in the past. (Pls.' Mot. at 2.) As a preliminary matter, there is no reason to believe that the Court did not fully understand Plaintiffs' claims. Throughout the Opinion, the Court specifically quotes from Plaintiffs' Complaint. (Mem. Opin. at 4, 15, 37.) Regardless, the same jurisdictional, constitutional, and merit defenses apply to a request to recognize a past duty and to impose prospective one. In both circumstances, the Secretary does not determine, through his appropriation requests or otherwise, the final amount appropriated by Congress in any given year. In addition, Congress has made clear in the ISDA that funding is limited to the "availability of appropriations." As such, neither the ISDA nor the contracts can support an implied duty to request additional appropriations from Congress, regardless of how Plaintiffs package or repackage their claims.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Partial Reconsideration or Clarification

of December 9, 2003 Memorandum Opinion and Order should be denied.



Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

ROSCOE C. HOWARD, JR.
United States Attorney

/s/

SHEILA M. LIEBER
Deputy Director
RACHEL J. HINES (D.C. Bar #424774)

**Trial Attorney
Federal Programs Branch, Room 7314
Civil Division**

Mailing Address

**P.O. Box 883
Washington, DC 20044**

Delivery Address

**20 Massachusetts Avenue, NW
Washington, DC 20001**

Telephone: (202) 514-5532

Facsimile: (202) 616-8202

E-mail: rachel.hines@usdoj.gov

Counsel for Defendants

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