

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

PUEBLO OF ZUNI, on behalf of itself
and all others similarly situated,

Plaintiff,

Case No. CV 01-1046 WJ/WPL

v.

UNITED STATES OF AMERICA; et al.,

Defendants.

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR
RECONSIDERATION OF MEMORANDUM OPINION AND ORDER GRANTING
DEFENDANTS' MOTION TO DISMISS CERTAIN CLAIMS (Dkt. No. 330)**

Pursuant to Fed.R.Civ.P. 59(e) and this Court's inherent power to amend its interlocutory orders, the Pueblo of Zuni respectfully moves this honorable Court for limited reconsideration of those portions of the Court's Memorandum Opinion and Order Granting Defendants' Motion to Dismiss Certain Claims (Mem. Op.) (Dkt. No. 330), which dismiss the Plaintiff's statutory claims for money damages for lack of jurisdiction.

Under Rule 59(e), a court may reconsider an Order if appropriate to "correct clear error or prevent manifest injustice." Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000). See also Servants of Paraclete, Inc. v. Great Am. Ins. Co., 866 F. Supp. 1560, 1581 (D. N.M. 1994) (Burciaga, C.J.) ("the court may appropriately grant a Rule 59(e) motion where 'the court has obviously misapprehended a party's position or the facts or the law, or ... mistakenly decided issues outside of those the parties presented for determination.'") (citation omitted). To the extent some

courts have considered Rule 59(e) to be technically inapplicable to reconsideration motions directed to interlocutory orders, see Trujillo v. Bd. of Educ., 229 F.R.D. 232, 234-235 (D. N.M. 2005) (reviewing cases), Plaintiff respectfully moves in the alternative that the Court exercise its inherent power to alter or amend its Memorandum Opinion and Order. Id. (discussing a district court’s ““plenary power”” or ““general discretionary authority”” to reconsider such orders) (citations omitted). As explained herein, the Pueblo of Zuni respectfully submits that the Court’s construction of 25 U.S.C. § 450m-1(a) so as to conflate statutory causes of action with contract causes of action, and thus to subject both actions (rather than only the latter) to the exhaustion requirements of the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, is mistaken because such a construction is contrary to the terms of the statute, the controlling rules of statutory construction, and the provision’s legislative history.

At issue here is a highly unique and technical provision. Section 450m-1(a) of the Indian Self-Determination Act (ISDA) (among other things) vests this Court with “original jurisdiction” to hear “any civil action or claim” for violation of that Act and, inter alia, to award “money damages” in connection with such claim. This jurisdictional authority, which Plaintiff’s Amended Complaint asserts in connection with three claims (see First Amended Complaint at 30, 32 & 34) (“First,” “Third” and “Fifth” causes of action) (Dkt. No. 5)), is wholly independent and separate from the Court’s “concurrent” jurisdiction with the United States Court of Federal Claims over claims “arising under contracts authorized by [the Act].” 25 U.S.C. § 450m-1(a). Plaintiff respectfully submits that only where the Court’s “concurrent” jurisdiction has been invoked is the action or claim “subject to the provisions” of the CDA (id.), the primary ground for this Court’s Memorandum Opinion and

Order granting Defendants' Motion to Dismiss Certain Claims.

Plaintiff respectfully requests that the Court revise its Memorandum Opinion and Order to make clear that those separate and independent claims asserted by Plaintiff which are based upon alleged violations of the ISDA (as contrasted with the claims based upon breach of contract) are not subject to the requirements of the CDA and, accordingly, that such statutory claims have not been dismissed for lack of jurisdiction.

ARGUMENT

Section 450j-1(a)(1) of the Act provides that “[t]he amount of funds provided under the terms of self-determination contracts entered into pursuant to this [Act] shall 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 ...” (the so-called ‘Secretarial amount’). Section 450j-1(a)(2) provides that “contract support costs” (CSCs) “shall be added to the amount required” under § 450j-1(a)(1). In construing these and related statutory provisions, the Supreme Court determined in Cherokee Nation v. Leavitt, 543 U.S. 631 (2005), that “The Act specifies that the Government must pay a tribe’s costs, including administrative expenses. See §§ 450j-1(a)(1) and (2).” 543 U.S. at 635 (emphasis added). The duty to “pay” found by the Court in Leavitt means that the ISDA, in and of itself, is authority to sue the United States and its federal officers for money damages.

The Pueblo of Zuni alleges that, wholly apart from breach of its contracts, Defendants violated its rights under § 450j-1(a)(2) and related ISDA provisions by underpaying the CSCs to which it was entitled by statute. Supra at 2 (citing First Amended Complaint). These claims arise directly and exclusively under the ISDA. The Pueblo respectfully submits that this Court has

jurisdiction to hear and determine these statutory claims without regard to the exhaustion requirements of the CDA for contract claims, and, therefore, that these claims should have survived the Defendants’ Motion to Dismiss.

The centerpiece of this Court’s jurisdiction is found in Section 110 of the ISDA, 25 U.S.C. § 450m-1. That section, added in 1988, in material part authorizes this Court to exercise two kinds of jurisdiction over various claims:

(a) The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this [Act] and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of [Federal] Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this [Act]. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this [Act] or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this [Act] or regulations promulgated hereunder

* * *

(d) The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) shall apply to self-determination contracts

As added in 1988, the first half of the first sentence in subsection (a) provides that district courts have exclusive “original jurisdiction over any civil action or claim against the Secretary arising under th[e] [ISDA],” and, the second sentence explains that “[i]n an action brought under [subsection (a)]” this Court may award “money damages.” Id. (emphasis added). By contrast, under the second half of the first sentence a district court’s original jurisdiction is “concurrent with the United States Court of [Federal] Claims, over any civil action or claim against the Secretary for money damages arising

under contracts authorized by the [Act],” although such “contract” claims are made “subject to the provisions of [the CDA].” Id. (emphasis added); see also § 450m-1(d) (the CDA “shall apply to self-determination contracts”).

In construing the jurisdictional section of the ISDA, as is true for all statutes, the first step “begins where all such inquiries must begin: with the language of the statute itself.” United States v. Ron Pair Enter., Inc., 489 U.S. 235, 240 (1989). “Where,” as the Pueblo submits is the case here, “the statute’s language is plain, ‘the sole function of the courts is to enforce it according to its terms.’” Id. (citing Caminetti v. United States, 242 U.S. 470, 485 (1917)). See also id. at 242 (“The plain meaning of legislation should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’”) (citation omitted); Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) (“we begin with the understanding that Congress ‘says in a statute what it means and means in a statute what it says there’”) (citation omitted); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, ___ U.S. ___, 126 S.Ct. 2455, 2459 (2006) (same); Lindsay v. Thiokol Corp., 112 F.3d 1068, 1070 (10th Cir. 1997) (“The exceptions to our obligation to interpret a statute according to its plain language are ‘few and far between.’”) (citing Resolution Trust Corp. v. Westgate Partners, Ltd., 937 F.2d 526, 529 (10th Cir. 1991)).

Here, the text of § 450m-1(a) speaks clearly, separately and differently to two forms of district court jurisdiction. The former original jurisdiction is exclusive and applies to claims “arising under th[e] Act” – claims which have nothing to do with, and thus do not implicate, the CDA. The latter, original jurisdiction, is concurrent with the Court of Federal Claims’ jurisdiction and applies

to claims “arising under contracts authorized by th[e] Act.” This Court has concluded that these latter claims are subject to the CDA’s exhaustion requirements because they are, in the words of § 450m-1(a), “subject to the [CDA] provisions of subsection (d).” In other words, as a matter of correct grammar, the phrase “subject to the [CDA] provisions of subsection (d),” coming after the conjunction “and,” must modify the language which follows it concerning “concurrent” jurisdiction, and not the material which precedes it.

Any other reading of the Act – *i.e.*, conflating statutory claims with contract claims so that both are “subject to” the limitation concerning the CDA – would make the first half of the first sentence in subsection (a) wholly superfluous, because the Court’s jurisdiction under the first half of the sentence would be the same as its jurisdiction under the second half of the sentence. This is not permissible statutory construction. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (“It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant’”) (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)). See also Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 166 (2004) (stating that following a reading which would render part of a statute entirely superfluous is “something we are loath to do” and finding that the court “must, if possible, construe a statute to give every word some operative effect”); Bailey v. United States, 516 U.S. 137, 145 (1995) (“[j]udges should hesitate . . . to treat [as surplusage] statutory terms in any setting”) (citation omitted); Kungys v. United States, 485 U.S. 759, 778 (1988) (“no provision should be construed to be entirely redundant”).

Further, if this Court’s original and exclusive jurisdiction, like its “concurrent” jurisdiction,

also is circumscribed by the CDA, then the provisions of the second sentence of § 450m-1(a) granting the district courts express authority to award “money damages” would be redundant because the Court already has that authority under the CDA as set forth in the second half of the first sentence – again, a disfavored approach to statutory construction. Accordingly, to give the necessary effect to every word of the Act – in this instance, the power to award money damages – the Court’s “original” and exclusive jurisdiction over statutory claims must be deemed separate from and independent of its “concurrent” jurisdiction over contract claims. In asserting its statutory claims in its First, Third and Fifth Causes of Action, the Pueblo seeks to invoke a right specifically granted by the ISDA, not to avoid any applicable CDA requirement.

In sum, the Pueblo respectfully submits that construing § 450m-1(a) to make statutory damages claims subject to the CDA and its attendant exhaustion requirements, is not permissible statutory construction, violates rules of grammar, and renders superfluous other portions of the section.

An additional textual reason supports the construction of § 450m-1(a) advanced here. When Congress added this section to the Act in 1988, it provided in the second sentence that the district court is authorized to grant “injunctive relief” and “mandamus” against Federal officers and agencies. These are equitable powers that the Court of Federal Claims, exercising its general jurisdiction, usually does not possess,¹ and did not possess in CDA cases until 1992. See Armour

¹ See Brown v. United States, 105 F.3d 621, 622-24 (Fed. Cir. 1997) (affirming the dismissal by the Court of Federal Claims of an action in which the plaintiffs sought, inter alia, “an order that the IRS issue a letter” because “[t]he Tucker Act does not provide independent jurisdiction over such claims for equitable relief”); Bogart v. United States, 531 F.2d 988, 991-92 (Ct. Cl. 1976) (dismissing the General Services Administrator as a defendant because where “the relief sought is against others than the United States, it is not within the jurisdiction of this court”).

of America v. United States, 69 Fed. Cl. 587, 591 (2006) (“The statutory provision cited by Plaintiff [28 U.S.C. § 1491(a)(2)] does in fact grant this court jurisdiction to give **equitable relief** for nonmonetary claims under the CDA”) (emphasis in original) (citing Alliant Techsystems, Inc. v. United States, 178 F.3d 1260, 1268-70 (Fed. Cir. 1999), and Garrett v. Gen. Electric Co., 987 F.2d 747, 750 (Fed. Cir. 1993)). The second sentence thus reflects a Congressional intent to vest in the district courts a different and broader jurisdiction in ISDA cases than then existed under the CDA for resolving contract disputes.

Further, even if the distinctions between this Court’s “original” and exclusive jurisdiction over statutory damage claims and its “concurrent” jurisdiction over contract claims were less clear, the applicable rule is “that federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit.” Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1461 (10th Cir. 1997) (citing EEOC v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989)); see also Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985) (cited by this Court with approval in Eight Northern Indian Pueblos Council, Inc. v. Kempthorne, No. 06-745 WJ/ACT (D. NM Sept. 15, 2006), see Mem. Op. and Order Granting in Part Prelim. Injunction at 5 (Dkt. No. 14). Indeed, under the ISDA this rule is mandatory. 25 U.S.C. § 450l(c), sec. 1(a)(2) (“Each provision of the [ISDA] ... shall be liberally construed for the benefit of the Contractor ...”).

The legislative history of the 1988 ISDA Amendments confirms the conclusion that Congress intended the district courts to have separate, but parallel, jurisdiction over both statutory claims and contract claims. The principal Congressional analysis of new Section 110 is Senate Report No. 100-274 (Dec. 21, 1987), reprinted at 1988 U.S.C.C.A.N. 2620 (1988), which was prepared to

accompany S. 1703 (the bill which, as amended (in non-material respects) in the House of Representatives and renumbered as H.R. 1223, eventually became Public Law 100-472). With respect to new Section 110, S. REP. 100-274 stated, inter alia:

The Committee amendment affords self-determination contractors the opportunity to secure injunctive relief against the Bureau of Indian Affairs or the Indian Health Service for violations of the Self-Determination Act (or the terms of contracts under the Act) rather than being put to the cost of having to file multiple, annual claims to recover contract damages resulting from such violations, while the same violations continue unchecked.

1988 U.S.C.C.A.N. at 2653 (emphasis added). The Committee’s reference to “violations of the Self-Determination Act” and “violations of ... the terms of contracts under the Act” in the disjunctive indicates that two types of claims by “self-determination contractors” were contemplated – claims under the ISDA, and (subject to the CDA) claims under contracts awarded under the ISDA.

Returning to the Court’s October 11 Memorandum Opinion and Order, Plaintiff’s argument here differs from Plaintiff’s argument with respect to administrative exhaustion of contract claims, addressed by the Court at pp. 14-15 of its Opinion. With respect, the Court’s discussion assumes that “Plaintiff is seeking money damages, which under 450m-1(a) is ‘subject to the provisions of the [CDA]’” (id. at 15), and that Plaintiff is thus seeking to “bypass” the CDA’s exhaustion requirements. But the Pueblo here contends, and argued previously (see Pl. Op. to Mtn. to Dismiss at 7 n.5 (Dkt. No. 111)), that the clause “subject to the provisions of [the CDA]” applies only to the Court’s “concurrent” jurisdiction with the Court of Federal Claims to adjudicate contract damage claims, and not to the Court’s “original” and exclusive jurisdiction over statutory damage claims arising under the Act. See also Pl. Reply in Support of Motion for Class Certification at 10-12 (Dkt. No. 329) (discussing the Court’s jurisdiction over these separate and distinct claims).

Notwithstanding the compelling language of the statute's text, it can be anticipated that Defendants will argue this Court's "original jurisdiction" under § 450m-1(a) to hear damages claims is limited to claims filed before a contract is awarded, or else to claims contesting the terms of a contract that has been awarded. But no such limitation appears in § 450m-1(a), nor is such a limitation necessarily implied. And while the Pueblo's plain meaning interpretation confers upon Tribal contractors greater rights than possessed by other Government contractors, it is indisputable that Congress' remedial 1988 scheme intended that very result – including the right to pursue contract claims in a local district court and the right to secure injunctive and mandamus relief. To limit statutory damages actions under the ISDA to pre-contracting disputes is thus to engraft upon this remedial statute a limitation Congress nowhere saw fit to impose – a particularly impermissible construction given the general duty, imbedded in the Act itself, to interpret the ISDA broadly in favor of the Tribes (infra at 8).

Importantly, Defendants' Motion to Dismiss in Part for Lack of Subject Matter Jurisdiction (Dkt. No. 59) sought dismissal solely because of "Plaintiff's [alleged] failure to follow the procedures specified in the [CDA]," Def. Mem. at 10 (Dkt. No. 59, Exh. 1), on the theory (shown above to be erroneous) that "the ISDA explicitly incorporates the [CDA] . . . and its mandatory administrative exhaustive scheme for monetary claims for relief under the ISDA and ISDA contracts." Id. at 2 (emphasis added). Section 450m-1(a) on its face, however, does not "incorporate" the CDA (and its exhaustion rules) for purposes of money damage claims arising "under the ISDA;" it does not limit this Court's jurisdiction over damage claims only to contract claims; and thus, contrary to Defendants' thesis, it does not subject ISDA statutory claims (over

which the Court has “original” and exclusive jurisdiction) to the requirements of the CDA. (This point was made at length in Plaintiff’s Opposition to the Motion to Dismiss at 6-7 and n.5. (Dkt. No. 111).) To this damages argument, Defendants responded that there is no such cause of action as a statutory damages claim (Def. Reply at 4-5 n.2 (Dkt. No. 132)),² and, without quoting any ISDA language to that effect (because there is none), again wrote about the alleged “direction in the ISDA that the CDA applies to all claims by contractors against the government for monetary relief.” Id. (emphasis in original). Given both its terms and the controlling rules of statutory construction, § 450m-1(a) cannot be so read.

CONCLUSION

The Court’s observation that “[t]he ISDA provides for federal district courts to have original jurisdiction ‘over any civil action against the appropriate Secretary ... for money damages arising under contracts authorized by this subchapter’” (Mem. Op. at 4), by combining the front and back half of the first sentence to § 450m-1(a) as if that sentence spoke to only one type of jurisdiction, gives the impression that the Court considers only damages claims asserting a breach of contract to be covered by the Act. The Court’s conclusion (after describing claims “properly exhausted” under the CDA) “that this Court lacks jurisdiction over any other claims which the Plaintiff has included in the First Amended Complaint” (id. at 24, emphasis added) raises the further concern that the Pueblo’s separate statutory damages claims under this Court’s “original” and exclusive jurisdiction have been dismissed for failure to comply with the CDA, notwithstanding that by the ISDA’s terms

² While denying the existence of statutory claims, Defendants acknowledged they had been asserted. Def. Reply at 4 (“The third and fifth causes of action involve alleged statutory violations”).

the CDA does not apply to statutory damage claims.

For the foregoing reasons, the Pueblo respectfully requests that, pursuant to Rule 59(e) and this Court's inherent authority, the Court amend its Memorandum Opinion and Order to make clear that all of the Pueblo's statutory claims for violations of the ISDA, i.e. the Pueblo's First, Third and Fifth Causes of Action, still remain pending before the Court and have not been dismissed on CDA exhaustion grounds.

Respectfully submitted this 25th day of October 2006.

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CERTIFICATE OF SERVICE

I hereby certify that I served, or caused to be served by means as set forth below, a true and correct copy of the foregoing to the following attorneys this 25th day of October, 2006:

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