

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

PUEBLO of ZUNI,)	
)	
Plaintiff,)	
)	
v.)	No. CIV 01-1046 WJ/WPL
)	
UNITED STATES of AMERICA;)	
MICHAEL O. LEAVITT, Secretary of the)	
United States Department of Health and)	
Human Services; and CHARLES W. GRIM,)	
Director of the Indian Health Service,)	
United States Department of Health and)	
Human Services,)	
)	
Defendants.)	
)	

**DEFENDANTS’ RESPONSE TO PLAINTIFF’S NOTICE OF ADDITIONAL
AUTHORITY**

Defendants, by and through undersigned counsel, hereby submit this response to Plaintiff’s Notice of Additional Authority, dated January 20, 2006. In Plaintiff’s Notice, Plaintiff submits that Shoshone-Bannock Tribes v. Leavitt, 408 F. Supp. 2d 1073 (D. Or. 2005) (notice of appeal filed), is applicable to the briefing on Defendants’ Motion to Dismiss in Part for Lack of Subject Matter Jurisdiction (docketed as #59) and presents argument about the meaning of the case. But Shoshone-Bannock, the decision of a magistrate judge from the District of Oregon, is a case about contract formation and not breach of contract and thus has no applicability here.

Originally brought in March 1996, Shoshone-Bannock involved Shoshone-Bannock’s request to contract for new Indian Self-Determination Act (“ISDA”) programs and, in turn, to obtain program funding and contract support costs (“CSC”) for these programs. See Shoshone-

Bannock Tribes v. Shalala, 988 F. Supp. 1306, 1311-12 (D. Or. 1997). The CSC component of the lawsuit arose out of Shoshone-Bannock's request for CSC in 1996 and IHS's determination that all available funding (\$7.5 million) had already been allocated to satisfy other ISDA contractors' requests. Shoshone-Bannock challenged IHS's "declination" of its CSC request.

Under the ISDA, there are two means by which tribal contractors can seek judicial review of IHS action. The first is that a tribe or tribal organization that receives notification of a declination may seek direct review in federal court pursuant to 25 U.S.C. § 450m-1(a). See 25 U.S.C. § 450f(b). Section 450m-1(a) gives federal courts the power to review a Secretary's declination decision for its compliance with ISDA and, if the decision is in error, to enjoin the Secretary "to reverse the declination finding . . . or to compel the Secretary to award and fund an approved self-determination contract." Id. § 450m-1(a). The second method makes all disputes arising under executed ISDA contracts subject to the Contract Disputes Act ("CDA"). See id. §§ 450m-1(a), (d). The CDA is found at 41 U.S.C. §§ 601 et seq., and requires, inter alia, that before a claim may be brought in federal court, it must first be timely presented to a contracting officer at the relevant agency. See 41 U.S.C. § 605(a). Shoshone-Bannock utilized the first method and sought judicial review of the partial declination of its contract proposal and CSC request.

In 1997, the Magistrate Judge in Shoshone determined that it was improper for IHS to limit its CSC allocations for new and expanded programs to \$7.5 million because additional funds could be allocated out of IHS's lump-sum appropriation of approximately \$1.7 billion for 1996, see 998 F. Supp. at 1331-1332, and later entered summary judgment for Shoshone-

Bannock, see 999 F. Supp. 1395, 1398 (D. Or. 1998). The parties thereafter reached an agreement as to the amount of Shoshone-Bannock's CSC claims for 1996 and 1997 (\$374,936.05), and the government appealed. See Shoshone-Bannock Tribes v. Secretary, 279 F.3d 660, 664 (9th Cir. 2002). The Ninth Circuit reversed and held that Congress intended IHS to limit CSC funding for new and expanded contracts to \$7.5 million, and because IHS had already allocated that amount, there was no basis to review the method of allocation. See id. at 667. Shoshone-Bannock filed a petition for rehearing and for en banc consideration, which was denied, but Shoshone-Bannock did not petition for certiorari to the Supreme Court. The mandate was issued on April 3, 2002.

After the Supreme Court's decision in Cherokee Nation v. Leavitt, Shoshone-Bannock moved to reopen the judgment. Over the Secretary's objection, the Magistrate Judge granted the Rule 60(b) motion and, without any further briefing, reinstated the original judgment in Shoshone-Bannock's favor. The Magistrate Judge cited to the discretionary standard under Rule 60(b) and the Supreme Court's decision in Cherokee Nation as support for the decision. With respect to its reliance on the holding in Cherokee Nation, Shoshone Bannock misunderstands its facts and decision.

In Cherokee Nation, the Supreme Court first had to determine the nature of an ISDA contract. See 543 U.S. 631, ___, 125 S. Ct. 1172, 1178-79 (2005). The government had argued that an ISDA contract is not a contractually binding agreement, but a unique, government-to-government agreement to which general contract law did not apply. See id. at 1178. Rejecting this argument, the Court held that ISDA contracts are like any other procurement contract in

which the government is bound by its promises. See id. Next, the Court had to assess a defense raised by the Secretary to the specific contracts at issue in that case, e.g., that the Secretary did not have sufficient appropriations to pay the amounts promised in the plaintiffs' contracts. See id. at 1179-81. It was undisputed that the Secretary had failed to pay the specific funding amounts in the contracts of the two Cherokee plaintiffs. See id. at 1177. Given these circumstances, the Court held that (1) when the Secretary promised a specific amount in an ISDA contract for indirect CSC, and (2) when appropriations were legally available for that purpose, the Secretary could not defend against a breach of contract action by arguing that it had insufficient appropriations. See id. at 1178-81. Moreover, the Court held that when Congress appropriated an unrestricted, lump-sum appropriation, that appropriation was legally available to satisfy contractual promises. See id. at 1180.

Cherokee Nation was plainly about contractual promises and, unlike Shoshone-Bannock, not about contract formation (i.e., whether IHS was required to include additional CSC in an ISDA contract). Because Shoshone-Bannock involved a contract formation dispute, Cherokee Nation was not applicable. Nonetheless, the Magistrate Judge granted Shoshone-Bannock's motion to reopen the judgment. It also appears that the Magistrate relied upon an incomplete understanding of the facts of this case. In stating that Shoshone-Bannock would be the only tribal contractor ineligible for damages here, the Magistrate Judge must have concluded, incorrectly, that this Court had already (1) denied Defendants' Motion to Dismiss in Part, and (2) determined that Defendants are liable, notwithstanding the fact that neither party has moved for summary judgment. Because of the Magistrate Judge's misunderstanding of both the

Supreme Court's decision and this case, her Rule 60(b) decision has no persuasive value here.

Moreover, the fact that Shoshone-Bannock was about contract formation and not breach of contract makes it entirely distinguishable. The Pueblo of Zuni did not take advantage of the judicial review procedure, utilized by Shoshone Bannock, to challenge the amount of CSC funding that IHS made available to it in fiscal years 1993-1998, see 25 U.S.C. § 450f(b), and instead agreed to the amounts set forth in its contracts. Thus, in contrast to Shoshone-Bannock, the Pueblo of Zuni (and other contractors that it seeks to represent) waived any right to additional funding by executing its contracts and accepting the funding provided by IHS. This distinguishes Shoshone-Bannock from this case and certainly from the more narrow issues presented in Defendants' Motion to Dismiss in Part For Lack of Subject Matter Jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2006, I sent, via electronic mail, a copy of Defendants'

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