2010-5043

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

DARRELL BOYE, KIRK SNYDER, LARRY ETSITTY, JR., SARAH HABAADIH, JONES R. BEGAY, JOHNNY PESHLAKIA, RONALD PLATERIO, REX BUTLER, TYRONE BENALLY, CHALENE BAHE, KENNY JAMES, ROSALYN BENALLY, LEROY BUTLER, LUCY LANE, DALE DENNISON, RANDELL TOMASYO, MARJORIE HENDERSON, PATRICIA YELLOWHAIR, CLINTON CURTIS, HENRY K. MOORE, IRESEN SIX, THOMAS ESITTY, GENEVIEVE MORGAN, DARRELL HARVEY, AND LELAND TOM,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
IN No. 07-CV-195

BRIEF OF APPELLEE

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
Director

MARTIN F. HOCKEY, JR.
Assistant Director

CHRISTOPHER A. BOWEN
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
Attn: Classification Unit
8th Floor
1100 L Street, N.W.
Washington, D.C. 20530
Tel: (202) 305-7594
Fax: (202) 514-8624
Attorneys for Appellee

July 9, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

STATEMENT OF RELATED CASES

Pursuant to Rule 47.5 of the Rules of the Court of Appeals for the Federal Circuit, counsel for the respondent, the United States, states that we are unaware of any other related cases.

Respondent's counsel is also unaware of any cases currently pending before this Court that may be affected by the Court's decision in this case.

2010-5043

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DARRELL BOYE, KIRK SNYDER, LARRY ETSITTY, JR. et al.,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
IN No. 07-CV-195

BRIEF OF APPELLEE

STATEMENT OF THE ISSUES

1. Pursuant to a contract between the United States and the Navajo Nation, the Bureau of Indian Affairs ("BIA") pays the Navajo Nation to provide its own police services ("BIA Contract"). The Navajo Nation then employs the appellants as criminal investigators and police. The appellants allege that the Navajo Nation failed to adhere to the BIA Contract's pay provisions. Assuming this is true, does either the Indian Self-Determination and Education Assistance

Act ("ISDEAA") or the Indian Law Enforcement Reform Act ("ILERA") mandate the payment of money by the United States for this failure?

2. Are the appellants third-party beneficiaries to the contract between the Navajo Nation and the United States?

STATEMENT OF THE CASE

The appellants' "Statement of the Case" and "Statement of the Facts," Appellants' Third Corrected Brief at 10-19, contain assertions and legal conclusions with which we disagree, or which are not relevant to the issues in this appeal. We also believe that additional information may help the Court. For these reasons, we provide below a statement of the nature of the case, a statement of the facts, and a description of the prior proceedings.

I. Nature Of The Case

Appellants, employees of the Navajo Department of Public Safety ("NDPS"), appeal the final decision of the United States Court of Federal Claims in Boye, Snyder, et al. v. United States, 90 Fed. Cl. 392 (Nov. 12, 2009). The decision dismissed the employees' complaint for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1). Id. at 398.

II. Statement Of The Facts

Pursuant to the ISDEAA, 25 U.S.C. § 450 et seq., the Secretary of the Department of the Interior "is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof . . . ." 25 U.S.C. § 450f. Because the ISDEAA was originally embodied within Public Law 93-638, these contracts are also referred to as "638 contracts." Boye, 90 Fed. Cl. at 399, n.2 (citing P.L. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. § 450)). Pursuant to 25 U.S.C. § 450j(e), a tribe may retrocede a 638 contract to the BIA, making the Department of the Interior responsible for its completion.

The Indian Law Enforcement Reform Act ("ILERA"), 25 U.S.C. § 2801 et seq., established a Division of Law Enforcement Services within the BIA to enforce Federal and tribal law. 25 U.S.C. § 2802(c)(1) - (9), (d). The ILERA also noted that the BIA "shall be responsible for providing, or for assisting in the provision of, law enforcement services in Indian country as provided in this Act." 25 U.S.C. § 2802(a). The ILERA notes that law enforcement and criminal investigation could be subject to a 638 contract. See 25 U.S.C. § 2802(a), (d).

The Department of the Interior executed contracts for law enforcement and

criminal investigation services with the Navajo Nation. Boye, 90 Fed. Cl. at 398. The BIA Contracts were generally awarded for multiple-year terms, but amended on an annual basis for funding purposes. Id. Each contract and annual amendment incorporated a model contract, an annual funding agreement, and a statement of work. Id.

The purpose of the BIA Contracts was to transfer funding for, and responsibility to perform, law enforcement and criminal investigation services from the United States to the Navajo Nation. See, e.g., DA 186. The Navajo Nation, after notice to the Secretary of the Interior ("Secretary of the Interior"), could suspend work under the contract for lack of funds. Id. at 188. Moreover, unless otherwise provided by law, the Navajo Nation was not bound by the "program guidelines, manuals, or policy directives" of the Secretary of the Interior. Id. at 193. The annual funding agreements provided that "[t]he Navajo Nation shall administer the programs identified in the Statement of Work . . . during the term of this [annual funding agreement] in accordance with the provisions of the Contract and the [annual funding agreement] . . . ." Id. at 201; accord id. at 220, 254.

The agreements indicated that, along with the funding awarded pursuant to the BIA Contracts, the Navajo Nation could also receive funding from other

sources. Id. at 56; accord id. at 221, 255. The agreements also provided that "all personnel employed by the Navajo Nation under [the annual funding agreements] will adhere to applicable Navajo Nation personnel policies and procedures, including . . . pay schedules and pay tables." Id. at 205; accord id. at 225, 259. Further, the annual funding agreements indicated that, "[f]or purposes of Federal Tort Claims Act coverage, the Navajo Nation and its employees are deemed to be employees of the Federal government while performing work under this contract." Id. at 206, 231, 265. Finally, the model contracts and some of the annual funding agreements provided that the BIA was required to perform an annual performance monitoring visit. See, e.g., id. at 191, 230, 264.

The statements of work in the law enforcement contracts covering 2002 through 2007[1] contained the following provisions:

> 101. The Contractor [, i.e., the Navajo Nation,] shall perform the following Bureau program: LAW ENFORCEMENT SERVICES. Subject to the terms of the contract, the Annual Funding Agreement (AFA), and availability of funds, the Contractor shall perform police law enforcement activities as noted in the Indian Law Enforcement Reform Act ... within Navajo Indian Country...
>
> 102. Personnel. The Contractor shall perform the contracted law enforcement program in accordance with the qualifications, training,

---

[1] The Government notes that the plaintiff-appellants do not challenge the lower court's decision that the statute of limitations bars any claims accruing prior to March 23, 2001. Boye, 90 Fed. Cl. at 404-05.

> code of conduct, inspection and evaluation, and other standards applicable to Bureau law enforcement personnel, or the equivalent....
>
> 106. Salaries. Salaries paid law enforcement officers by the Contractor under this Contract shall be equal to or greater than the salaries paid law enforcement officers with similar responsibilities employed directly by the Bureau of Indian Affairs.
>
> 107. Reporting. The Contractor shall prepare and submit the following reports to the Contracting Officer's Representative:
> B. Internal Reporting Procedures.
>
> The Contractor will maintain the following information as part of its performance of this Contract, but will not submit this information. However, this information will be available for inspection during the Bureau's yearly monitoring visit:
> ....
> 8. Payroll records of all employees[.]

GA 3-4, 8-10, 14-15, 19-21, 25-26, 30-32, 36-37, 42-43, 48-49, 54-56, 60-61, 66-68. The contracts concerning the criminal investigation services contained substantially the same language. Id. at 72, 77, 82-83, 88, 93, 97a-98,10 102, 106, 110-11, 116, 119, 122-24, 128, 131, 135-36, 140, 143, 147-48.

In addition, the 2003-2007 law enforcement contracts and the 2006-2007 criminal investigation contracts contained the following provision:

> No Third Party Beneficiary. This contract does not and is not intended to create rights in any person(s) or entities other than the contracting parties.

GA at pp. 22, 33, 45, 57, 69 at ¶ 109; pp.137, 149 at ¶ 112.

III. Course Of Proceedings Below

The NDPS employees filed suit against the United States in the United States Court of Federal Claims, alleging that the Navajo Nation had failed to pay them as much as they would have been paid as BIA employees. The plaintiffs alleged that the court possessed jurisdiction pursuant to the ISDEAA and the ILERA, or, alternatively, that they were third-party beneficiaries of the BIA Contracts between the Secretary of the Interior and the Navajo Nation.

The Government moved to dismiss the complaint on the grounds that the ISDEAA, ILERA, and accompanying regulations were not money-mandating. Boye et al v. United States, No. 07-195, Docket No. 11 at pp. 14-18. Additionally, the Government argued that the plaintiffs could not claim to be the third-party beneficiaries of the 638 contracts, because the contracts and the statutory scheme did not demonstrate that either the United States nor the Navajo Nation had the clear intention to benefit the tribe's employees. Id. at 10-13.

Prior to ruling on the motion to dismiss, the court below permitted discovery on the limited issue of whether any of the BIA Contracts could be read as evincing an intent on the part of the United States and the Navajo Nation to benefit the NDPS employees. Boye, Docket No. 20 (Nov. 20, 2007). During discovery, the Government produced the law enforcement and the criminal

investigation contracts from 2002 to 2007, along with the accompanying annual funding agreements and statements of work. Government Appendix at 1-167 ("GA").[2] Additionally, the plaintiffs' served interrogatories upon Ms. Delores Torrez and Ms. Sharon Pinto, the awarding officials for the contracts, as well as deposing Ms. Torrez and Mr. Ivan Bowekaty, Ms. Torrez's Awarding Official's Technical Representative.

After this discovery closed, the plaintiffs submitted a supplemental response brief, but did not mention the "no third party beneficiary" paragraph noted above. Boye, Docket No. 74 (Filed Jul. 14, 2009). The Government filed a supplemental reply brief, arguing that the plaintiffs still had not pointed to any evidence that they were third-party beneficiaries, especially in light of the "no third-party beneficiary" paragraph within the statement of work. Boye, Docket No. 80 (Filed Aug. 18, 2009). The court granted the motion to dismiss. Boye, 90 Fed. Cl. at 398 (Nov. 12, 2009).

SUMMARY OF THE ARGUMENT

Neither the ISDEAA or the ILERA is money mandating, and so neither can serve as a basis for the jurisdiction of the court below. The ISDEAA simply

---

[2] Because the appellants has already filed her appendix, pursuant to Rule 30(f) of the Rules of this Court the Government files its own supplemental appendix, designated "GA."

permits Native American tribes to perform certain responsibilities in exchange for the money the BIA would have spent providing the service itself. There is no provision within the ISDEAA that could be construed as mandating the payment of money from the United States to individuals hired by Native American tribes.

The ILERA is likewise not money-mandating. The ILERA states that the BIA is responsible for providing or assisting in the provision of law enforcement services to the Native Americans. The NDPS employees cannot assert that the ILERA is "reasonably amenable to the reading that it mandates a right of recovery in damages," when the ILERA makes only fleeting reference to a tribe's employees.

Finally, the employees are not third-party beneficiaries of the BIA Contracts. The contractual and statutory language indicates that the intended beneficiaries were the members of the Navajo Nation, not the tribe's employees. Additionally, courts have consistently held that employees of a Government contractor are not third-party beneficiaries to the contract itself. Because there is no evidence that either the Navajo Nation nor the BIA clearly intended to benefit the NDPS employees, they do not possess third-party beneficiary rights.

ARGUMENT

I. Standard Of Review

This Court reviews de novo decisions of the Court of Federal Claims regarding jurisdiction. Taylor v. United States, 303 F.3d 1357, 1359 (Fed. Cir. 2002). The plaintiff, however, bears the burden of showing jurisdiction by a preponderance of the evidence. Id. (citing Thomson v. Gaskill, 315 U.S. 442, 446 (1942)). "An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." Mitchell v. Maurer, 293 U.S. 237, 244 (1934); Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. Dep't of Homeland Sec., 490 F.3d 940, 944 (Fed. Cir. 2007).

II. The ISDEAA And The ILERA Are Not Money-Mandating, Because Neither Statute Could Be Reasonably Read As Mandating The Payment Of Money From The United States To The Employees Of The Navajo Nation

The court below correctly held that neither the ISDEAA nor the ILERA are money-mandating, because neither contemplates that the United States would be liable for the payment of a contractor's employees' wages. A "waiver of sovereign immunity must be strictly construed in favor of the sovereign." Orff v. United States, 545 U.S. 596, 601-02 (2005). Such a waiver "must be unequivocally expressed in statutory text" and "will not be implied." Lane v. Pena, 518 U.S. 187, 192 (1996) (citations omitted). The Tucker Act, 28 U.S.C. § 1491, does not

confer jurisdiction by itself, because it does not mandate the payment of money. United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003).[3] "Tucker Act

jurisdiction, however, must derive from substantive law. The relevant substantive law supports a claim within the Tucker Act's sovereign immunity waiver if, but only if, it 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" Samish Indian Nation v. United States, 419 F.3d 1355, 1364 (Fed. Cir. 2005) (quoting United States v. Testan, 424 U.S. 392, 400 (1976)).

This Court has held statutes may be money-mandating if they: "(1) provide 'clear standards for paying' money to recipients; (2) state the 'precise amounts' that must be paid; or (3) as interpreted, compel payment on satisfaction of certain conditions." Samish Indian Nation, 419 F.3d at 1364 (quoting Perri v. United States, 340 F.3d 1337, 1342-43 (Fed. Cir. 2003)).

---

[3] The employees also reference the Indian Tucker Act, 28 U.S.C. § 1505, on page 22 of their brief. As the court below explained, and the employees do not here refute, the Indian Tucker Act is inapplicable, because it only applies to Native American Tribes as plaintiffs, not to a tribe's employees. See, Fields v. United States, 423 F.2d 380, 383 (Ct. Cl. 1970) ("[S]ince the instant case is one brought by individual Indians and not a tribe, band, or identifiable group of Indians, we feel that defendant is correct in asserting that section 1505 does not apply to the present case.").

As demonstrated below, neither the ISDEAA nor the ILERA meet any of the above standards with respect to employees of the Navajo Nation.

A. The ISDEA Is Not An Independent Source Of Jurisdiction For The NDPS Employees, Because It Cannot Be Read As Requiring The Payment of Money To Them From The Federal Government

The ISDEAA does not make the United States responsible for any underpayment of the NDPS employees' salaries. "The relevant substantive law supports a claim within the Tucker Act's sovereign immunity waiver if, but only if, it 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" Samish Indian Nation, 419 F.3d at 1364.

1. The ISDEAA Is Not Money-Mandating As To The Employees, Because The ISDEAA Does Not Even Purport to Deal With The NDPS Employees's Wages

The ISDEAA's purpose is "to provide maximum Indian participation in the government and education of the Indian people; to provide for the full participation of Indian tribes in programs and services conducted by the Federal Government for Indians, and to encourage the development of human resources of the Indian people." P.L. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. 450); see also Snyder v. Navajo Nation, 382 F.3d 892, 896 (9th Cir. 2004) ("The purpose of the ISDEAA is to increase tribal participation in the management of programs and activities on the reservation."); Demontiney v. United States, 255 F.3d 801, 806

(9th Cir. 2001).

To promote Indian participation, the ISDEAA permits a Native American tribe to request that the BIA pay the tribe the money which it otherwise would have spent on providing the tribe with certain services, such as healthcare, law enforcement, and education. 25 U.S.C. § 450f, 25 U.S.C. § 450j-1(a)(1). In exchange, the tribe performs these functions itself. Id. The Government may only refuse to contract upon a written finding that the tribe would either provide inadequate service to the Native Americans or that the requested amounts exceed what Congress has appropriated. 25 U.S. C. § 450f(a)(2).

The ISDEAA has the following sections related to a tribe's employees performing functions pursuant to 638 contracts:

> (1) For purposes of malpractice or negligence lawsuits, employees performing public health functions pursuant to a 638 contract are deemed employees of the Public Health Services.
> 25 U.S.C. § 450f(d);
>
> (2) For purposes of the Federal Tort Claims Act ("FTCA"), Native American tribes are deemed part of the BIA and tribal employees are deemed employees of the BIA.
> 25 U.S.C. § 450f, note.
>
> (3) Federal employees who opt to become employees of a tribe pursuant to a 638 contract can take their Federal benefits with them.
> 25 U.S.C. § 450i(e);

> (4) tribal employees hired pursuant to a 638 contract may determine the amount of benefits for individual Native Americans, receive supplies at the same price as Federal employees, and receive Federal lodging in Alaska at reasonable rates.
> 25 U.S.C. § 450j.

There are no other provisions within the ISDEAA relating to the employees of the Native American tribes. See 25 U.S.C. § 450 et seq.

The ISDEAA does not mandate the payment of money by the United States for the wages of a tribe's employees, because ISDEAA does not cover this issue. The ISDEAA has no clear standards for when the United States would become obligated nor any mention of the "precise amounts" to which the claimants would be entitled. See Samish Indian Nation, 419 F.3d at 1364. Additionally, the statute is devoid of what conditions would compel the United States to begin paying for the employees' wages or when the United States would become liable for an Indian tribe's non-payment. See id. Because the ISDEAA imposes no obligations upon the United States except with respect to the Native American tribes, the ISDEAA cannot confer jurisdiction upon the court below.

2. The Supreme Court And This Court Have Already Held That ISDEAA And Similar Statutes Are Not Money-Mandating

Additionally, in examining whether Indian statutes are money-mandating, courts have differentiated between statutes where the United States assumed responsibility for monetary obligations and those where it left the discretion to the Native American tribe. Cf. United States v. Mitchell, 445 U.S. 535 (1980) (holding that the General Allotment Act is not money-mandating, because it left the individual Native Americans with discretion on how to dispose of their timber) with United States v. Mitchell, 463 U.S. 206 (1983) (holding that the United States had assumed fiduciary responsibilities where it had assumed "elaborate control over forests and property").

The Supreme Court and this Court have generally held that where the statute gives the individual tribes control over their contracts, the statute is not money-mandating. United States v. Navajo Nation, 537 U.S. 488, 508 (2003) ("The IMLA aims to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases"); Mitchell, 445 U.S. at 545-46; Samish Indian Nation v. United States, 419 F.3d 1355, 1365 (Fed. Cir. 2005) ("Absent a contract this statutory language and structure is not reasonably read as demonstrating congressional intent to establish a damage remedy under the

[ISDEAA] for non-payment of the underlying benefits . . . ."). Indeed, in Samish, this Court emphasized that "[i]f anything, the [ISDEAA]has precisely the opposite effect. Instead of arrogating control and authority to the government, like regulations and conduct that gave rise to a damage remedy in White Mountain and Mitchell II, the [ISDEAA] delegates to tribal organizations authority over federal programs." Id. at 1368.

Unlike the present case, Samish Indian Nation, Navajo Nation, and Mitchell were brought by either Native American Tribes or individuals in their capacities as Native Americans. Navajo Nation, 537 U.S. at 495; Mitchell, 445 U.S. at 537; Samish Indian Nation, 419 F.3d at 1358. Here, the plaintiffs-appellants here bring suit as employees of an agency of the Navajo Nation. Boye Third Corrected Brief at 10. Given this status, the employees cannot claim that the ISDEAA creates an obligation for the United States to pay money to them.

Furthermore, this Court has already held that Congress intended the ISDEAA to give the Native American tribes more control over services. Samish, 419 F.3d 1365. Imposing liability upon the United States pursuant to the ISDEAA, therefore, "would be out of line with one of the statute's principal purposes, enhancing tribal self-determination." Navajo Nation, 537 U.S. at 491. The ISDEAA, therefore, is not a statute that generally creates obligations for the

United States.

3. The Employees Have Failed To Explain How Any Section Of The ISDEAA Is Money-Mandating

In their brief, the employees fail to cite any portion of the ISDEAA's statutory language that could be construed as mandating the payment of money to them from the United States.

Although the plaintiffs cite to 25 U.S.C. § 450(a)(1), this provision does not "delineate[] a Model Contract," as the plaintiffs assert. Boye Third Corrected Brief at 16. Rather, Section 450(a)(1) is part of the prologue for the ISDEAA. 25 U.S.C. § 450(a)(1). Section 450(a)(1) states:

> the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities. . . .

25 U.S.C. § 450(a)(1) (West 2006). This section, therefore, does not have a model contract within it and, more importantly, actually supports the Government's contention, supra Section II(a)(2), that the purpose of the ISDEAA is to take responsibility away from the BIA and give it to the tribes. Although 25 U.S.C. § 450*l*(c) does contain a model agreement, it does not contain any pay provision

that relates to the pay of the tribe's employees. See generally 25 U.S.C. § 450*l*(c). Rather, the payment clauses in the model contract relate to when and how the BIA is to pay the tribe that receives a contract. Id. at Model Contract, § b(6).

Other than Section 450(a)(1), the employees also cite to Sections 450f and 450h(L). Section 450f, however, relates to employees only in that they are deemed BIA employees for purposes of malpractice and negligence claims brought against public health employees and for torts. 25 U.S.C. § 450f(d), note; see also Snyder v. Navajo Nation, 382 F.3d 892, 897 (9th Cir. 2004); ; Demontiney v. United States, 255 F.3d 801, 807 (9th Cir. 2001).

The appellants also cite to 25 U.S.C. § 450h(L). Boye Third Corrected Brief at 16. As an initial matter, this citation does not exist; 25 U.S.C. § 450h only has subsections "(a)" through "(e)." 25 U.S.C. § 450h. In addition, this section is inapplicable. Section 450h simply authorizes the Secretary of the Interior to assist a Native American tribe in its governance of a 638 contract, 25 U.S.C. § 450h(a), (e); give money to a tribe to build a public health facility, 25 U.S.C. § 450h(b); and assist in obtaining or modifying a 638 contract, 25 U.S.C. § 450h(d). This section does not contain the word "employee" nor any provision that could be read as mandating the payment of money to the tribe, much less its employees. See 25 U.S.C. § 450h.

Finally, the employees rely upon Carlow v. United States, 40 Fed. Cl. 773 (1998) to argue that the ISDEAA is money-mandating, based upon the historical note appended to 25 U.S.C. § 450f. Boye Third Corrected Brief at 22-23. Carlow, however, rested upon a determination that the contractors hired by the tribe were third-party beneficiaries of a 638 contract that had been retroceded to the BIA and then subsequently modified. Carlow, 40 Fed. Cl. at 783. That decision found potential liability for the Government, therefore, not upon a finding of the ISDEAA being money-mandating, but upon the modified contract. Id. Carlow, therefore, is inapposite on the question of whether the ISDEAA is money-mandating.

Additionally, the two Circuit Courts of Appeal that have considered the historical note within 25 U.S.C. § 450f have already held that employees of the tribe are deemed employees of the BIA only for purposes of the Federal Tort Claims Act ("FTCA"). See Snyder v. Navajo Nation, 382 F.3d 892, 897 (9th Cir. 2004)[4] ("Congress, however, did not intend [this language] to provide a remedy against the United States in civil actions unrelated to the [FTCA]."); Demontiney v. United States, 255 F.3d 801, 807 (9th Cir. 2001) (holding that this language

---

[4] The Snyder litigation involved the same plaintiffs and the same claims as the present litigation. See Boye et al, 90 Fed. Cl. at 416-17.

"applies to tort claims brought under the Federal Tort Claims Act . . . against a contractor who has a self-determination contract"); FGS Constructors, Inc. v. Carlow, 64 F.3d 1230, 1234 (8th Cir. 1995) ("Congress amended the [ISDEAA] to allow recovery under the Federal Tort Claims Act for certain claims arising out of the performance of self-determination contracts."); see also General Accounting Office Report, No. 00-169, Federal Tort Claims Act: Issues Affecting Coverage for Tribal Self-Determination Contracts 6, 16 (July 2000) (GA Report) (noting that Congress extended only FTCA coverage in 1990).

The text of the note, "any civil action or proceeding involving such claim brought. . . . will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act," supports these courts' holdings, as it only refers to the FTCA, and no other money-mandating statute. 25 U.S.C. § 450f. Finally, as the court below noted, the BIA and the Navajo Nation incorporated this interpretation into the 638 contracts, by specifically providing that Navajo Nation employees would be deemed Federal employees only for purposes of the FTCA. GA at 206, 231, 266. This historical note, therefore, does not indicate that tribal employees can sue the United States for the alleged failure of the tribe to follow the ISDEAA contract.

The ISDEAA is not a money-mandating statute for employees of a Native American tribe. Given that the plaintiffs do not allege that they have a contract with the BIA, this Court should continue to follow Samish and reject the argument that the ISDEAA is independently money-mandating.

B. The Indian Law Enforcement Reform Act Does Not Provide The Court With Jurisdiction, Because No Provision Or Interpreting Regulation Mandates The Payment Of Money To A Tribe's Employees

"The relevant substantive law supports a claim within the Tucker Act's sovereign immunity waiver if, but only if, it 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" Samish Indian Nation, 419 F.3d at 1364 (Fed. Cir. 2005). Pursuant to the ILERA, the Secretary of the Interior is responsible for "providing, or for assisting in the provision of, law enforcement services in Indian country as provided in this chapter." 25 U.S.C. § 2802 (emphasis added). To assist in these duties, the ILERA authorizes the Secretary to establish within the BIA a division of law enforcement services, along with a criminal investigation branch, although these may be subject to a 638 contract. 25 U.S.C. §§ 2802(b), (d).

The only ILERA provision that deals with non-BIA employees is 25 U.S.C. § 2804(f):

(f) Status of person as Federal employee

While acting under authority granted by the Secretary under subsection (a) of this section, a person who is not otherwise a Federal employee shall be considered to be--

(1) an employee of the Department of the Interior only for purposes of--

(A) the provisions of law described in section 3374(c)(2) of Title 5, and

(B) sections 111 and 1114 of Title 18,

(2) an eligible officer under subchapter III of chapter 81 of Title 5 [5 U.S.C. §§ 8191-93]

25 U.S.C. § 2804(f). None of the exceptions listed above relate to this case. Section 3374(c)(2) of Title 5 deems a non-Federal officer enforcing Federal law a Federal employee for purposes of the Ethics in Government Act and the FTCA. 5 U.S.C. § 3374(c)(2). Sections 111 and 1114 of Title 18 make it a crime to assault or murder a Federal law enforcement officer. 18 U.S.C. §§ 111, 1114. Finally, sections 8191, 8192, and 8193 of Title 5 concern injury and disability compensation decisions made by the Secretary of Labor regarding law enforcement officers injured while protecting Federal interests. 5 U.S.C. §§ 8191-93. None of these provisions concern the payment of non-BIA employees' wages, much less mandate that the United States pay for any non-payment by a Tribe holding a 638 contract.

The employees cite to 25 C.F.R. §§ 12.33, 12.34, and 12.62, alleging that these regulations indicate that the ILERA and the ISDEAA are money-mandating. Boye Third Corrected Brief at 23-24. However, 25 C.F.R. §§ 12.33 and 12.62 only relate to BIA employees. Section 12.33 states that BIA law enforcement officers are to be classified at least as GS-08-1811. Additionally, 25 C.F.R. § 12.62 only provides for a uniform allowance for "Uniformed BIA police officers." 25 C.F.R. § 12.62. Given that the plaintiff-appellants are not employees of the BIA, Boye Third Corrected Brief at 10, 25 C.F.R. §§ 12.33 and 12.62 are inapplicable to them and cannot give rise to a right to monetary damages.

Section 12.34 provides that "[a]ny contract or compact with the BIA to provide law enforcement services for an Indian tribe must require a law enforcement officer to be paid at least the same salary as a BIA officer performing the same duties." 25 C.F.R. § 12.34. Although potentially mentioning the appellants, it cannot be fairly interpreted as "mandating compensation by the Federal Government for the damage sustained." Samish Indian Nation, 419 F.3d at 1364. The regulation only states that the United States will have the clause inserted into 638 law enforcement contracts. Notably, it does not state that the Government will be responsible for paying the difference if the tribe fails to follow through with the agreement or if the Government fails to detect the

shortfall. 25 C.F.R. § 12.34. See Acousti v. United States, 15 Cl. Ct. 698, 701 (1988) (holding that the United States did not have liability to a subcontractor for failing to ensure that a prime contractor carried a sufficient bond pursuant to the Miller Act).

The ILERA and the ISDEAA, along with the accompanying regulations, have no provisions that would mandate that the United States pay the salaries of employees hired pursuant to 638 contracts. These statutes and related regulations, therefore, are not money-mandating.

III. The NDPS Employees Are Not Third-Party Beneficiaries Of The BIA Contracts, Because Neither The BIA Nor The Navajo Nation Intended For The Contracts To Benefit NDPS Employees

The NDPS employees are not third-party beneficiaries of the BIA contracts, because the contractual language, along with the ISDEAA's and ILERA's statutory text, fail to indicate that either the BIA or the Navajo Nation clearly intended to benefit the Navajo Nation's employees.

"In order to prove third party beneficiary status, a party must demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly." Glass v. United States, 258 F.3d 1349, 1354 (Fed. Cir. 2001). As evidence of intent, the court must consider "the language of the contract itself." Dewakuku v. Martinez,

271 F.3d 1031, 1041 (Fed. Cir. 2001). If a contract does not list a third party as an intended beneficiary, the Court may look to other objective evidence. Roedler v. Dep't of Energy, 255 F.3d 1347, 1352 (Fed. Cir. 2001); see also Montana v. United States, 124 F.3d 1269, 1273 (Fed. Cir. 1997) (noting that if an individual or group is not "specifically or individually identified in the contract" as a third-party beneficiary, then the individual or group must "fall within a class clearly intended to be benefitted thereby").

When looking at the contract's language, the court must first determine whether a "beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him." Dewakuku, 271 F.3d at 1041. To the extent a contract implements a statute, a court may look to "the governing statute and its purpose." Roedler, 255 F.3d at 1352. Finally, the court may look to "other objective evidence" of the parties' intent at the time of the signing of the contract. Flexfab, L.L.C. v. United States, 424 F.3d 1254, 1262 (Fed. Cir. 2005).

A. The NDPS Employees Are Not Third-Party Beneficiaries Of The BIA Contracts Containing The "No Third Party Beneficiary" Clause, Because That Clause Would Make Any Reliance Unreasonable

To determine if an individual is a third-party beneficiary of a contract, the court first looks to the language of the contract. Dewakuku, 271 F.3d at 1041 (Fed. Cir. 2001). Prior precedent has held, unsurprisingly, that an individual cannot be reasonable in believing that he or she is a contract's intended third-party beneficiary if the contract states that the contracting parties did not intend to create third-party beneficiaries. Securities & Exchange Comm'n v. Prudential Sec. Inc., 136 F.3d 153, 159 (D.C. Cir.1998); Corrugated Paper Prods. v. Longview Fibre Co., 868 F.2d 908, 911 (7th Cir. 1989) (quoting Brooklawn v. Brooklawn Housing Corp., 11 A.2d 83 (1940)); see also Restatement (Second) of Contracts § 302(1); 9 Corbin on Contracts § 44.6, p. 68 (Rev. ed. 2007) (stating that it is "obvious" that "where the terms of the contract expressly state the intention of the promisee and promisor concerning the enforceable rights of third parties, the critical question of whether the parties intended the third party to have such a right is easily answered.").

As noted above, the statements of work for the 2003-2007 law enforcement contracts, along with those for the 2006 and 2007 criminal investigation contracts, contained the following paragraph:

> No Third Party Beneficiary. This contract does not and is not intended to create rights in any person(s) or entities other than the contracting parties.

GA at pp. 22, 33, 45, 57, 69 at ¶ 109; pp.137, 149 at ¶ 112. The NDPS employees, therefore, could not have been reasonable in believing that they were third-party beneficiaries of these contracts, because the contracts expressly excluded them.

In response to this clause, the NDPS employees contend that this clause's inclusion was improper, and that the BIA and the court below failed to cite any legal authority for the inclusion of this clause. In support of this contention, the appellants purport to quote from Demonitiney v. United States, 54 Fed. Cl. 780, 791 (2002) that "'a provision cannot be inserted in a federal contract not supported by a relevant federal statute.'" Boye Third Corrected Brief at 26.

First, this quotation does not exist. Not only can this quotation or a variation of it not be found in Demonitiney, that case does not even support the general proposition. See generally Demonitiney, 54 Fed. Cl. at 791 (holding that the tribe's contractor could not sue the United States pursuant to a 638 contract). In addition, a search on Westlaw of all federal cases looking for the general terms within the quotation returned no cases with a quotation even resembling the one given by the plaintiff. Given that this is the sole authority cited in this section of the brief, the appellants have no authority to assert that BIA and the Navajo Nation

improperly inserted this contract clause.

Second, the appellants forget that it is their burden to prove their case. Taylor v. United States, 303 F.3d 1357, 1359 (Fed. Cir. 2002). Given that the NDPS employees have no legal authority supporting their argument regarding the inclusion of the "No Third Party Beneficiary" clause, they have failed to meet their required burden of demonstrating that this clause was improper. Indeed, the Government is unaware of any case or statute that would prohibit the inclusion of this clause. In Prudential Securities, the Federal Court of Appeals for the District of Columbia supported the inclusion of such a clause in a consent degree signed by a Federal agency. Prudential Securities, 136 F.3d at 158-59. Additionally, although the appellants contend that this clause frustrated congressional intent, they cite to no statutory text, legislative history, or other precedent indicating that Congress intended to benefit individual tribal employees when it passed the ISDEAA. Indeed, the statutory text and case law indicate that the Native Americans as a whole were the intended beneficiaries. See, e.g., 25 U.S.C. § 450a(b) ("The Congress declares its commitment to . . . individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy"). The clause, therefore, is properly included.

Finally, the appellants cast aspersions upon the court below for rejecting

arguments that they never made. As a result, any argument about the inclusion of the clause is waived. Gant v. United States, 417 F.3d 1328, 1332 (Fed. Cir. 2005); Henry v. Department of the Navy, 902 F.2d 949, 953 (Fed. Cir. 1990). The BIA produced the relevant contracts, including those with the "no third party beneficiary" clause, to the appellants. The NDPS employees then submitted a supplemental response brief on the third-party beneficiary issue, but chose to ignore how the court should address the contracts with the "no third party beneficiary" clause. See Boye et al. v. United States, Fed. Cl. No. 07-195, Docket No. 76-2 (Filed Jul. 15, 2009). If the appellants thought that these clauses had been improperly included within the contracts, they should have raised the issue with the court in their supplemental response brief. Instead, despite having requested and received discovery of the all of the relevant contracts, the appellants chose not to include any of the contracts in their appendix, but instead focused upon the depositions and the interrogatories. Having made the tactical choice not to address the provisions below, the appellants should not now be permitted to raise this argument.

The court below correctly held that the NDPS employees could not be third-party beneficiaries of the 2003-2007 law enforcement contracts and the 2006 and 2007 criminal investigation contracts, because the NDPS employees could not

have reasonably expected benefits from a contract that excluded all third-party beneficiaries.

B. Even Without The "No Third Party Beneficiary" Clause, The Employees Are Not Third-Party Beneficiaries, Because The Contractual Language And The Statutory Framework Do Not Indicate That There Was An Intent To Benefit Tribal Employees

As noted above, when looking at the language of the contract, a court must first determine whether a "beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him." Dewakuku, 271 F.3d at 1041. If a contract does not list an individual as an intended beneficiary, then the beneficiary must "fall within a class clearly intended to be benefitted thereby." Montana, 124 F.3d at 1273; see also Roedler, 255 F.3d at 1353. To the extent a contract implements a statute, a court may look to "the governing statute and its purpose," Roedler, 255 F.3d at 1352, along with "other objective evidence" of the parties' intent at the time of the signing of the contract. Flexfab, L.L.C. v. United States, 424 F.3d 1254, 1262 (Fed. Cir. 2005). Third-party beneficiaries are distinguished from an incidental beneficiary, who is "a person who is neither the promisee of a contract nor the party to whom performance is to be rendered [but who] will derive a benefit from performance." 2 S. Williston, A Treatise on the Law of Contracts, § 402 at 1099 (3d ed.1959).

1. The Language Of The Contract Does Not Clearly Indicate That The BIA Or The Navajo Nation Intended To Directly Benefit NDPS Employees

This Court and the Court of Federal Claims have held that subcontractors and employees of prime contractors cannot sue the United States for a prime's failure to pay. United States v. Munsey trust Co., 332 U.S. 234, 241 ("nothing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation"); United Electric Corp v. United States, 647 F.2d 1082, 1085 (Ct. Cl. 1981) (holding that subcontractor could not sue the United States for compensation under a prime contract).

This prohibition even extends to Government contracts including provisions regarding the compensation of subcontractors or employees. Christos v. United States, 48 Fed. Cl. 469, 477-78 (2000) (holding that employees of Government contractor were not third-party beneficiaries for purposes of a severance payment, despite provision in Government contract stating that employees "shall receive severance pay"); Sallee v. United States, 41 Fed. Cl. 509, 514-515 (1998) (holding that employee of Government contractor was not third-party beneficiary of Government contract allowing compensation for the submission of cost reduction proposals); Acousti, 15 Cl. Ct. at 701 (holding that the United States was not liable to subcontractor on third-party beneficiary theory for the prime contractor's

failure to have an adequate bond, despite Miller Act provision in the Government contract requiring the prime contractor to have adequate coverage).

The paragraph upon which the NDPS employees base their claim states:

> 106. Salaries. Salaries paid law enforcement officers by the Contractor under this Contract shall be equal to or greater than the salaries paid law enforcement officers with similar responsibilities employed directly by the Bureau of Indian Affairs.

GA 3-4, 8-10, 14-15, 19-21, 25-26, 30-32, 36-37, 42-43, 48-49, 54-56, 60-61, 66-68. Neither this paragraph nor any other within the BIA contracts lists the NDPS employees as third-party beneficiaries or give them the right to bring suit to enforce this provision against the Navajo Nation, much less against the United States. Id. The NDPS employees, therefore, must show that the United States and the Navajo Nation "clearly intended" to benefit them. Montana, 124 F.3d at 1273.[5]

The appellants do not cite to any provision of the contract demonstrating this intent. Although the plaintiffs note that the BIA Contracts required the

---

[5] Additionally, it is far from clear that the NDPS employees have standing to sue the United States for the failure of the Navajo Nation to honor the contract. The Supreme Court has held that a plaintiff lacks standing, where the alleged injury "results from the independent action of some third party not before the court." Simon v. Welfare Rights Org., 426 U.S. 26, 42 (1976); see also Allen v. Wright, 468 U.S. 737, 757 (1984); Warth v. Seldin, 422 U.S. 490, 505 (1975); Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973).

Navajo Nation to provide training and equipment to NDPS employees, along with keeping records of any incidents, these fall short of creating third-party beneficiary rights in the NDPS employees. As the Court of Federal Claims has observed:

> The Government can, as a condition of providing federal assistance . . . to one or both of the parties, require that their contract conform to certain standards, follow a particular format, include certain terms, and/or be approved by the responsible federal agency without thereby waiving the Government's sovereign immunity and establishing privity of contract between the Government and either non-federal party with respect to the terms of that contract.

Sucesion J. Serralles, Inc. v. United States, 46 Fed. Cl. 773, 787 (Fed. Cl. 2000); see also Housing Corp. of America v. United States, 468 F.2d. 922, 923-924 (Ct. Cl. 1972) (holding that builder was not third-party beneficiary of contract between the United States and local housing authority). Additionally, the text of the contracts indicates that the contract was meant to benefit the Native Americans and their Tribes, rather than the employees. As the agreements state in the second paragraph, "Each Provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and each provision of this contract shall be liberally construed for the benefit of the contractor [the Navajo Nation] . . . ." GA at 18. The text of the contract, therefore, does not indicate that either the United

States or the Navajo Nation "clearly intended" to benefit the NDPS employees.[6]

The appellants' authorities do not hold otherwise. Although the NDPS employees cite to a number of cases involving suits pursuant to ISDEAA, all of these, except for Carlow, involved tort claims, and thus are covered by the FTCA waiver found in 25 U.S.C. § 450f. See Locke v. United States, 215 F.Supp. 2d 1033 (S.D. 2002) (tort claim); Waters v. United States, 812 F.Supp. 166, 168-169 (N.D. Cal. 1993) (holding that physical and sexual assaults fall within the definition of 'wrongful acts' for purposes of the FTCA); Big Owl v. United States, 961 F.Supp. 1304, 1307-1308 (holding that the BIA can be sued for "emotional distress" pursuant to 25 U.S.C. § 450f and the FTCA). They are, therefore, inapposite as to this breach of contract claim.

In cases where courts have found a party to be a third-party beneficiary, the intent to benefit has been far clearer. See, e.g., Montana, 124 F.3d at 1272

---

[6] Nor is it clear that any audit by the BIA would have benefitted the NDPS employees. Pursuant to 25 U.S.C. § 450m, the Secretary may only rescind or cancel a 638 contract if he finds mismanagement, and then only after notice and a hearing. 25 U.S.C. § 450m. The Secretary does not possess the power to alter the Navajo Nation's contracts. Id. Additionally, upon cancellation, the BIA is not required to hire the employees who formerly held their positions pursuant to a 638 contract. See id.. That any action by the BIA would have benefitted the NDPS employees is speculative. See Simon, 426 U.S. at 42-43 (noting that it was too speculative for standing purposes that IRS's changing of hospital's tax-exempt status would result in indigent plaintiffs receiving medical care).

(paragraph in settlement agreement explicitly stated that one of the parties was "subject to claims and obligations . . . whether such claims are asserted by such other parties or by the Bank lenders by way of indemnity or contribution"); Carlow, 40 Fed. Cl. at 781 (contract explicitly contained retrocession clause that was exercised by the Indian tribe and gave responsibility for the contract back to the Government); Schuerman v. United States, 30 Fed. Cl. 420, 433 (1994) (Government conceded that guarantee contract was for benefit of loan applicant). Here, in contrast, the language of the contracts does not contemplate third parties having any right to sue to enforce its terms against either of the parties, and, therefore, does not reflect an intention to benefit NDPS employees directly. Glass, 258 F.3d at 1354. Contrasting the explicit language that this Court has found to confer third-party beneficiary status on past claimants and the dearth of such language in the current contracts, this Court should conclude that the requisite intent was not present.

The language of the contracts, therefore, does not indicate that the United States or the Navajo Nation "clearly intended" to benefit the NDPS employees.

2. The Statutory Framework And Other Evidence Also Does Not Indicate An Intent To Benefit The NDPS Employees

As the court below and numerous other courts correctly have held, Congress intended the ISDEAA to benefit the Native Americans and their tribes. Demontiney v. United States, 255 F.3d 801 (9th Cir. 2001); Demontiney v. United States, 54 Fed. Cl. 780 (2002). As the ISDEAA states in its Declaration of Commitment, "[t]he Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole . . . ." 25 U.S.C. § 450a. Nothing within the ISDEAA, therefore, indicates that Congress intended to be benefit the NDPS employees.

Additionally, the appellants fail to demonstrate how the course of conduct indicates an intent to benefit them. Roedler, cited by the plaintiffs, did not examine the parties' "course of conduct" in deciding that the customers were not third-party beneficiaries. Roedler, 255 F.3d at 1353. Indeed, Roedler does not even contain the phrase "course of conduct." See generally, Roedler, 255 F.3d at 1347-1356. Rather, this Court examined the legislative history and text of the statute in deciding that individual consumers of nuclear power could not sue the United States for failure to store their utilities' nuclear waste. Id.

Regardless, the BIA officials' answers to the interrogatories and deposition questions indicates that the intended beneficiaries were the Native American people, not the tribe's employees. The BIA officials all stated that the statement of work was subject to the availability of funds and, further, that the Navajo Nation could implement its own pay schedule. Boye, 90 Fed. Cl. at 414. The court below held, "the responses from Ms. Pinto and Ms. Torrez . . . contain no opinion on whether employees of the Navajo Nation were meant to directly benefit from the 638 contracts." Id. The appellants do not provide this Court with any citation to the interrogatories that contradicts this finding of the court below. Additionally, the appellants cite to no interrogatory or deposition response indicating that the BIA intended to benefit the NDPS employees or give them the ability to enforce the contract. Boye Third Corrected Brief at 18-19, 31.

The appellants cannot demonstrate through the contract language, the statutory text, or the other evidence that the BIA Contracts were "clearly intended" to benefit them.

V. Neither The General Duties Contained Within The ILERA Nor The Jurisdiction Of The Navajo Tribal Court Are Relevant To This Case

In part C of their argument section, the employees contend that the BIA has a non-delegable duty to provide law enforcement services to the Native American tribes. The employees have never alleged, however, that the Navajo Nation has not received adequate law enforcement or criminal investigation services. Additionally, the ILERA specifically contemplates the BIA could fulfill its obligations by providing assistance to the tribe, rather than performing the duties itself. 25 U.S.C. § 2802(a) (noting that the BIA "shall be responsible for providing, or for assisting in the provision of, law enforcement services in Indian country as provided in this Act.") (emphasis added). Regardless, nothing within part C indicate that the United States is liable for the payment of the Navajo Nation's employment contracts, absent a retrocession or contract modification as in Carlow.

In part D of their argument, the employees assert that the Navajo Tribal Court would need to consider the responsibilities of the parties to the 638 contract. Boye Third Corrected Brief at 35. Were the NDPS employees to sue the Navajo Nation for failing to pay the required amounts, however, the Tribal Court would only need to determine the responsibilities of one party to the 638 contract, the

Navajo Nation. The employees do not explain, and cite no cases, treaties, or statutes explaining, why the Navajo Tribal Court could not determine the responsibilities of the Navajo Nation in an employment dispute. Regardless, nothing within part D explains why the United States would be liable for the payment of the salaries of the Navajo Nation's employees.

CONCLUSION

We ask the Court to affirm the decision of the Court of Federal Claims.

Respectfully submitted,

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
Director

MARTIN F. HOCKEY, JR.
Assistant Director

Christopher Bowen
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
Attn: Classification Unit
1100 L Street, N.W., 8th Floor
Washington, D.C. 20530
Tel: (202) 305-7594
Fax: (202) 514-8624

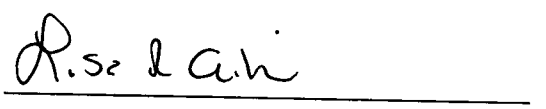
Attorneys for Defendant

July 9, 2010

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this 9th day of July 2010, I caused to be delivered by United States mail (first class mail, postage prepaid) service copies of "BRIEF OF APPELLEE" addressed as follows:

Tamra Facciola
Law Office of Edward D. Fitzhugh
P.O. Box 24328
Tempe, Arizona 85285-4238



CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e)2 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, counsel for Appellee, the United States, certifies that this brief complies with Rule 28.1(e)(2)(B)(i), because, based on a word count by the word processing software, it contains 8,211 words.

July 9, 2010

Christopher A. Bowen