No. 08-2262

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RAMAH NAVAJO CHAPTER, *et al.*,

Plaintiffs-Appellants,

v.

KENNETH L. SALAZAR, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
The Honorable Senior Judge C. LeRoy Hansen

BRIEF *AMICUS CURIAE* OF NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF APPELLANTS AND FOR REVERSAL OF THE DECISION BELOW

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus National Congress of American Indians ("NCAI") is a non-profit organization. NCAI has no parent corporation and, as it has no stock, no publicly held company owns 10 percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Administrative Decisions

Statutes

Rules

Legislative Materials

Other Authorities

STATEMENT OF *AMICUS CURIAE* INTEREST

The National Congress of American Indians ("NCAI") was founded in 1944 and is the largest tribal government organization in the United States. NCAI serves as a forum for consensus-based policy development among its over 250 member tribal governments from every region of the country. NCAI's mission is to inform the public and all branches of the federal government about tribal self-government, treaty rights, and a broad range of federal policy issues affecting tribal governments. NCAI and its members have considerable experience with the history and operation of contracts under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq*. ("ISDEAA").

NCAI submits this brief with the consent of all parties to this appeal under the authority of Federal Rules of Appellate Procedure 29(a). NCAI believes the brief will help the Court understand the questions presented in a broader context framed by the specific history of the ISDEAA and the national policy of tribal self-determination. Full payment of contract support costs to Indian tribes under ISDEAA contracts has been in controversy since the ISDEAA became law in 1975 and remains a top priority of NCAI. NCAI supports the position of the Appellants Ramah Navajo Chapter, et al., and urges reversal of the decision of the district court below.

INTRODUCTION

By all accounts, the policy of tribal self-determination embodied in the ISDEAA has greatly improved services to Indians while building tribes' managerial and governmental capacities.[1] The persistent failure of the Bureau of Indian Affairs ("BIA") to fully fund contract support costs, however, undermines self-determination by forcing contracting tribes to either subsidize the federal programs they assume or cut back on services they provide in order to cover unavoidable administrative costs. Ten years ago, amicus NCAI undertook an extensive study of the contract support cost crisis. The study's number one finding was as follows:

> The payment of full contract support costs is essential to the success of the Self-Determination Policy, empowerment of Tribal governments and to avoid a contracting ***penalty*** associated with the transfer of federal programs to tribal operation….

NAT'L CONGRESS OF AM. INDIANS NAT'L POLICY WORK GROUP ON CONTRACT SUPPORT COSTS: FINAL REPORT at 4 (July 1999) (emphasis in original). Ten years later, BIA still interprets the ISDEAA as embodying Congressional intent to

[1] *See e.g.*, Miccosukee Tribe of Indians of Florida, Chairman Billy Cypress, Prepared Statement Before the House Resource Committee (Aug. 3, 1999) (describing self-determination as "the most successful Indian policy [ever] adopted by the United States"); S. Hrg. 109-688 at 2 (Sept. 20, 2006) (Statement of Hon. Lisa Murkowski) ("There is little dispute within Indian country that the policy of self-determination … is probably one of the best, if not the single best thing that this Federal Government has ever done to help our Native people.").

penalize tribal contractors for exercising their rights to self-determination—and the district court below agreed.

Appellants have asked this Court to correct errors of law that result in basic unfairness. Under the district court's interpretation of the ISDEAA, Congress intended not only to penalize tribal contractors compared to direct service tribes, but also to make Indian tribes second-class contractors not entitled to the full indirect cost recovery routinely afforded all other government contractors.

NCAI agrees with Appellants that this interpretation is wrong as a matter of law and basic fairness. Appellants' arguments demonstrate well that the ruling below should be reversed. In this brief, NCAI supplements those arguments by elaborating on (1) the hardships and inequities wrought by contract support cost shortfalls; (2) the *St. Regis* case,[2] which demonstrates the Secretary's "contract authority" under the ISDEAA; and (3) the *Choctaw* case,[3] which shows that recovery of otherwise valid claims is not precluded by the appropriations "caps" on which the Government relies.

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[2] *St. Regis Mohawk Tribe*, HHS Departmental App. Bd., No. A-02-12, Dec. No. 1808 (2002) (attached as Exhibit A).

[3] *Appeals of Mississippi Band of Choctaw Indians*, 06-1 BCA ¶ 33253, 2006 WL 1009210 (I.B.C.A.) (2006) (attached as Exhibit B).

ARGUMENT

I. Chronic Contract Support Cost Shortfalls Subject Tribal Programs to Severe Hardships.

The ISDEAA was enacted in 1975 to redress "the prolonged Federal domination of Indian service programs" by allowing tribes to exercise increased control over those programs. 25 U.S.C. § 450(a)(1). To enable tribes to provide these services, the ISDEAA requires that program funding included in the contract "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...." 25 U.S.C. § 450j-1(a)(1). This amount, often referred to as the "Secretarial" or "program" amount, does not reflect the full cost of carrying out programs in the contract. Tribes must also carry out administrative activities that the Secretary does not need to carry out because they are done by other federal agencies, for example the Office of Personnel Management, the General Services Administration, the General Accountability Office, and the Department's Office of General Counsel. In addition, Tribes incur costs to carry out ISDEAA contracts that the Secretary does not incur when he carries out the activities directly, such as obtaining insurance, and completing annual audits under the Single Agency Audit Act, 31 U.S.C. § 7501 *et seq*.

To cover these additional administrative costs, Tribes historically were compelled to either divert federal program funds, thus reducing services, or expend

tribal funds, in effect subsidizing the federal program. In 1987, responding to "the overwhelming administrative problems caused by indirect cost shortfalls," S. Rep. No. 100-274, at 12 (1987), Congress amended the ISDEAA by adding a new section 106,[4] which requires payment of full contract support cost funding. 25 U.S.C. § 450j-1(a)(2), (g); Appellants' Brief at 7-10. The Senate Report accompanying the 1988 amendments emphasized several times that these provisions are not half-way measures meant to reduce diversion of program and tribal funds, but to eliminate such diversion by mandating full funding. *E.g.*, S. Rep. No. 100-274, at 13 ("Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed.").

Full funding is critical because of the devastating effects of contract support cost shortfalls. By definition, contract support costs are "the *reasonable* costs for activities which *must* be carried out by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management." 25 U.S.C. § 450j-1(a)(2) (emphasis added). These are fixed and unavoidable costs, such as insurance, property and personnel management systems, audits, and facilities overhead and maintenance. Faced with contract support cost shortfalls, tribes have limited options, none of them good:

[4] Indian Self-Determination Amendments of 1987, Pub. L. No. 100-472, § 205 (Oct. 5, 1988), codified at 25 U.S.C. § 450j-1.

(1) Cut Indirect Costs: One option is for tribes to cut administrative costs. However, cost reduction can only go so far before becoming counterproductive. Cost reduction measures reported by tribes range from turning off lights and air conditioning to reducing staff to forgoing equipment purchase and repair. At a certain point, administrative infrastructure (personnel, computer systems, accounting systems) deteriorates, reducing productivity and efficiency and jeopardizing contract compliance. GAO/RCED-99-150, Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to Be Addressed, at 39-40 (1999) ("GAO Report").

(2) Use Program Funding: Another alternative is for tribes to use direct program dollars to cover contract support cost shortfalls. This practice reduces the resources available for already underfunded and much-needed programs and services. The Principal Chief of the Cherokee Nation explained this dilemma to the Senate Committee on Indian Affairs:

> The contract support cost problem has caused severe financial strains on the Cherokee Nation's programs and facilities, as it has for many other tribes in the country. What it means in real terms is that the Nation must reduce these critical health, education and other programs to pay for these shortages.

S. Hrg. 108-540, Tribal Contract Support Cost Technical Amendments: Hearing on S. 2172 Before the Senate Comm. on Indian Affairs, at 34 (April 28, 2004) (written statement of Chad Smith).

(3) Use Tribal Resources: A third option is for tribes to cover contract support cost shortfalls with revenues from tribal businesses, trust funds, or other resources. These resources could otherwise be used for economic development, land acquisition, additional services, or other purposes. S. Rep. 100-274 at 8-9 (1987) ("funds derived from trust resources, which are needed for community and economic development, must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility"). Forcing tribes to divert their own funds to administer federal programs not only creates tangible harm, in the form of lost economic opportunities, but it is inappropriate and inconsistent with how other government contractors are treated. As government contracting expert Herbert Fenster testified to the Senate Committee on Indian Affairs in 2004, it would be "unthinkable" for the General Services Administration to suggest that IBM bear the indirect costs of building computers for the government. S. Hrg. 108-540, Tribal Contract Support Cost Technical Amendments: Hearing on S. 2172 Before the Senate Comm. on Indian Affairs, at 20 (April 28, 2004) (statement of Herbert Fenster, citing U.S. CONST. art. I, § 9, cl. 7).

(4) Forgo Self-Determination: A final option is for tribes to forgo assuming federal programs through the self-determination and self-governance programs. The lack of full contract support funding has, according to BIA's own testimony to

Congress, played a significant role in the leveling off of participation in self-determination and self-governance in recent years. *See, e.g.*, S. Hrg. 109-688, Oversight Hearing on Tribal Self-Governance Before the Senate Comm. on Indian Affairs at 129 (Sept. 20, 2006) (statement of George T. Skibine, Acting Deputy Assistant Sec. – Indian Affairs, noting relatively flat rate of participation in self-governance, and reporting that "tribes have indicated that they would increase their overall participation if the issue of contract support cost funding was resolved"); H.R. Hrg. 106-9 at 14 (Feb. 24, 1999) (statement of Assistant Sec. – Indian Affairs Kevin Gover that "[t]he first step" toward expanding self-governance "is definitely 100 percent funding of contract support").

The options described above, either alone or in combination, force tribes to slash administrative capacity, divert program resources to cover administrative expenses, subsidize federal programs with their own scant tribal resources, and/or curtail or forgo self-determination altogether. In effect, tribes are shortchanged and treated as second-class government contractors. Yet the district court's interpretation of the ISDEAA is based on the premise that Congress intended to write these inequities into law, so that tribes, unlike other government contractors, could never recover their full indirect costs. That premise is unfounded, as demonstrated by Appellants' Brief and as further supported in the next sections.

II. The Self-Determination Act Grants the Secretary Contract Authority, as Recognized by the HHS Appeals Board in the *St. Regis* Decision.

Appellants argue correctly that the Secretary has "contract authority," the ability and indeed the duty to enter into binding legal agreements with tribal contractors under the ISDEAA in advance or in excess of appropriations. *See* Appellants' Brief at 37-52; General Accountability Office, II PRINCIPLES OF FEDERAL APPROPRIATIONS LAW at 6-88 to 6-90 (discussing contract authority). While the Secretary's ability to liquidate contract obligations is "subject to the availability of appropriations," 25 U.S.C. § 450j-1(b), the statute commands the Secretary to award the contract itself in advance of appropriations under certain circumstances.

The *St. Regis* decision illustrates this point well. In *St. Regis Mohawk Tribe*, HHS Departmental App. Bd., No. A-02-12, Dec. No. 1808 (2002) ("*St. Regis*"), the Tribe proposed an Annual Funding Agreement ("AFA") for calendar year 1999, a period that spanned federal fiscal years 1999 and 2000. See 25 U.S.C. § 450j(d)(1) (requiring, upon tribal election, use of calendar year as basis for contracts or agreements). The Tribe requested payment in a lump sum at the beginning of the year, as authorized by the ISDEAA. *Id*. § 450*l*(c), section 1(b)(6)(B)(i) of mandatory model contract; *id*. § 450*l*(b). The Indian Health Service ("IHS") partially declined the Tribe's proposal on the basis that it exceeded the applicable funding level. *See* 25 U.S.C. 450f(a)(2)(D) (allowing Secretary to decline proposal

to extent it exceeds applicable funding level). Because federal FY 2000 began October 1, 1999, and no appropriation for that year had been enacted, IHS argued, the agency could not pay the Tribe's Headquarters tribal shares for the last three months of calendar year 1999. Instead, IHS paid a nine-month lump sum in January, and a three-month lump sum after October 1.[5]

The Department of Health and Human Services ("HHS") Departmental Appeals Board ("DAB") affirmed a ruling by the Administrative Law Judge ("ALJ") that the IHS declination violated the ISDEAA. St. Regis was entitled to a lump-sum payment for the full calendar year up front, despite the fact that the contract spanned two federal fiscal years. *St. Regis*, Exh. A at 7. The IHS argued that this would violate the Anti-Deficiency Act by obligating FY 2000 funds in advance of the appropriation, but the DAB rejected this argument. "Since Congress clearly intended that tribes electing to proceed on a calendar year basis would receive on January 1 payments overlapping the next Federal fiscal year, that fact alone indicates that Congress did not intend that the Anti-Deficiency Act would apply to obviate the express statutory language regarding these contracts." *Id*. at 9. Since the contract was otherwise lawful, the DAB concluded, IHS could obligate FY 2000 funds in advance of the appropriation without violating the Anti-Deficiency Act. *Id*.

[5] IHS continued the same practice in calendar years 2000 and 2001; the Tribe filed claims for each year, and the appeals were consolidated.

The district court below quoted dictum from *Cherokee Nation v. Leavitt*, 543 U.S. 631, 643 (2005), stating that "normally" a subject-to-availability clause means that "an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become *binding* unless and until Congress appropriates funds for that year." *Ramah Navajo Chapter v. Norton*, Civ. No. 90-957, Mem. Op. and Order at 14 (D.N.M. Aug. 31, 2006). Whatever it might "normally" mean, the ISDEAA's availability clause did not preclude recovery of full contract support costs in *Cherokee*, and it did not preclude recovery of full funding in advance of an appropriation in *St. Regis*. In fact, the *Cherokee* decision has been read to confirm the Secretary's contract authority under the ISDEAA regardless of appropriations. *See* Appellants' Brief at 42 (citing 19 Nash & Cibinic Report No. 29, at 4-5 (2005)). The DAB recognized this contract authority three years earlier in *St. Regis*, a decision fully consistent with *Cherokee*.[6]

[6] The government briefly discussed *St. Regis* below, but focused entirely on the ALJ's Recommended Decision and ignored the DAB's Final Decision on Review. *See* Def. Supp. Mem. in Support of Cross-Motion for Partial Summary Judgment at 17-18, Docket No. 970 (Sept. 6, 2005) ("Def. Supp. Mem."). The government quoted a remark made by the ALJ "in passing" (as the government concedes) that the cap constituted "an express restriction on [ISDEAA] funding," yet acknowledged that the ALJ still ruled that the agency could not defer payment for the last three months of the 1999 calendar year until after the federal FY 2000 appropriation was available. In any event, the DAB decision is the authoritative ruling in *St. Regis*, and neither the government nor the district court addressed this decision below.

III. The "Caps" Do Not Preclude Recovery of an Otherwise Valid Obligation, as Shown in the *Choctaw* Case.

The government has argued below, and in other contract support cost cases, that BIA's expenditure of the entire capped appropriation for contract support costs in a given year precludes recovery of any additional amount. *E.g.*, Def. Supp. Mem. at 8 ("These appropriations caps signal the death knell for plaintiffs' monetary claims for years 1994 forward."). That is incorrect, as an otherwise valid claim may be satisfied from the Permanent Judgment Fund, 31 U.S.C. § 1304(a)(3).

In *Appeals of Mississippi Band of Choctaw Indians*, 06-1 BCA ¶ 33253, 2006 WL 1009210 (I.B.C.A.) (2006), the Tribe claimed that BIA errors in calculating and awarding contract support costs in FYs 2000, 2001 and 2002 cost the Tribe $4,231,391. The BIA contracting officer agreed that BIA failed to include in its calculation of CSC the Tribe's Indian school grants, so the Tribe should have received the full amount it claimed. But the contracting officer further ruled that the contract support cost "caps," in conjunction with the Anti-Deficiency Act, barred BIA from paying the claims until Congress appropriated new amounts to do so. Since BIA expended the total amount it was "not to exceed" in each year, the contracting officer ruled, the agency could not pay more contract support costs to the Tribe for any of those years without exceeding the statutory cap. 2006 WL 1009210 at *1.

The Tribe appealed the contracting officer's decision to the Interior Board of Contract Appeals ("IBCA"), where BIA renewed its argument that the caps prevented paying the Tribe's claims despite BIA's acknowledged mistake. But the IBCA ruled that the Tribe could recover despite the caps, because payment would come not from BIA but from the Judgment Fund. *Id*. at *4, *citing* 31 U.S.C. § 1304(a)(3)(C) (providing for appropriation and payment of necessary amounts to pay judgments, awards or settlements due "under a decision of a board of contract appeals"). Thus if the Tribe was entitled to the funds, as BIA did not dispute, the appropriations caps did not pose any barrier to recovery.

Judge Parrette of the IBCA described contract support costs as "not merely incidental, gratuitous, or surplus funds added to the amounts that BIA would normally expend for program operation. They are, rather, intended to cover the administrative and other expenses necessary for tribal operation of the various self-government programs. The tribes' right to them is clearly contractual as well as statutory." 2006 WL 1009210 at *4. Citing the *Cherokee* case, Judge Parrette held that the Tribe had a statutory and contractual right to contract support costs that the government could not sidestep by invoking the Anti-Deficiency Act and the caps. *Id*. at *5. Thus the IBCA awarded the Tribe $4,231,391 plus interest.

The *Choctaw* case illustrates that if liability can be established, the caps are no impediment to recovery.

The *Choctaw* decision further illustrates that the government cannot take refuge in a "four corners" argument that the liability of the United States is limited to the amount of contract support costs specified in the contract or AFA for a given year. In *Choctaw*, it was undisputed that BIA paid the entire amount included in the AFA. 2006 WL 1009210 at *5 ("the funds involved were inadvertently omitted [from the AFA] at the time of general disbursement"). Since that amount was less than the amount the Tribe should have received under the ISDEAA and other contractual provisions, BIA breached the contract and violated the statute notwithstanding its payment of the full (but incorrect) amount of contract support costs identified in the AFA. *Id.*[7]

CONCLUSION

The district court's decision fails to account for the unique language and purpose of the ISDEAA, and for that reason vastly oversimplifies and overstates the effect of the "caps." The Tenth Circuit should interpret the statute so as to avoid the historical, and ongoing, injustice of forcing tribes to either subsidize federal programs or incur a self-determination penalty in the form of reduced services due to resources diverted to administration. The district court's decision should be reversed.

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[7] *See also Appeals of Seldovia Village Tribe*, IBCA 3862 & 3863/97 (2003) (holding IHS liable for failing to amend AFA to include additional CSC based on approval of higher indirect cost rate).

Respectfully submitted this 14th day of May, 2009.

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CERTIFICATE OF DIGITAL SUBMISSION

The undersigned hereby certifies as follows:

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2. The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection, version 11.0.4010.19, which is automatically updated when new releases are made, and, according to the program, are free of viruses.

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May 14, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2009, I caused to be delivered by United Parcel Service overnight service the original and six copies of the Brief *Amicus Curiae* of the National Congress of American Indians ("Amicus Brief") to the following for filing:

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In addition, on this 14th day of May, 2009, the Amicus Brief was delivered by electronic mail to esubmission@ca10.uscourts.gov.

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May 14, 2009

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: St. Regis Mohawk Tribe DATE: January 17, 2002
Docket No. A-02-12
Decision No. 1808

FINAL DECISION ON REVIEW OF RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE

The Indian Health Service (IHS) appealed an October 23, 2001 Recommended Decision by Administrative Law Judge (ALJ) Marcel S. Greenia granting the St. Regis Mohawk Tribe (St. Regis) Motion for Summary Judgment and denying a similar Motion by IHS. St. Regis Mohawk Tribe v. Area Director, Nashville Area Indian Health Service (ALJ Decision). The issue before the ALJ was whether IHS' partial declinations of St. Regis' proposed Annual Funding Agreements (AFAs) for calendar years 1999 - 2001[1] were appropriate under the Indian Self-Determination Act (ISDA), 25 U.S.C. § 450f et seq. IHS declined to pay St. Regis' Headquarters tribal share for the last three months covered by each AFA as part of a lump-sum payment at the beginning of the calendar year, and instead paid this amount at a later date out of the appropriations for the next fiscal year. The ALJ found that IHS was required to provide all funds for each AFA in a

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[1] The original appeal involved a partial declination of the calendar year 1999 AFA. While that appeal was before the ALJ, IHS issued declinations for calendar years 2000 and 2001. Given their similar facts and identical legal basis, the ALJ consolidated the appeals.

lump-sum payment at the beginning of the calendar year, in effect reversing IHS' partial declination.

Based on the analysis below, I affirm the ALJ Decision.

Statutory Background

IHS, an agency of the United States Department of Health and Human Services (HHS), provides primary health care for American Indians and Alaskan Natives. IHS Headquarters provides nationwide support for all IHS programs. IHS' 12 Area Offices provide administrative support for health care programs in a designated IHS Area.

The ISDA directs the Secretary of HHS to award "self-determination" contracts to tribal organizations to provide programs, functions, services and activities (PFSAs) for the benefit of Indians that had previously been provided by IHS. 25 U.S.C. § 450f(a)(1). A tribal organization may also contract to take over certain "supportive administrative functions" for those PFSAs which were carried out by IHS Headquarters and the Area Office. 25 U.S.C. § 450j-1(a)(1).

Section 450f(a)(2) provides that the Secretary must approve a tribal organization's proposal for a self-determination contract unless the Secretary makes one of five specific findings, only one of which is relevant here: the Secretary may decline a proposal to renew a contract on the ground that the amount of funds requested exceeds the applicable funding level for the contract as determined under section 450j-1(a). 25 U.S.C. § 450f(a)(2)(D). In such cases, the Secretary is still required to "approve a level of funding authorized under section 450j-1(a)." 25 U.S.C. § 450f(a)(2). Section 450j-1(a) provides that the amount of funds awarded under a self-determination contract shall not be less than what would have been provided for the federal operation of the program covered by the contract. This is referred to as the "Secretarial Amount."

Section 450j-1(b)(2) provides that, once a self-determination contract has been awarded, the amount of funds awarded in subsequent years shall not be reduced except in certain specified circumstances, including "a reduction in appropriations from the

previous fiscal year for the program or function to be contracted" and "a tribal authorization."

Section 450j-1(b)(5) provides in part that-

> [n]otwithstanding any other provision in this Act, the provision of funds under this Act is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this Act."

In addition, section 450j(c)(1)(B) sets the term of self-determination contracts and states that the amount of a self-determination contract "shall be subject to the availability of appropriations."

Funding for self-determination contracts is provided through AFAs. Section 450j(d) provides:

> (1) Beginning in fiscal year 1990, upon election of a tribal organization, the Secretary shall use the calendar year as the basis for any contracts or agreements . . . unless the Secretary and the Indian tribe or tribal organization agree on a different period.
>
> (2) The Secretary shall, on or before April 1 of each year beginning in 1992, submit a report to the Congress on the amounts of any additional obligation authority needed to implement this subsection in the next following fiscal year.

The legislative history explained this provision as follows:

> Section . . . [450j(d)] authorizes the Secretary to begin using the calendar year as the annual timeframe for agreements and contracts under the . . . [ISDA] except where the Secretary and the tribal organization agree on a different period. Many tribal contractors have experienced considerable problems with cash flow at the beginning of the [Federal] fiscal year due to the problem of delays in the enactment of annual

> appropriations legislation and the consequent delays in allocating funding to the Federal agencies and the tribes. Most of the problems occur during the first quarter of the Federal fiscal year, e.g., October through December. Many tribes have been forced by delays in placing contract awards on the letter of credit system to borrow from commercial banks in order to maintain program operations. Routinely, tribes have been unsuccessful in recovering interest costs necessitated from the Federal agencies. . . .

S. Rep. No. 100-274 at 30, 100th Cong., 2d Sess. (1987), reprinted in 1988 U.S.C.C.A.N. 2620 at 2649.

Section 4501(b) provides that "[n]otwithstanding any other provision of law, the Secretary may make payments pursuant to section 1(b)(6) of [the Model Agreement described in section 4501(c)]." The Model Agreement provides in pertinent part:

> (B) QUARTERLY, SEMIANNUAL, LUMP-SUM, AND OTHER METHODS OF PAYMENT. -
>
> (i) IN GENERAL. -- . . . for each fiscal year covered by this Contract, the Secretary shall make available to the Contractor the funds specified for the fiscal year under the annual funding agreement . . . by paying to the Contractor, on a quarterly basis, one-quarter of the total amount provided for in the annual funding agreement for that fiscal year, in a lump-sum payment or as semiannual payments, or any other method of payment authorized by law, in accordance with such method as may be requested by the Contractor and specified in the annual funding agreement.
>
> (ii) METHOD OF QUARTERLY PAYMENT. -- If quarterly payments are specified in the annual funding agreement . . ., each quarterly payment made pursuant to clause (i) shall be made on the first day of each quarter of the fiscal year, except that in any case in which the Contract year coincides with the Federal fiscal year, payment for the first quarter shall be made not later than the date that is 10 calendar days

> after the date on which the Office of Management and Budget apportions the appropriations for the fiscal year for the programs services, functions, and activities subject to this Contract.

A tribal organization whose contract proposal has been declined is entitled to a hearing on the record. 25 U.S.C. § 450f(b)(3). The Secretary has the burden of proof to clearly demonstrate the validity of the grounds for declining the contract proposal. 25 U.S.C. § 450f(e)(1).

Factual Background

St. Regis is a federally recognized "tribal organization" served by the Nashville Area Office (NAO). St. Regis has negotiated calendar year contracts since 1995 and has requested its Secretarial Amount in a single, lump-sum payment since 1994.

St. Regis negotiated an AFA with IHS for calendar year 1997[2] which provided St. Regis with a lump-sum payment at the beginning of 1997. In 1998, St. Regis negotiated a modification to the 1997 AFA, extending that contract from January 1, 1998 through March 31, 1998. At the beginning of 1998, IHS paid St. Regis a lump-sum amount for the period January 1 - March 31.

While negotiating the 1998 AFA for the period April 1 through December 31, 1998, St. Regis requested a lump-sum payment to be paid at the beginning of the contract period, April 1, 1998. IHS paid St. Regis a prorated, single, lump-sum payment equal to the Area Office tribal share due for the remaining nine months of 1998.

However, IHS insisted that the 1998 Headquarters tribal share be paid in two installments, the first from Federal fiscal year (FY) 1998 appropriations and the second from FY 1999 appropriations. The first payment would be made at the beginning of the contract period (April 1, 1998) and cover the remainder of the Federal fiscal year (through September 30, 1998). The second payment

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[2] Unless indicated otherwise, all further references to years are to calendar years.

would be made October 1, 1998 and cover the last three months of 1998. St. Regis did not object at that time.

In December 1998, St. Regis submitted its proposed 1999 AFA, which totaled $4,633,131. IHS declined the proposed AFA with respect to the Headquarters tribal share on the premise that it exceeded the applicable funding level for the contract period under 25 U.S.C. § 450f(a)(2). In January 1999, NAO made a lump-sum payment of the Area Office tribal share to St. Regis. However, IHS paid the Headquarters tribal share in two installments, the first within 15 days of January 1, 1999 and the second within 21 days of the Office of Management and Budget apportionment to IHS following the FY 2000 appropriations being signed into law (which the ALJ stated and IHS did not dispute was received by St. Regis by October 21, 2000).

On March 30, 2000, IHS partially declined St. Regis' 2000 AFA requesting a single, lump-sum payment covering twelve months of the Headquarters tribal share. IHS again declined to pay three months of the Headquarters tribal share, asserting that the funding requested under the AFA exceeded the funding available.

IHS issued another partial declination on February 5, 2001, for St. Regis' 2001 AFA. Again, St. Regis requested twelve-month funding and again IHS declined to pay three months of the Headquarters tribal share, asserting that the requested funding exceeded the applicable funding level available. Rather, IHS proposed to pay these funds at the start of FY 2002.

The ALJ Decision

The ALJ in effect reversed the partial declination. The ALJ determined that the requirement in the Model Agreement that the Secretary make available to a tribal organization "the funds specified for the fiscal year under the annual funding agreement" did not refer to the federal fiscal year (October 1 to September 30). ALJ Decision at 7. The ALJ found that, as a result of IHS' "forward funding policy" based on a contrary reading, "tribes like St. Regis, whose contracts are scheduled on a 12 month calendar year, are denied the interest on the full contract funding and are held hostage to the uncertainties of the

EXACTLY ANALOGOUS TO CSC FUNDING

federal appropriations process." Id.[3] The ALJ stated that this would undermine "the manifest legislative intent to provide the tribe the full measure of contract funding as expeditiously as possible." ALJ Decision at 7. The ALJ also rejected IHS' argument that providing the funds in one lump-sum payment would injure those tribes who choose not to contract with IHS. Id. In addition, the ALJ found that none of the statutory circumstances for a reduction in funding existed, noting that St. Regis has not given IHS permission to reduce its lump-sum funding and that there has not been a reduction in appropriations. Id. at 8. Moreover, the ALJ found that the ISDA specifically contemplated that IHS would request additional obligation authority to implement calendar year contracts, so that "IHS has the means . . . to request additional funding to accommodate the Tribe's request for CY lump-sum payments, including a one time, fifteen-month, payment." ALJ Decision at 7-9. Accordingly, the ALJ concluded that "to the extent IHS policy of funding the Tribe's self determination contract is consistent with the [ISDA] and to the degree that sufficient appropriations are made by Congress, IHS must provide in a lump-sum the amount of money negotiated in the Annual Funding Agreement including Headquarter tribal shares for a twelve month calender [sic] year for years 1999, 2000 and 2001." ALJ Decision at 10.

Analysis

Below I find that the ALJ did not err in finding that IHS did not clearly demonstrate the validity of its declinations.

While IHS vigorously contends that the ISDA allows it to fund St. Regis' Headquarters Share via a nine-month lump-sum payment on January 1 and a three-month lump-sum payment on or about October 1, I agree with the ALJ that IHS' interpretation is inconsistent with the ISDA. The specific language of the statute at section 450j(d) leaves it up to the tribal organization to elect to proceed on a calendar year basis for the funding of its self-determination contracts. The legislative history makes the

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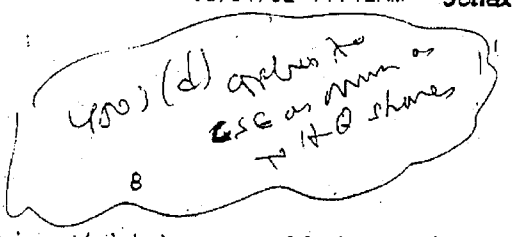
[3] The ISDA provides that tribal organizations are not accountable for the interest earned on funds advanced to them pending their disbursement by such organization. 25 U.S.C. § 450j(b).



rationale for this provision (which was added to the statute in 1988) abundantly clear; it is designed to protect tribes against the cash flow problems that regularly occur at the start of the federal fiscal year "due to the problem of delays in the enactment of annual appropriations legislation and the consequent delays in allocating funding . . . during the first quarter of the Federal fiscal year." S. Rep. No. 100-274 at 30, *supra*.

The approach urged by IHS would have precisely the opposite effect from that which the legislation was intended to produce. Rather than being able to enter into the long-term contracts contemplated by Congress and the ISDA, St. Regis would continually be at the mercy of the congressional budget process for the last three months of its calendar year. It would not be reasonable for St. Regis, or any other tribe electing calendar year funding, to expect to face, on a regular basis, a funding process split over two Federal fiscal years. As the ALJ recognized, it is a well-recognized canon of the law that - "Statutes affecting Indian rights . . . should be liberally construed and 'doubtful expressions [should be] resolved in favor of the Indians.'" ALJ Decision at 9 (quoting Yukon Flats School Dist. v. Native Village of Yenetie Tribal Gov't, 101 F.3d 1286, 1294 (9th Cir. 1996), *cert granted*, 521 U.S. 1103 (1997), citing Alaska Pacific Fisheries Co. v. United States, 248 U.S. 78, 89 (1918)). Here, there is not even a "doubtful expression"; the desires and motivations of the legislators are made clear in both the language of the statute and the legislative history.

IHS' contention that the ALJ erroneously interpreted the word "fiscal" in his Recommended Decision is unpersuasive. The IHS interpretation - that "fiscal year", as used in the Model Agreement, refers to the Federal fiscal year, even though the contract provision in the statute referred to later uses the term "Federal fiscal year" - would render the calendar year funding option language of the statute meaningless. When Congress allowed tribes to use the calendar year as their funding basis, Congress was effectively allowing tribes to use the calendar year as their fiscal year, as opposed to the Federal fiscal year. I agree with St. Regis that the use of the contrasting terms, "fiscal year" and "Federal fiscal year" in the statute's Model Agreement section, is a classic example of *expressio unius est exclusio alterius*, particularly where, as here, the two terms are

used so close together, and where an opposite interpretation would contravene the letter and spirit of the language authorizing lump-sum calendar year payments.

IHS' contention that the ALJ's decision -- by effectively forcing IHS to fund fifteen months during the course of a year where a tribe is in transition from a Federal fiscal year to a calendar year funding basis, or by generally appropriating funds over two Federal fiscal years to be paid on January 1 -- violates the Anti-Deficiency Act[4] is likewise unconvincing. It is obvious to the undersigned that in allowing tribes to transition from a fiscal year beginning October 1 to a fiscal year coinciding with the calendar year, with tribes entitled to a one-year lump-sum payment, then there has to occur, on a one-time basis, the need for a transitioning tribe to receive fifteen months of payment in the transitional year. Such an approach would be the only way to give effect to the clear intent of Congress that a tribe could make this transition from the October 1 to January 1 fiscal year. Since Congress clearly intended that tribes electing to proceed on a calendar year basis would receive on January 1 payments overlapping the next Federal fiscal year, that fact alone indicates that Congress did not intend that the Anti-Deficiency Act would apply to obviate the express statutory language regarding these contracts. St. Regis has legitimately entered into a lawful contract with IHS as authorized by statute. See St. Regis Br. at 13 (citing Wetsel-Oviatt Lumber Co., Inc. v. U.S., 38 Fed. Cl. 563, 570 (1997)). In light of this fact as well as express language in the statute and legislative history, IHS' Anti-Deficiency argument fails.

Finally, IHS' contention that granting the relief requested would somehow injure other tribes appears to be an argument made without any basis. Compliance with an express and unambiguous statutory mandate takes precedence over what is at best a speculative showing of possible harm to unnamed tribes. There is undisputed evidence in the record that IHS has the ability to

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[4] The Anti-Deficiency Act, at 31 U.S.C. 1341(a)(1), prohibits an officer or employee of the United States from making or authorizing an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.

control and reprogram its funds, and the reprogramming that may be necessitated in this case has clearly been contemplated by Congress by its enacting of the provisions at issue in the first place.

Conclusion

Based on the foregoing analysis, I sustain the ALJ Decision in its entirety.

This is the final determination of the Department in this matter.

Marc R. Hillson
Member
Departmental Appeals Board

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
909 St. Joseph Street, Suite 201
Rapid City, South Dakota 57709

October 23, 2001

ST. REGIS MOHAWK TRIBE,	.	IBIA 99-40-A
	.	IBIA 00-57-A
Appellant	.	IBIA 01-88-A
	.	
v.	.	Recommended Decision
	.	Indian Self-Determination Act,
AREA DIRECTOR,	.	25 U.S.C. §§450-450n
NASHVILLE AREA	.	
INDIAN HEALTH SERVICE,	.	
	.	
Appellee.	.	

RECOMMENDED DECISION

Appearances: Geoffrey D. Strommer, Craig A. Jacobson, Portland, Oregon, for Appellant

Duke McCloud, Julia Pierce, Rockville, Maryland, for Appellee

Before: Administrative Law Judge Marcel S. Greenia

This Recommended Decision addresses pending motions for Summary Judgment filed by both parties. The above entitled cases have been consolidated. The parties have been provided with the opportunity to submit briefs regarding the motions and they are now ripe for decision. The issue before this Tribunal is whether Indian Health Service's partial declination of the St. Regis Mohawk Tribe's proposed calendar year 1999, 2000, 2001 Annual Funding Agreements (AFA) were appropriate pursuant to the Indian Self-Determination and Education Assistance Act (ISDEA). For the reasons set forth below, Appellant's Motion for Summary Judgment is granted and Appellee's Motion for Summary Judgment is denied.

Statement of Facts

ISDEA provides for tribes and tribal organizations to assume responsibility for, and to administer federal programs and services. Congressional intent is more fully set forth in 25 U.S.C. § 450a which recognizes the Federal Government's unique relationship to Indian tribes and to the Indian people by establishing through ISDEA a meaningful self-determination policy.

"In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." 25 U.S.C. § 450a. Appellant, St. Regis Mohawk Tribe is a federally recognized "tribal organization" under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. § 450 et seq..

Pursuant to ISDEA, if a tribe proposes to assume the responsibility of administering the programs and services presently administered by the Indian Health Service (IHS), which is an agency of the Department of Health and Human Services (HHS), such tribe would contract with IHS to receive the funding required to do so. This shift in responsibility requires IHS to define each tribe's share of the funding necessary to carry out these programs and services ,since not all the tribes elect to take on the burden of running the programs. IHS has to identify the annual funding available for each program, the share of that funding each contracting tribe would require to carry out the program, and the share necessary to serve those tribes that elect not to contract with IHS. The funding the tribes would receive would be derived from two sources, the Area Offices and the Headquarters tribal shares (HQ). In this funding process IHS must distinguish between unencumbered resources, which are considered liquid assets, and encumbered resources, which include compensation for government employees and payment for goods and services under binding contracts. IHS needs additional time to free encumbered resources.

In light of these circumstances, IHS Headquarters (HQ) and Nashville Area Office (NAO) initiated a three year phased approach to distributing the funds. Under this approach the tribe receives only a percentage of the total tribal share amount in the first two years. The total tribal share, which consists of the tribe's share of funding allocated to NAO and its share of funding allocated to HQ, is not received until the third year. This transitional funding method allows IHS to free up encumbered funds and carry out its obligation to provide full funding while avoiding loss of services to non-contracting tribes.

The specific fiduciary relationship between the NAO and the tribe of St. Regis Mohawk, has followed a similar course of conduct. Appellant, St. Regis Mohawk Tribe (Tribe) has had a long history of self-determination contracts with IHS under Title I of ISDEA. As a federally recognized tribe, St. Regis Mohawk has negotiated calendar year (CY) contracts since 1995 and has requested payment of their Secretarial shares in a single lump-sum payment since 1994.

Under the three-year funding transfer schedule which NAO began implementing in CY 1997, the Tribe receives a percentage of the total tribal share amount during a three year period. Under this "phased approach" the total tribal share is defined but the Tribe does not receive its total tribal share amount until the third year. In years one and two, the contracting tribe receives a percentage of the total tribal share amount. This approach allows IHS to free up funds tied in fixed costs that IHS is obligated to pay which prevents providing the tribal shares immediately to each contracting tribe. The Tribe received half of its available NAO shares in year one under the "phase approach", 75% of its NAO shares in year two and 100% of the NAO total tribal shares

in year three. The Tribe was on different phase-in tracks with NAO and HQ. At the time of the CY 1999, St. Regis Mohawk was in year three of the three year funding schedule for its NAO tribal shares. IHS HQ also utilized a three year transfer schedule and in CY 1999, when the Tribe negotiated its CY 1999 AFA, the Tribe and HQ were in year two of the HQ phase in and received approximately 75% of its available HQ shares.

The Tribe negotiated an AFA with IHS for CY January 1, 1997 through December 31, 1997 with a lump-sum payment paid to the Tribe at the beginning of the calendar year. In CY 1998, the Tribe negotiated a modification to the contract calendar year 1997 Annual Funding Agreement, (AFA), to extend the 1997 contract from January 1, 1998 through March 30,1998. Once again IHS paid the Tribe a lump-sum amount at the beginning of the calendar year for the period of January 1 through March 30, 1998.

While negotiating the CY 1998 AFA for the period of April 1 through December 31, 1998, the Tribe requested a lump-sum payment to be paid at the beginning of the contract period which was April 1, 1998. The NAO complied with the Tribe's request and provided a single lump-sum payment which was prorated to equal the NAO tribal shares for the nine-month period covered by the CY 1998 AFA.

However, IHS insisted that the IHS HQ tribal share be paid out in two installments, the first from federal fiscal year (FFY) 1998 appropriations and the second from FFY 1999 appropriations. The first payment would be made at the beginning of the contract period for 1998 and would cover funding for April 1, 1998 through September 30, 1998. The second lump-sum payment would be made on October 1, 1998 and cover the remainder of the calendar year ending on December 31, 1998. No objection was made by the Tribe at this time.

In FFY 1999, (October 1, 1998), IHS borrowed three months of funding from FY 1999 appropriation to pay the Tribe's HQ shares on the CY 1998 contract. Consequently IHS had only nine months of funding to meet its obligation to pay the Tribe's CY 1999 HQ share. This pattern of delaying payment of a portion of its HQ tribal share funding is the basis for the appeal.

In December 1998, the Tribe submitted a proposed AFA, for calender year 1999 totaling $4,633,131.00. Direct program costs consisted of $3,458,218.00. The proposed agreement included a breakdown of direct program costs as well as direct contract support, indirect contract support, NAO area tribal shares and all Headquarter tribal shares. IHS declined a section of the proposed Annual Funding Agreement on the premise that the Tribe's proposal exceeded the applicable funding level for the period of the contract. 25 U.S.C. § 450f(a)(2). Yet the Tribe received its NAO tribal shares in one lump-sum payment on January 1, 1999. On the other hand, the HQ tribal shares were paid in two installments within 15 days of January 1, 1999 and within 21 days of OMB apportionment to IHS following Fiscal Year Appropriations for year 2000 being signed into law. It is assumed that the Tribe received its remaining HQ shares by October 21, 1999.

On March 30, 2000, IHS partially declined the Tribe's CY 2000 contract requesting twelve months of funding of Tribe's HQ tribal share in the amount of $157, 699.00. IHS declined three months Tribe's HQ tribal share in the amount of $49,717.00 in so far as the amount of funds requested by the Tribe was in excess of the applicable funding level as set forth under §450j-l(a).

Likewise, on February 5, 2001, IHS partially declined the Tribe's CY 2001 contract proposal. Once again, the Tribe requested twelve month funding of its HQ tribal share, this time in the amount of $211,988.00. IHS declined to pay three months of the HQ tribal share in the amount of $50,460.00 arguing this exceeded the applicable funding available pursuant to 25 U.S.C. §450f(a)(2)(D). Rather IHS proposed to pay these funds at the beginning of the FFY 2001.

At issue in each appeal is the timing of the Tribe's HQ tribal share payment. Consequently, the appeals have been consolidated for the purposes of this decision.

Discussion

Appellant, St. Regis Mohawk Tribe filed with this Court a motion for Summary Judgment. Appellee Area Director, Nashville Area, Indian Health Service has filed a cross motion for Summary Judgment. The standard of review is where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party moving for summary judgment bears the burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

ISDEA, 25 U.S.C. § 450 et seq., addresses the rights of tribes and tribal organizations to assume responsibility for and to administer, federal programs and services that had been operated previously by IHS. One method of accomplishing this goal is the Title I contracting process. Under Title I, the Secretary, at the request of any tribe or tribal organization, can enter into a "self-determination" contract to "plan, conduct and administer" any IHS program. 25 U.S.C. § 450f(a)(1).

In 1988, Title III was added to ISDEA which allowed tribes and tribal organizations to take over responsibility of all health care programs and services previously handled by IHS. Title III is funded by "Annual Funding Agreements". The Secretary was also required to provide "contract support costs" to cover administrative and indirect costs associated with the new programs.

By 1994 Congress had amended ISDEA again by enacting the Indian Self-Determination Contract Reform Act of 1994. This now allowed tribes and tribal organizations to contract with IHS to take over administrative duties from the IHS Area Offices and Headquarters Office for Service Unit programs that the tribes and tribal organizations have contracted to operate. 25

U.S.C. § 450j-1(a)(1). As a result, a tribe may only take over administrative duties supporting the Service Unit program that the tribe has specifically contracted to handle. The funding for carrying out the duties is referred to as "tribal share". This has changed the makeup of funds known as the "Secretarial Amount" to include funding for administrative costs associated with operating a specific program in addition to direct funding for the operation of that program.The "Secretarial Amount" is that amount that would directly fund the operation of the program. Pursuant to ISDEA, 25 U.S.C. § 450j-1(a) the Secretarial Amount provided "...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 funding amount cannot be discretionarily reduced by the Secretary. In fact, funding reductions are allowed only under statutorily specified, limited circumstances, such as when there is a reduction in appropriations or when a tribe agrees to a reduction. 25 U.S.C. §450j-1(b)(2). Further, the Secretary is not required to reduce funding for a tribe to make funding available for other tribes or tribal organizations. 25 U.S.C. § 450j-1(b).

Within ninety days after receiving the proposed contract, the Secretary must award a contract under Title I "unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates" that one of the following five specific declination criteria applies:

> (A) the service to be rendered to the to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;
>
> (B) adequate protection of trust resources is not assured;
>
> (C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;
>
> (D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a) of this title; or
>
> (E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

25 U.S.C. § 450f(a)(2).

The declination or partial declination must be made in writing to allow the tribe to address and correct the objections. Further the tribe would be allowed to have a hearing with an opportunity for full discovery. The Secretary is required to sever and approve any portion of the contract that does not meet a declination factor. 25 U.S.C. § 450f(a)(4).

"[T]he Secretary has the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portions thereof)." 25 U.S.C. §450f(e)(1); accord, 25 C.F.R. §900.163. The legislative history of 25 U.S.C. §450f(e)(1) and the preamble to the implementing regulation, 25 C.F.R. §900.163, indicate that the "clearly demonstrate" standard is an intermediate standard that is higher than a "preponderance of the evidence" standard but lower than a "clear and convincing evidence" standard. See140 cong. Rec. H11140-01, H11142-43; 140 cong. Rec. S14677-02; Fed. Reg. 32,482, 32,497 (June 24, 1996).

Under ISDEA, the tribe or the tribal organization has the option to negotiate its self-determination contract based upon a calendar year as opposed to a fiscal year. Similarly, the tribe has the ability to request a lump-sum payment, semi-annual payment, a quarterly payment or any other method of payment agreed upon by the parties in accordance with the law. 25 U.S.C. § 4501(b)(6)(B).

Operating under this language, IHS has been paying St. Regis lump-sum payments in two installments, in January and again in October. IHS argues since the contract straddles two fiscal years, IHS is making lump-sum payments, albeit at the beginning of the FFY, and is thereby complying with the CY funding language of ISDEA. The issue before this Tribunal is the propriety of this forward funding plan.

On appeal the Tribe argues that the contract, negotiated in March 1995 was based upon the calendar year. The Tribe argues that prior practice as well as 25 U.S.C. §4501(b)(6)(B) requires IHS to make lump-sum payments to the tribe if so requested by the Tribe. The Tribe further relies upon language of the Model Agreement more fully set forth in 25 U.S.C. §450*l*(c).

> [F]or each *fiscal* year covered by this Contract, the Secretary shall make available to the Contractor the funds specified for the *fiscal* year under the annual funding agreement incorporated by reference pursuant to subsection (f) (2) by paying to the Contractor, on a quarterly basis, one-quarter of the total amount provided for in the annual funding agreement for that *fiscal* year, in a lump-sum payment or as semi-annual payments, or any other method of payment authorized by law, in accordance with such method as may be requested by the Contractor...

25 U.S.C. §405*l*(c)(1)(b)(6)(B)(i) (Emphasis added). The Court in California Rural Indian Health Board, Inc. v. Shalala, No. C-96-3526 DLJ, slip op. (N.D. Cal. 1998) (CRIHB) addressed this forward funding issue. The court found that contracting tribes whose contracts are payable within a 12 month period satisfy the "fiscal funding" requirement of 25 U.S.C. §450*l*(c)(1)(b)(6).

In other words,"fiscal" refers to any twelve month period and does not necessarily follow a federal fiscal year, October 1 to September 30. This conclusion is buttressed by the language in the same contract provision of 25 U.S.C. §450*l*(c)(1)(b)(6) which provides:

> If quarterly payments are specified in the annual funding agreement incorporated by reference pursuant to subsection (f)(2), each quarterly payment made pursuant to clause (i) shall be made on the first day of each quarter of the fiscal year, except that in any case in which the contract year coincides with the ***Federal fiscal year***, payment for the first quarter shall not be made later...

Id. (Emphasis added). Specifically, Congress makes a distinction between a *fiscal* year and a *federal fiscal* year . Congress tied the annual funding provision to the language of " a fiscal year" but specifically suggests in the same statute for quarterly funding that payment may be made under a "federal fiscal year". The meaning to be given to an act of Congress can only be derived from weighing every relevant aid to construction. United States v. Dickerson, 310 U.S. 554, 562 (1940). A statute, upon the whole, is to be so construed that if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. See Regions Hospital v. Shalala, 118 S.Ct. 909, 920 (1998). Congress' express use of a "federal fiscal year" in a section of the Model Contract supports the Tribe's argument that Congress intended "fiscal year" to be other than a Federal fiscal year.

As a result of this forward funding policy, tribes like St. Regis, whose contracts are scheduled on a 12 month calendar year, are denied the interest on the full contract funding and are held hostage to the uncertainties of the federal appropriations process. This is contrary to the manifest legislative intent to provide the tribe the full measure of the contract funding as expeditiously as possible. 25 U.S.C. §450j(b).

IHS argues that it cannot provide the funds in one lump-sum payment because to do so would injure those tribes who choose not to contract with IHS for services. In 1994 IHS was given the responsibility to downsize its operations and to transfer, to those tribes who were interested and desired to contract, those programs and support services that had previously been administered by IHS. There are tribes who chose not to contract out those services. IHS is obligated to continue to provide direct health care services for these non-contrating tribes. IHS claims that providing the contracting tribes, such as, St Regis, with a lump-sum for a calender year budget would detrimentally affect non-contracting tribes by drawing down from the same budgetary pool.

IHS cannot hide behind the non-contracting tribes to avoid its contracting responsibilities. While IHS currently provides funding for a twelve month federal fiscal year to its non-contracting tribes, IHS can also budget for calender year distributions to contracting tribes even though this may require IHS to initiate a time table to implement payment for a twelve month calender contract year. See 25 U.S.C. §450j-*l*. In fact, Congress provides a means to accommodate this funding transition from a federal fiscal year to a calender year contract. Specifically, 25 U.S.C. §450j (d)(2) requires the Secretary to submit a report to Congress by April of each year setting forth the amount of additional obligation authority needed to

implement calender year contracts. IHS has not submitted such a request.

Instead IHS continues with its forward funding policy arguing that the Tribe would receive 15 months of funding if IHS had to provide for calender year funding out of one FFY. This argument is circular. Had IHS not dipped into another FFY appropriations originally in 1998, the situation described by IHS would not have occurred and persisted to this time.

Nor can IHS properly rely upon any of the statutory circumstances for a reduction in funding to justify its partial declinations of the Tribe's proposed AFA's. The Tribe has not given IHS permission to reduce its lump-sum funding and, as more fully discussed below, there has not been a reduction in appropriations which would justify a reduction.

The ISDEA clearly states that any funds provided under a self-determination contract are subject to the availability of appropriations, even if the amount is less than the amount negotiated in the contract. 25 U.S.C. § 450j-l subsection (a) sets the amount of funds to be provided: "The amount of funds provided under the terms of self-determination contracts..shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs...for the period covered by the contract." This subsection concludes with: "Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject of the availability of appropriations..."Id. §450j-l(b). In Babbitt v. Oglala Sioux Tribal Public Safety Department, 194 F.3d 1374 (Fed. Cir. 1999) the court upheld the Secretary's denial of a self-determination contractor's request for all of its indirect costs. The Secretary argued there were insufficient funds to pay the contract. The court upheld the denial of funds based upon ISDEA's subject-to-availability-of-appropriations language despite the contractor reliance on the money.

This is an express restriction on ISDEA funding. Other sections of ISDEA indicate a congressional intent to limit ISDEA funding subject to availability of appropriations. Section 450j(c) sets the term of the self determination contracts and notes that: "[t]he amounts of such contracts shall be subject to the availability of appropriations." Likewise, the model contract set out in ISDEA also contains language that specifies the funding for self determination contracts is based upon available funding, "[s]ubject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement..." Id. §450*l*(c). An agency can only spend what money has been appropriated for any particular program. See Highland Falls-Fort Montgomery Cent. School District v United States, 48 F.3d 1166, 1170-71(Fed. Cir. 1995)(citing 31 U.S.C. §1341(a)(1)(A)). Any other interpretation would render the subject-to-appropriations language as meaningless. See West Virginia University Hospitals Inc. v. Casey, 499 U.S. 83, 98-99, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991). We must assume that Congress "says in a statute what it means and means in a statute what it says there...". Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992).

Assuming arguendo that the meaning of this statute were in doubt, we must remain mindful of the nature of this legislation. In construing a statute, courts must "look to the

provisions of the whole law, and its object and policy." United States Nat'l Bank of Oregon v. Indeependent Ins. Agents of Am., Inc., 508 U.S. 439, 455k, 113 S.Ct. 2173, 2182, 124 L.Ed.2d 402 (1993). Statutes affecting Indian rights, such as the ISDEA, should be liberally construed and "doubtful expressions [should be] resolved in favor of the Indians." State of Alaska ex rel. Yukon Flats School Dist. V. Native Village of Yenetie Tribal Gov't., 101 F.3d 1286, 1294 (9th Cir. 1996), *cert granted*, 521 U.S. 1103, 117 S.Ct. 2478, 138 L.Ed.2d 987(1997), citing Alaska Pacific Fisheries Co. V. United States, 248 U.S. 78, 89, 39 S.Ct. 40, 41, 63 L.Ed.138 (1918). "Standard principles of statutory construction do not have their usual force in cases involving Indian law." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766, 105 S. Ct.2399, 2403, 85 L.Ed.2d 753 (1985). "Canons of construction applicable in Indian Law are rooted in the unique trust relationship between the United Sates and the Indians." Oneida County v. Oneida Indian Nation, 470 U.S. 226, 247, 105 S.Ct. 1245, 1258, 84 L.Ed.2d 169 (1985). Statutes are to be construed liberally in favor of the Indians; ambiguous provisions are to be interpreted to the Indians' benefit. Blackfeet Tribe, 471 U.S. at 766. Ramah Navajo Chapter v. Lujan, 112 F3d 1455 at 1462 (10th Cir. 1997).

Although the application of the canon of construction that statutes benefitting Native Americans should be construed liberally in their favor, it does not, however, permit a "disregard of the clearly expressed intent of Congress." Quinault Indian Nation v. Portland Area Director, Bureau of Indian Affairs, 33 IBIA 6, 14 (1998) See also Tyonek Native Corp. v. Secretary of the Interior, 836 F.2d 1237, 1239 (9th Cir. 1998). South Carlona v. Catawba Indian Tribe, Inc., 476 U.S. 498, 505-06, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986). In Ramah Navajo School Board Inc. v. Babbitt, 87 F.3d 1338, 1341-42, 1345 (D.C. Cir. 1996) (Ramah I), the Court addressed the Secretary's discretion to allocate indirect contract funds with respect to the 1995 congressional cap on the appropriations available to the tribe under IDSEA for contract support costs. The court held that the Secretary is "not required to distribute money if Congress does not allocate that money to him under the Act." Id. At 1345. Despite a tribe's claim that it is entitled to the funds under ISDEA, if the money is not available, then, the Secretary need only distribute the amount of money provided by Congress.

The fact remains that during the years 1999, 2000, and 2001 there was no decrease in congressional appropriations. IHS continued to receive the money needed to fund the contracts with the tribes. The question then focuses on IHS's concerns over paying the Tribe 15 months for a calender year contract. IHS could have avoided this scenario had it not borrowed from its 1999 federal fiscal year appropriations. But having done so, the Tribe's request for one lump-sum calender year HQ payment can be accommodated by a one time 15 month federal fiscal year payment. With the following calender year, IHS would be on track to pay HQ tribal share in a lump-sum out of one federal fiscal year. Moreover, IHS has the means through the ISDEA to request additional funding to accommodate the Tribe's request for CY lump-sum payments, including a one time 15 month payment. Thus the argument presented by IHS fails.

IHS is charged with providing health care to all Indian persons pursuant to 25 U.S.C.§§13, 450f. ISDEA places the burden of proof in any appeal on the Secretary "to

establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof.)" 25 U.S.C. §450f(e). IHS has failed to show that its declination of a portion of the AFA with St. Regis was appropriate or based upon any congressional reduction in appropriations. Moreover, IHS is required by statute to report to Congress any amounts needed to implement the calender year contract. Failure on the part of IHS to notify Congress and thereafter claim limited funding flies in the face of the intent of the statute. The burden and responsibility of health care remains with IHS on a contracting and non-contracting basis. In carrying out this responsibility, IHS, pursuant to ISDEA, and the self-determination contract entered into by IHS and St. Regis, must follow its contractual duties and provide lump-sum funding for 12 month calender year.

Conclusion

Therefore to the extent IHS policy of funding the Tribe's self determination contract is consistent with ISDEA and to the degree that sufficient appropriations are made by Congress, IHS must provide in a lump-sum the amount of the money negotiated in the Annual Funding Agreement including Headquarter tribal shares for a twelve month calender year for years 1999, 2000 and 2001. Consistent with this opinion it is hereby ordered that Summary Judgment is granted to Appellant. Appellee's cross motion for Summary Judgment is denied.

Marcel S. Greenia
Administrative Law Judge

APPEAL INFORMATION

Within 30 days of the receipt of this Recommended Decision, you may file an objection to the Recommended Decision with the Secretary of Health and Human Services under 25 C.F.R. §900.165(b). An appeal to the Secretary under 25 C.F.R. 900.165(b) shall be filed at the following address: Departmental Appeals Board, U.S. Department of Health and Human Services, Room 637-D, Humphrey Building, 200 Independence Avenue, S.W., Washington D.C. 20201. You shall serve copies of your notice of appeal on the on the official whose decision is being appealed. You shall certify to Secretary that you have served these copies. If neither party files an objection to the Recommended Decision within 30 days, the Recommended Decision will become final.

06-1 BCA P 33253, IBCA No. 4711, 2006 WL 1009210 (I.B.C.A.)

IBCA

***1** APPEALS OF MISSISSIPPI BAND OF
CHOCTAW
INDIANS

Contract No. GTS 78 T 98076, 79, & 80, FY's 2000-2002

Decided: April 14, 2006

Bureau of Indian Affairs, Tribally Controlled School Act
Appellant's Motion for Summary Judgment Granted; Government Motion Denied
APPEARANCE FOR APPELLANT:

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Santa Fe, New Mexico 87504-1447

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OPINION BY ADMINISTRATIVE JUDGE PARRETTE

Both the Government and the above-named Appellant separately have moved for summary judgment in connection with the Mississippi Band's (hereafter, "Tribe's") pending Appeal from a July 15, 2005, final decision of the Contracting Officer (CO) holding that although the Tribe was entitled to recover a total of $4,231,391 in **Contract Support Costs** (CSC) for Fiscal Years (FY's) 2000, 2001, and 2002, it could not legally recover these costs until new appropriations became available, because of explicit ceilings in the Department's applicable Appropriations Acts. **Contract support costs** generally are indirect costs calculated by applying an indirect cost rate to the amount of funds otherwise payable to the tribe. The Tribe seeks here to recover these overhead funds, plus interest.

Because the Department's underpayment appears to be solely the result of a mistake or error in BIA's disbursement procedures, as discussed below, and because funds for these payments were available within appropriation limits at the time the disbursements of funds to the various Indian tribes took place, we conclude that the Tribe is entitled to

prompt payment of the full amount for which the CO found it eligible, plus interest in accordance with the Prompt Payment Act, 31 U.S.C. §§ 3902 and 3907, and the Contract Disputes Act, 41 U.S.C. §611.

Background

The facts of the case are undisputed. For each of Fiscal Years 2000, 2001, and 2002, the Bureau of Indian Affairs (BIA) inadvertently did not include in its calculation of Appellant's allowable CSC under 25 U.S.C. § 450j-1(a)(2) the amounts it was entitled to on the basis of its contemporaneous Indian school grants. After all of the Department's CSC funds for those years had been expended, the Tribe on September 8, 2003, filed a claim with BIA seeking a belated payment of the omitted funds. The Deciding Official (CO) found that the amounts that should have been paid to Appellant were, FY 2000, $686,357; FY 2001, $1,108,282; and FY 2002, $2,436,752; for a total of $4,231,391. But she concluded that the Tribe could lawfully be paid these amounts only when new BIA appropriations became available. The Tribe disagreed and appealed to the Board.

The CO based her decision on language in the Appropriation Acts for each of the three years that limited CSC expenditures to amounts "not to exceed" specific totals for each year. The Department did not receive any later supplemental appropriation to pay additional CSC for those years, and the Tribe has not yet received the omitted payments. It therefore seeks from the Judgment Fund, 31 U.S.C. § 1304, the total amount due.

Law (in part)

***2** Paragraphs (1), (2), and (3) of 25 U.S.C. § 450j-1 are as follows:

> (1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter 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, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Resources, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.
>
> (2) There shall be added to the amount required by paragraph (1) **contract support costs** which shall consist of an amount for the reasonable costs of activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which-
>
> (A) normally are not carried on by the respective Secretary in his direct operation of the program; or
>
> (B) are provided by the Secretary in support of the contracted program from resources other than those under contract.
>
> (3)(A) The **contract support costs** that are eligible costs for the purpose of receiving funding under this subchapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of-
>
> (i) direct program expenses for the operation of the Federal program that is the subject of the contract, and
>
> (ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract.
>
> (B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this subchapter, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

Positions of the Parties

The Government argues that the CO was correct in concluding that a Deciding Official could only make a finding that the Tribe was entitled to the additional funds, but because of the Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1350, she could not obligate the additional funds needed to pay the Tribe the amount owed. The Government further argues that because the Department cannot pay the funds, the Board cannot either, because the Board is only the "authorized representative" of the Secretary under 43 CFR 4.1, and it cannot do what the Secretary cannot do. It contends that the Cherokee case (Cherokee Nation v. Leavitt. 543 U.S. 631, 125 S. Ct. 1172 (2005)), does not apply because the funds involved in that case were unrestricted; whereas, here the funds are subject to a precise limitation or "cap," such as the one involved in Babbitt v. Oglala Sioux Tribal Public Safety Department. 194 F.3d 1374 (Fed.

Cir. 1999), cert.denied. 530 U.S. 1203 (2000), in which the Court noted that "in the face of underfunding, an agency can only spend as much money as has been appropriated for a particular program" (194 F.3d at 1378).

***3** But in its 41-page Opposition Memorandum, the Tribe disputes the Government's view of the law, discussing cogently and in great detail the various relevant cases and their holdings, essentially beginning with Ramah Navajo School Board v. Babbitt. 87 F.3d 1338 (D.C. Cir. 1996), and concluding with Thompson v. Cherokee Nation of Oklahoma. 334 F.3d 1075 (Fed. Cir. 2003) aff'd Cherokee Nation v. Leavitt, 543 U.S. 631 (2005). The thrust of these cases is simply that self-determining Indian tribes have an absolute contractual right to their proportional shares (which are normally stated in percentage terms) of capped or uncapped appropriations, whether or not the appropriation is sufficient to meet all of the tribes' needs. We need not decide that universal issue in this case.

Discussion

As the D.C. Circuit Court said in Ramah, supra (also quoted by the Board in a previous case):

> We do not think that there is any support in the text or history of the ISDA [Indian Self-determination Act], or in prior caselaw, for the district court's conclusion that the ISDA committed the allocation of insufficient CSF [contract support funds] to the Secretary's discretion. Congress has clearly expressed in the CDA both its intent to circumscribe as tightly as possible the discretion of the Secretary, see ISDA ¶ 450k(a) (prohibiting the Secretary from promulgating any regulation or imposing any nonregulatory requirement, except for regulations pertaining to sixteen carefully delineated topics not relevant here), and its intent to make available judicial review of all agency action, see id. 450m-1(a). The statute itself reveals that not only did Congress *not* intend to commit allocation decisions to agency discretion, it intended quite the opposite: Congress left the Secretary with as little discretion as feasible in the allocation of CSF. (87 F.3d at 1344, emphasis added.)

In our case, the Deciding Official, acting on behalf of the Secretary, admitted that the Tribe was in fact entitled to the CSC funds and acknowledged that it did not timely receive them simply because of a BIA error at the time the funds were being disbursed. However, there is no contention that the Tribe is not entitled to them; the present issue is rather how and when they will be paid. The Government asserts that they cannot be paid now because there is no available appropriation authorizing them, since the relevant cap on appropriations for that purpose has already been reached, and the Anti-Deficiency Act makes it a criminal offense to pay out Government funds under those circumstances.

The Government does not cite what appears to be the strongest case in support of its Motion, Shoshone-Bannock Tribes v. Dept. of Health and Human Services. 279 F.3d 660 (9th Cir. 2002), in which HHS then used a system of paying full CSC costs until its funds were exhausted and then told the remaining tribes to wait until the following year when they would rise to the top of the list of potential CSC recipients. But in the meantime the tribes got no funds. The Shoshones sued in district court for the current year's CSC's, and the district court granted them, but the 9th Circuit court overturned the district court's decision on the ground that all CSC funds had been expended and that the ceiling on the total CSC appropriation controlled. The court cited the Federal Circuit case of Babbitt v. Oglala Sioux Tribal Public Safety Department, supra, as the basis for its decision.

***4** Appellant's reply, with which we agree, is that such circumstances are the very purpose of the Judgment Fund, established under 31 U.S.C. § 1304, which specifically provides for the payment of necessary amounts to pay final judgments, interest, and costs when the judgment is payable, such as under a decision of a board of contract appeals. 31 U.S.C. § 1304(a)(3). Thus, the sole issue in this Appeal whether Appellant is entitled to a favorable judgment from the Board as to immediate payment. We think that it is. CSC funds are not merely incidental, gratuitous, or surplus funds added to the amounts that BIA would normally expend for program operation. They are, rather, intended to cover the administrative and other expenses necessary for tribal operation of the various self-government programs. The tribes' right to them is clearly contractual as well as statutory.

The most recent major case involving contractual CSC funds, Cherokee Nation, supra, a Supreme Court case decided subsequent to Oglala Sioux, although not directly on point, is clearly relevant because the issue before the

Court was whether the Government's promises under the ISDA are legally binding (543 U.S. 634). The Court pointed out that the Indian Self-Determination Act (ISDA) "uses 'contract' 426 times to describe the nature of the Government's obligation, and that 'contract' normally refers to 'a promise for the breach of which the law gives a remedy, or the performance of which the law... recognizes as a duty'." We think that Appellant here, like the appellant in Cherokee, has a contractual right to its CSC funds. In its discussion of unrestricted funding, the Court observes (543 U.S. 637) that:

> [T]he Government normally cannot back out of a promise to pay on grounds of "insufficient appropriations," even if the contract uses language such as "subject to the availability of appropriations," and even if an agency's total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made. See *Ferris v. United States, 27 Ct. Cl. 542, 546 (1892)* ("A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects."); see also *Blackhawk, supra, at 135, and n.9, 622 F. 2d at 552, and n. 9.*

***5** 543 U.S. 638.

In Cherokee, the Government also argued for a special interpretation of the ISDA's language amounting to an affirmative grant of authority to it to adjust funding levels "based on appropriations." The Court responded, at 543 U.S. 644, that:

> In our view, however, the Government must again shoulder the burden of explaining why, in the context of Government contracts, we should not give this kind of statutory language its ordinary contract-related interpretation, at least in the absence of a showing that Congress meant the contrary. We believe it important to provide a uniform interpretation of similar language used in comparable statutes, lest legal uncertainty undermine contractors' confidence that they will be paid..." citing United States v.Winstar Corp.. 518 U.S. § 839, 884-885 (1996), inter alia.

Thus, pacta servanda sunt ("agreements must be honored"), which is the well-established foundation of international law, is equally important in domestic matters. Add to that the fact that Indian Tribes are domestic dependent nations with many of the attributes of national sovereignty, and that the program involved is a school program, and it is evident that the Government promises to them ought to be expeditiously carried out, particularly when there is clearly a valid and readily accessible legal means of doing so - here, the Judgment Fund. We express no opinion on how this matter would otherwise be decided, but we side with the Supreme Court that CSC agreements are valid and enforceable contracts.

We conclude that BIA's denial of immediate payment of CSC funds due under 25 U.S.C. § 450j-1(a)(2) but withheld by error is clearly a breach of contract that is redressable through the Contract Disputes Act and the Judgment Fund, 31 U.S.C. § 1304(a)(3), to the extent that other funds are unavailable. Cherokee Nation, supra: Winstar, supra.

Lest we open a Pandora's box of litigation, however, we must add the caution that our present holding is limited to the facts of this Appeal, where (a) neither party denies that the Tribe was entitled to the funds involved; (b) the funds involved were inadvertently omitted at the time they were disbursed to other tribes but (c) were within BIA's statutory appropriation ceiling at the time of general disbursement and (d) subsequent payment was expressly determined by the Deciding Official to be proper. We express no opinion on the likely outcome of this Appeal if the facts had been different.

Decision

The Government's Motion for Summary Judgment is denied. Appellant's Motion for prompt payment is granted, together with interest as provided by the Prompt Payment Act and the Contract Disputes Act, calculated from the date the CSC payment would normally have been made. It is so ordered.

***6** Bernard V. Parrette
Administrative Judge
I Concur:

Candida S. Steel
Chief Administrative Judge

06-1 BCA P 33253, IBCA No. 4711, 2006 WL 1009210 (I.B.C.A.)
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