

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TUNICA-BILOXI TRIBE OF LOUISIANA, et al.,)

PLAINTIFFS,)

vs.)

UNITED STATES OF AMERICA, et al.,)

DEFENDANTS.)

No. 1:02CV02413 (RBW)

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR
RECONSIDERATION OR CLARIFICATION**

By failing to request sufficient funds to pay contract support costs, the Indian Health Service and Bureau of Indian Affairs defeat Congress' policy of Indian self-determination. By systematically failing to request sufficient appropriations, they have helped create the very insufficiency they now stand on. Plaintiffs argue that the good faith, fair dealing, and trust clauses in their contracts under established federal contract law, *S.A. Healy Co. v. United States*, 576 F.2d 299 (Ct. Cl. 1978) and *San Carlos Irrigation & Drainage District v. United States*, 23 Cl. Ct. 287 (1991), vitiate Defendants' affirmative defense of unavailability of appropriations. *And see* Opposition to Defendants' Motion to Dismiss, at 1, 19, 24, 39; 25 U.S.C. § 450l(c), Model Agreement, § 1(d)(1)(A)(1), (2). The Memorandum Opinion and Order, however, do not address this point and therefore leave the impression that reliance on these clauses of the contract and perhaps on the *S.A. Healy* principle itself is precluded.

The practice of not requesting sufficient funds from Congress was one of the principal

reasons for passage of the 1988 amendments, Public Law 100-472, to the ISDA:

For several years the [BIA] and Indian health Service have failed to request from Congress the full amount of funds needed to fully fund indirect costs associated with self-determination contracts.

Sen. Rept. No. 100-274, at 9, 1988 USCCAN, at 2628. This practice has persisted:

The 1988 amendments to the act require the agencies to provide contract support costs to tribes for their reasonable costs associated with administering BIA's and IHS' programs. However, since at least 1993, neither BIA nor IHS has requested full funding for these costs, nor has the Congress appropriated full funding for them. . . .

United States General Accounting Office, "Indian Self-Determination Act—Shortfalls in Indian Contract Support Costs Need to Be Addressed", at 34-35 (GAO/RCED-99-150; 1999). Failure to request sufficient monies to preserve health programs under contracts is part of the general intransigence that prompted yet another round of amendments. *See* Public Law 103-413, 108 Stat. 4250 (1994).¹

The instant motion seeks only to clarify that the Court's December 9, 2003, ruling does not preclude: (1) assertion of the *S.A. Healy* principle in opposition to Defendants' defense of unavailability of funds resting on the proviso at the end of 25 U.S.C. §450j-1(b) and corresponding contract clauses, Def. Exh. J, at 7; 25 U.S.C. §450l(c), Model Agreement, § 1(b)(4); and (2) use of the good faith, fair dealing, and trust clauses as an added or alternate basis for the opposition.

¹ Commenting on Section 5 of the bill, the Senate Committee on Indian Affairs stated: "This action [removing the Secretaries' authority to promulgate interpretive regulations] is a direct result of the failure of the Secretaries to respond promptly and appropriately to the comprehensive amendments developed by this Committee six years ago. . . ." Sen. Rept. No. 103-374, at 14 (accompanying S.2036).

DEFENDANTS' OPPOSITION IS UNRESPONSIVE

A. Defendants argue that the absence of a corpus managed by the Government eliminates all redressable claims based on the good faith, fair dealing, and trust clauses. Assuming, for argument's sake only, that the contention is correct, the effect, of course, is to eliminate these clauses from the contract. Because the Order and Memorandum Opinion of December 9, 2003, do not address this issue, we seek clarification whether those clauses do indeed have any utility. The answer must be affirmative, because the Government controls a vital part of the ISDA scheme, the initiation of a Request for Appropriation.

A formal Request for Appropriation is simply not the same as a report to Congress. As the GAO Treatise says:

The President's budget must be submitted to Congress on or before the first Monday in February of each year, for use during the following fiscal year. 2 U.S.C. § 631. Numerous statutory provisions, the most important of which are 31 U.S.C. §§ 1104-1109, prescribe the content and nature of the materials and justifications that must be submitted with the President's budget request.

1 U.S. General Accounting Office, *Principles of Federal Appropriations Law* 1-14 (2d ed. 1991) (hereinafter "Principles"). The annual Shortfalls Report is not a part of the President's Budget.² It is not vetted in the same manner as the Budget Request. *See Principles* 1-16. It simply does not have the status of an appropriations request. The good faith, fair dealing, and trust clauses must be given meaning and, at the very least, must bar the Defendants from asserting insufficiency of

² On information and belief, IHS did not submit the required reports to Congress for FY 1996 and FY 1997 and perhaps other relevant years.

funds as a defense where the contract clauses do not expressly or by necessary implication shift the risk of an insufficient request to the contractor.

B. Defendants recognize, Opposition, at 6, that *Healy* and *San Carlos Irrigation & Drainage District* deal with “interpretation of availability clauses and whether they prevent the recovery of claimed contractual damages (i.e., which party should bear the risk when Congress fails to appropriate sufficient appropriations).” They then attempt to neutralize that precedent by stating that this and three other circuits have ruled that the tribes bear the risk of insufficient appropriations. Opposition, at 6. None of those decisions, however, addresses whether the failure to request sufficient appropriations overcomes the proviso in 25 U.S.C. § 450j-1(b), and none cites *Healy* or *San Carlos*.

Rather than deal with the contract interpretation rules set forth in *S.A. Healy*, the Defendants resort to an argument cut from whole cloth. In footnote 5 of their opposition, Defendants attempt to distinguish *Healy* on the grounds, incredibly, that ISDA contracts are not really contracts but instead are “governmental funding arrangements”.³ If the Court accepts the argument, ISDA contracts are reduced to one-sided grant agreements under which the Government may determine the price at any time, including after the services are provided!⁴ The court in *Thompson v. Cherokee Nation*, 334 F.3d 1075, 1086 n. 5 (Fed. Cir. 2003) answered this argument with ease:

There is nothing in the ISDA to support the contention that the

³ Sen. Rept. 100-274, at 19, 1988 USCCAN at 2638: (“...[U]se of the term “contract” is important to convey the sense of a legally binding instrument ... [and is] consistent with the provision which authorizes the application of the Contract Disputes Act to self-determination contracts.”).

⁴ Defendants also contend that *Healy* did not involve a statute with a proviso like ISDA’s 1(b). In fact, the exculpatory availability clause in that case was much more detailed than 1(b)’s or the corresponding contract clauses.

Secretary has wider latitude to breach his contracts with the Indian tribes than he has with other government contractors.

ISDA contracts were exempted from federal procurement laws not to allow the federal government to terminate them or evade payment whenever it feels like it, but to reduce needless bureaucracy. *See* Sen. Rept. No. 100-274, at 19, 1988 USCCAN at 2638.

To emphasize that these are indeed contracts, Congress incorporated the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, into the ISDA to provide a damages remedy even where all appropriations have already been obligated. That is why the Judgment Fund does provide the appropriation necessary to satisfy the claims in this case. Indeed, that is the scheme for all federal contracts. The Federal Circuit in the *Thompson* case, above, recognized correctly that a uniform law of contract applies to all federal contractors. And the Government conceded that point in 1988:

... Regardless that self-determination contracts may not otherwise be considered “procurement contracts”, unless this body of existing law can be looked to for guidance, the courts and boards will have no foundation upon which to resolve disputes. . . .

Letter from John R. Bolton, Assistant Attorney General, U.S. Department of Justice, to Senator Daniel K. Inouye, Chairman, Select Committee on Indian Affairs, March 11, 1988, at 8 (attached as an exhibit to this Reply), commenting on S. 1703, which was enacted as Public Law 100-472. This letter came to light only after Plaintiffs filed the instant motion.

Even without the Bolton letter, it is clear that the Contract Disputes Act covers all manner of federal contracts purchasing services including ones which fulfill a federal responsibility, as here. 41 U.S.C. § 602(a)(2). *See* Sen. Rept. No. 100-274, at 26, 1988 USCCAN 2645 (“It is clear that tribal contractors are carrying out federal responsibilities.”) and at 27, 1988 USCCAN 2646 (“The United

States has assumed a trust responsibility to provide health care to Native Americans. [ISDA's] intent . . . is to prevent the Federal Government from divesting itself, through the self-determination process, of the obligation it has to properly carry out that responsibility.”).

A form of order granting this motion accompanies the Reply.

FOR THESE REASONS, Plaintiffs pray that their motion be granted.

Respectfully submitted,

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U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 11, 1988

Honorable Daniel K. Inouye
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Inouye:

In a letter dated October 27, 1987, I informed the Select Committee on Indian Affairs of the Department's objections to S. 1703, the "Indian Self-Determination and Education Assistance Act Amendments of 1987." My recent letter of January 26, 1988 expanded upon those objections insofar as they concerned application of the Indian Civil Rights Act to self-determination programs. Further comment upon section 201(c) of the Committee amendment to S. 1703 is also warranted, particularly in light of an amendment to section 103(c) of the Indian Self-Determination and Education Assistance Act enacted as part of the Continuing Resolution for fiscal year 1988. In fact, the need for section 201(c) of the Committee amendment to S. 1703 largely appears to have been obviated.

As it now reads, amended section 103(c) of the Indian Self-Determination and Education Assistance Act ("the Act") provides as follows:

The Secretary of Health and Human Services is authorized to require any tribe requesting that he enter into a contract pursuant to the provisions of this subchapter to obtain adequate liability insurance: Provided, however, That each such policy of insurance shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the tribe's sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy of insurance. For purposes of section 224 of the Public Health Service Act of July 1, 1944 (42 U.S.C. 233(a)), as amended by section 4 of the Act of December 31, 1970 (84 Stat. 1870), with respect to claims for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, a tribal organization or Indian

contractor carrying out a contract, grant agreement, or cooperative agreement under sections 103 or 104(b) of this Act is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of title 28) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement.¹

This new language will allow persons injured by certain acts of medical negligence to pursue a damage remedy against the United States under the Federal Tort Claims Act ("FTCA") in place of any remedy they may otherwise have had against a physician or health care provider. As you know, such a result had been a fundamental basis for our original opposition to S. 1703.²

In light of the above changes to section 103(c) of the Act, section 201(c) of the Committee amendment doubtless will be eliminated or amended further. We wish to express a concern which we hope will be taken into account in that process.³

As the Committee has recognized, whatever the merits of providing FTCA protection to Indian tribes and their employees, that protection should not extend to private physicians or health care providers who may be providing contract health care under a self-determination contract to a tribal organization -- so-called "indirect health care providers." See S. Rep. No. 274, 100th Cong., 1st Sess. 27 (Dec. 22, 1987). It follows that the term "Indian contractor," as now contained in section 103(c) of the Act, should not be construed to include such private physicians

¹ The highlighted language was added by the Continuing Resolution.

² Section 201(a) of an unamended S. 1703 essentially would have accomplished the identical result by adding similar language to a renumbered section 102(c) of the Act.

³ We continue to be opposed to the notion that the Indian tribes should be singled out for special treatment by absolving them from responsibility for their negligence in administering self-determination health care contracts. Recognizing, however, that amendments to section 103 of the Act are a fait accompli, we offer the following as a suggestion to ensure that this new language is applied in a manner consistent with our previously expressed concern that third-party health care providers who contract with the Indian tribes not be included within the scope of persons now protected by the FTCA under section 103(c) of the Act.

and health care providers. And, in a letter to you dated November 18, 1987, Mr. Lloyd B. Miller, writing on behalf of "many Indian tribes and tribal organizations," specifically disavowed any intent or desire to bring these subcontractors within the FTCA.⁴ Nor would such a course of action be advisable from the standpoint of seeking to deter medical malpractice.⁵

Although we seem to be in agreement on this basic point, our common understanding of the properly limited scope of "Indian contractor" is not self-evident from the Act, as amended by the Continuing Resolution. To our knowledge, the term "Indian contractor" is nowhere defined in the Act. Unfortunately, it is our experience that in cases where the deep pocket of the federal government is involved, any ambiguity in the law all too often is exploited in litigation to the detriment of the United States.

Accordingly, we strongly recommend that section 201(c) of the Committee amendment to S. 1703 be replaced with language which would simply delete the reference to "Indian contractors" in section 103(c) of the Indian Self-Determination and Education Assistance Act added by the Continuing Resolution. This clarification should allow section 103(c) to be applied with a minimum of interpretive problems.

If, instead, the Committee intends to ignore the recent amendment to section 103(c) in favor of the more sweeping changes presently contained in section 201 of the Committee amendment, a different aspect of providing FTCA protection to tribal

⁴ It should be noted that, for sound reasons rooted in public policy, the FTCA expressly does not apply to contractors of the United States. 28 U.S.C. 2671 ("Federal agency . . . does not include any contractor of the United States.") Thus, the inclusion of indirect health care providers within the term "Indian contractor" would not only be inconsistent with Congress's clearly expressed intent that the FTCA not cover independent government contractors, but would also unjustifiably give favored treatment to some such contractors but not others.

⁵ Our concern that the United States not accept responsibility for professional negligence unless it is accompanied by an adequate opportunity to control and supervise professional conduct is doubly important in this context. However limited may be the federal government's ability to control and supervise the tribes themselves, it far exceeds in scope any influence the federal government may exert over the medical practice of persons who independently contract with the tribes.

contractors is implicated.⁶ Although the report language discussing section 201 is confined to the area of medical malpractice, section 201 of the Committee amendment would extend the FTCA's coverage to all tribal negligence associated with carrying out virtually any self-determination contract, grant agreement, or cooperative agreement -- not just those associated with the provision of health care.

Whatever the particular merits of accepting federal responsibility for tribal medical malpractice, no need has been demonstrated for extending that indemnification to tribal conduct associated with the various other activities performed or capable of being performed by way of self-determination contracts or agreements. As presently structured in section 201, the United States will end up accepting financial responsibility for any number of everyday accidents that it had no hand in causing and that have no connection whatsoever to its obligations to the Indian tribes.⁷ It is imperative, in this regard that, as it is now, section 103(c) of the Act (becoming section 102(c) if S. 1703 is enacted) clearly be limited to medical malpractice claims.

Aside from the above suggestions, and those expressed earlier, we continue to have fundamental concerns with other provisions of the Committee amendment to S. 1703. Among other concerns, we object to proposed section 110 of the Act as contained in section 206 of the Committee amendment to S. 1703.

Proposed section 110(a) would grant jurisdiction to the United States district courts over any civil action or claim arising under the Act, expressly including any claim for money damages arising under a self-determination contract. In other words, despite applying the Contract Disputes Act to self-determination contracts for all other purposes, tribal contractors are to be exempted from the requirements of that Act

⁶ Section 201 of the Committee amendment does not contain the ambiguous reference to "Indian contractors," and the report accompanying S. 1703 makes it clear that private physicians and health care providers are not to be extended the protection of the FTCA.

⁷ The largest source of non-medical malpractice liability exposure will be automobile accidents, slip and fall cases, and similar "garden variety" type torts. We simply do not understand why the United States should accept financial responsibility for automobile accidents and similar everyday torts involving tribal employees.

