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, Secretary of the Interior, *et al.*,

Defendants-Appellees.

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

APPELLEES' PETITION FOR REHEARING AND REHEARING EN BANC

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PETITION FOR REHEARING AND REHEARING EN BANC

STATEMENT REQUIRED BY FED. R. APP. P. 35(b)(1)

A divided panel of this Court has explicitly created an intercircuit conflict with the Federal Circuit and the D.C. Circuit on an important question of appropriations law involving the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. §§ 450-458aaa-18, and the contracts entered into thereunder by the federal government with Indian tribes.

ISDA authorizes the Secretaries of the Interior (Interior) and Health and Human Services (HHS) to enter into contracts with Indian tribes for the administration of programs that the Secretaries would otherwise operate. The Act also provides that an amount for "contract support costs" (CSC), which are reasonable and necessary direct and indirect costs related to the administration of a contract, that the Secretaries do not incur, shall be added to the contract. The provision authorizing such contracts, however, and the contracts themselves explicitly make all contract payments "subject to the availability of appropriations," 25 U.S.C. §§ 450j-1(b) & 450(j)(c)(1); in every fiscal year beginning with fiscal year 1994, Congress has enacted a statutory cap on the amount of CSC the Secretary of the Interior may pay (and beginning with fiscal year 1998 has enacted similar statutory caps on CSC with respect to HHS ISDA programs).

This case involves the following question of exceptional importance:

> Whether annual statutory appropriations caps, in conjunction with statutory and contractual provisions that make all contract payments "subject to the availability of appropriations," preclude holding the government liable for additional CSC above and beyond the capped amounts.

The panel majority's resolution of this question expressly conflicts with the recent decision of the Federal Circuit in *Arctic Slope Native Ass'n v. Sebelius*, 629 F.3d 1296 (2010), as well as the earlier holdings of that court in *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000), and the D. C. Circuit in *Ramah Navajo Sch. Bd. v. Babbitt,* 87 F.3d 1338 (D. C. Cir. 1996).

INTRODUCTION

In this nationwide class action arising under ISDA and brought against Interior, a divided panel of the Court (Lucero, McKay, JJ.; Hartz, J., dissenting) has reversed the district court and created an intercircuit conflict with both the Federal Circuit and the D.C. Circuit, holding that despite the "subject to the availability of appropriations" language of the ISDA, 25 U.S.C. §§ 450j-1(b) & 450j(c)(1), and corresponding language in ISDA contracts, plaintiff Indian tribes can obtain contract support costs from the Judgment Fund in excess of the across-the-board statutory cap imposed by Congress in annual appropriations acts.

This case presents an important legal question warranting en banc review. First, the legal issue is a recurring one affecting annual contracting between federal agencies and more than 350 Indian tribes and tribal organizations, and it implicates congressional efforts to limit the government's expenditures on ISDA contracts. Second, although the government undoubtedly would present additional defenses, the decision potentially subjects the United States to substantial financial exposure from the multitude of individual claims for additional CSC. Third, as it acknowledges (Maj. Op. 33-37), the majority's ruling creates a conflict with decisions of both the Federal Circuit and the D.C. Circuit. That conflict would require the agencies to treat ISDA contracts differently among the tribes, depending on the jurisdiction in which the tribes are located -- a palpably undesirable result. Finally, for the reasons set forth in Judge Hartz's comprehensive dissent, the analysis of the majority is demonstrably mistaken and runs afoul of the ISDA, the Anti-Deficiency Act, 31 U.S.C. § 1341(a), and the Appropriations Clause of the Constitution, U.S. Const., art. I, § 9, cl. 7. Accordingly, rehearing en banc is warranted.

STATEMENT

The pertinent facts are set forth in the panel majority's opinion (Maj. Op. 5-14) and the dissent (Dissent 2-9). Briefly, this case involves a recurring issue between tribal contractors and the federal government with respect to the government's

obligation to fund ISDA CSC in the face of insufficient congressional appropriations. The dispute at issue on this appeal crystallized in the aftermath of *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005), where the Supreme Court held that the government is bound by its promise to pay CSC when it has entered into an ISDA contract with a tribe, and there are sufficient *unrestricted* appropriated funds available to make the payments promised in the contracts. The Supreme Court, however, did not address the question of the liability of the government when breach is contested or when there is a "capped" annual appropriation for the total amount of funds that can be spent on CSC for all ISDA contracts. The district court in the instant case granted summary judgment in favor of the government, holding that plaintiffs are not entitled to recover additional CSC in fiscal years in which Congress has imposed such a statutory cap in annual appropriations legislation.

Plaintiffs appealed, and a divided panel of this Court has now reversed the district court and avowedly created an intercircuit conflict with the Federal Circuit and the D.C. Circuit, holding that despite the "subject to the availability of appropriations" language of the ISDA, 25 U.S.C. §§ 450j-1(b) & 450j(c)(1), and corresponding language in ISDA contracts, plaintiff Indian tribes can obtain CSC from the Judgment Fund in excess of the across-the-board statutory cap imposed by Congress in annual appropriations acts. The panel majority rejected the recent

contrary holding of the Federal Circuit in *Arctic Slope Native Ass'n v. Sebelius*, 629 F.3d 1296 (2010), as well as the earlier holdings of that court in *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000), and the D. C. Circuit in *Ramah Navajo Sch. Bd. v. Babbitt* 87 F.3d 1338 (D. C. Cir. 1996).

Judge Hartz filed a lengthy dissent agreeing with *Arctic Slope*, the earlier cases, and the position of the United States in the instant case, stating that "[w]hen Congress says that 'the provision of funds under this subchapter [the ISDA] is subject to the availability of appropriations' . . . , it must mean that the government's *obligation* on ISDA contracts is limited by the amount appropriated." Dissent 14. He further added that if payments in excess of the statutory cap "are not barred by the Constitution's Appropriations Clause, then the Anti-Deficiency Act should do the trick," *id.*, and thus concluded that he "would adopt the more natural interpretation of the statutory scheme, which . . . has been adopted in three other circuit opinions and even endorsed by the plaintiffs in one of the cases." *Id.* at 33.

REASONS WHY THE PETITION SHOULD BE GRANTED

A divided panel of the Court has reversed the district court and expressly created an intercircuit conflict with both the Federal Circuit and the D.C. Circuit, holding that despite the "subject to the availability of appropriations" language of the

ISDA, 25 U.S.C. §§ 450j-1(b) & 450j(c)(1), and corresponding language in ISDA contracts, plaintiff Indian tribes can obtain contract support costs from the Judgment Fund in excess of the across-the-board statutory cap imposed by Congress in annual appropriations acts. This ruling potentially exposes the United States to substantial liability in this long-running nationwide class action litigation, and with respect to the similarly capped ISDA programs of the Department of Health and Human Services as well. The majority's holding thus threatens to upend key limitations established by the legislative branch with respect to the expenditure of public funds, and runs afoul of both the Anti-Deficiency Act, 31 U.S.C. § 1341(a), and the Appropriations Clause of the Constitution, U.S. Const. art. I, § 9, cl. 7.

With respect to the merits, we have little to add to Judge Hartz's thorough dissent, which fully elucidates the majority's error. Briefly, the majority's ruling is flawed in at least two crucial respects. First, the majority incorrectly discounts the parties' expectations at the time of contract formation. Second, it disregards Congress's intent in placing an express cap upon the amount available for contract support costs.

Regarding the first point, the majority recognizes, but mistakenly fails to give appropriate significance to, the parties' expectations when the ISDA contracts were signed. The majority properly notes that, based upon the contracts' language and the

course of the parties' dealing, plaintiffs "faced two levels of uncertainty" concerning how much funding they would receive for contract support costs. Maj. Op. 13. Thus, neither the contracts' text nor the parties' course of dealing assured the contractors of the full amount they sought for CSC. The majority avoids the parties' bargain, however, by resting upon the premise that in the ISDA, Congress required full funding of contract support costs, Maj. Op. 6 (citing Pub. L. No. 100-472, § 205, 102 Stat. 2285, 2292-24 (1988)) -- but the contractors did not have that assurance in their contracts, and ISDA itself anticipates shortfalls in CSC funding by requiring the government to provide an annual report to Congress "including "an accounting of any deficiency in funds" for payment of CSC. *See* 25 U.S.C. § 450j-1(c)(2). Moreover, had plaintiffs sought to challenge the contracts' terms, they had a unique statutory means of doing so before signing the agreements. 25 U.S.C. § 450f(b). The majority thus erroneously held the government liable for breaching a promise that was not contained in the contracts.

The majority's error is particularly glaring because the limitation on the funds available for ISDA contracts is not only mandated by statute, but is also statutorily required to be included in the language of each ISDA contract. *See* 25 U.S.C. § 450l(a)(1). Pursuant to the Model Contract set forth at 25 U.S.C. § 450l, ISDA contracts must contain language limiting the government's funding of those contracts

to available appropriations, and plaintiffs' contracts contained this required language. Moreover, the Model Contract also limits the obligation of ISDA contractors to perform under the contract to the amount of funds awarded. *See* 25 U.S.C. § 450l(c) at Sec. 1(b)(5). The tribes thus could not commence providing services without knowing that CSC funds would be limited.

The lack of a contractual assurance of payment for the full CSC amount requested also demonstrates the majority's error in relying upon *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005), and *Ferris v. United States*, 27 Ct. Cl. 542 (1892). In *Cherokee*, the government conceded both that the contract assured the amount the plaintiff sought for CSC, and that the government had breached that promise. *Cherokee*, 543 U.S. at 635. In *Ferris*, the court found that insufficient funds were not a defense to a breach of contract action because the contractor "is not chargeable with knowledge" of a contract's administration. *Ferris*, 27 Ct. Cl. at 546. In contrast, in the instant case the government warned the contractor at contract formation that funding of the full amount requested for CSC was not guaranteed; the "subject to the availability of appropriations" language of ISDA and plaintiffs' contracts thereunder, in conjunction with the annual funding caps established by Congress for the years in question, renders this conclusion inescapable.

Regarding the second point, the majority misconstrued the congressional intent in capping CSC funding. Given Congress's general requirement (subject to specified exceptions) that the government enter into ISDA contracts requested by tribes and tribal compacts, *see* 25 U.S.C. §§ 450b(i) & 450f(a), Congress's cap on CSC for particular years could *only* mean that Congress did not intend to fund all of the tribes' contract support costs in those years. Congress provided as part of the ISDA that an amount for reasonable and allowable CSC would be funded "subject to the availability of appropriations"; the cap necessarily restricts the amount of funds available. The majority's opinion disregards Congress's intent and makes public funds over and above what Congress appropriated available for all contractors' CSC, when Congress expressly prohibited that result.

As the dissent demonstrates at great length, the majority's holding is contrary to key statutory and contractual language, renders the congressionally imposed annual appropriations caps meaningless, and is at odds with decisions of both the Supreme Court and other circuits. The notion that the United States should be liable through the Judgment Fund for aggregate CSC amounts far in excess of the annual appropriations cap, simply because each tribe's individual annual CSC claim is within the capped amount, is both legally and logically untenable. And the majority's reliance upon the Supreme Court's *Cherokee* decision is misplaced, precisely because

there were no annual statutory appropriations caps to support the admitted breach in *Cherokee*.

The majority's conclusion that the Secretary is required to pay CSC for each tribal contract since 1994, without regard to the annual appropriations cap, is based on a misreading of the Appropriations Clause and congressional intent expressed in the Anti-Deficiency Act, the ISDA and all appropriations provided to fund Interior's tribal contracts since 1994. The Appropriations Clause prohibits the expenditure of funds by the United States in the absence of appropriations. U.S. Const., art. I, § 9, cl. 7. Additionally, in enacting the Anti-Deficiency Act, Congress has prohibited any officer or employee of the United States from authorizing an expenditure that exceeds appropriations. 31 U.S.C. § 1341(a).

Appropriations limitations are not unique to funding for Indian programs pursuant to ISDA. It is understood that the government could face such limitations and funding shortfalls in connection with its own direct operation of programs and provisions of services. So too the specific appropriations provided by Congress might not always be sufficient to allow Interior to pay every tribal contractor the full amount of funding requested by a tribe to operate its ISDA programs. Neither the agency nor a court has authority to ignore the funding limitation imposed by Congress

in appropriations Interior receives, whether for CSC for ISDA contracts or for other programs.

The majority found that Congress's appropriations for the Judgment Fund satisfy the requirements of the Appropriations Clause, but failed to establish how the act that created the Judgment Fund, 31 U.S.C. § 1304, granted the Secretary authority to expend funds to pay CSC beyond the capped CSC appropriations. The majority further failed to show what provision of the ISDA allows the Secretary to contravene the Anti-Deficiency Act.

The majority reasons that because the appropriations cap limits the agency's payment for CSC in the aggregate only, each ISDA contractor is still entitled to the full amount requested for CSC, as long as that amount is less than the lump-sum appropriation for CSC. But that rationale conflicts with Congress's intent in imposing appropriations caps on CSC payments, essentially eviscerating Congress's departure from the pre-1994 unrestricted agency appropriations.

Recognizing that the appropriations cap precludes the agency from making CSC payments in excess of the capped appropriations, the majority relies on the Judgment Fund as the source of the funding gap. Not only is that approach inconsistent with statutory limits on the availability of the Judgment Fund, *see* 31 U.S.C. § 1304 (making the Judgment Fund available only if "payment is not

otherwise provided for," as it is here through the capped annual appropriations), but it is an unreasonable interpretation of the statutory scheme. If Congress had intended to fully fund the CSC amount requested by the tribes, it would have provided sufficient unrestricted appropriations to do so, as it had done before 1994, rather than restricting the total amount available but allowing annual litigation by each contractor to recover the balance of CSC payments from the Judgment Fund. ISDA should not be read to require Congress to restrict a specific amount for *each tribal contractor* in each appropriations act -- an unworkable result -- to achieve its intended outcome.

The majority's holding effectively renders 25 U.S.C. §§ 450j-1(b) and 450j(c)(1) superfluous and entirely ignores the appropriations caps put in place by Congress in every fiscal year since 1994. The majority fails to explain how the Secretary is supposed to comply with § 450j-1(b)'s additional prohibition against reallocating funds from other tribes to pay for the CSC of another tribe -- particularly given the fact that, under the majority's ruling, other, non-contracting tribes might eventually have to bear the costs paid to contracting tribes, because the law contemplates that agencies will reimburse the Judgment Fund for breaches of contracts from departmental appropriations. *See* 41 U.S.C. § 612(c).

Although the majority relied on *Cherokee*, the underlying facts of this case are significantly different from those at issue in *Cherokee*. First, in *Cherokee*, the

Supreme Court's ruling was limited to determining the nature of an ISDA contract; the Court did not hold that the ISDA itself created an obligation to pay. Second, and most importantly, the appropriations at issue in *Cherokee* were legally unrestricted -- a distinction that was recognized by the Supreme Court. *See Cherokee*, 543 U.S. at 644 ("The Government refers to legislative history, . . . but that history shows only that Executive Branch officials would have liked to exercise discretionary authority to allocate a lump-sum appropriation too small to pay for all the contracts the Government had entered into; the history does not show that Congress granted such authority."). Here, however, the majority is extending the application of *Cherokee* considerably beyond its holding, thereby creating a direct conflict with decisions of the D.C. and Federal Circuits. *See Arctic Slope Native Ass'n v. Sebelius,* 629 F.3d 1296 (Fed. Cir. 2010); *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't,* 194 F.3d 1374 (Fed. Cir. 1999); *Ramah Navajo Sch. Bd. v. Babbitt,* 87 F.3d 1338 (D.C. Cir. 1996).[1]

[1] We note that the legislative history to the fiscal year 2000 appropriation specifically endorses the Federal Circuit's *Oglala* ruling, observing that the "decision clearly states that the law unequivocally makes contracts providing [CSC] subject to the availability of appropriations and that any agency can only spend as much money as has been appropriated for contract support costs. Any shortfall does not create an unfunded liability for the Federal government." H.R. Rep. No. 106-479, at 495 (1999).

Furthermore, the majority itself recognizes that the result of its opinion is unworkable. Its proposed remedy is to invite Congress to remove the "guarantees of full funding" purportedly provided in 25 U.S.C. §§ 450j-1(a) and (g). *See* Maj. Op. 45-46. Alternatively, it invites Congress to limit appropriations on a contract-by-contract basis. *Id.* at 46. What the majority fails to recognize, however, is that through its annual appropriations caps and its "subject to the availability of appropriations" language in ISDA, Congress has already accomplished the first alternative, and by distributing CSC funds in a pro-rata manner, as the D.C. Circuit held in *Ramah*, *supra*, Interior is required to do, the agency is already accomplishing the second.

To be sure, as the dissent acknowledges (Dissent 1), the statutory scheme may ultimately leave Indian tribes unpaid for some costs incurred in performance of government contracts. But a combination of ISDA's "subject to the availability of appropriations" language, the terms of the contracts repeating that language, the clear mandate of Congress's post-1994 appropriations caps for CSC, and Interior's annual Federal Register notices regarding CSC shortfalls, put tribal contractors on notice of the potentially limited funding of their contracts. *See* Dissent 2-7.

Finally, if the panel majority's decision in this nationwide class action stands, the United States will face significant litigation risk associated with claims for

additional CSC from Interior's ISDA contractors. While the government may well have additional defenses to individual claims, the government's litigation risk with respect to ISDA contractors could be substantial. Similarly, there is additional and considerable potential financial exposure associated with claims that HHS's ISDA contractors would be expected to pursue under this decision as well. Accordingly, this factor also militates in favor of the grant of rehearing en banc.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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JUNE 2011

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's General Order filed March 18, 2009, I hereby certify that:

1. all required privacy redactions have been made, and every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk; and
2. the digital submissions have been scanned for viruses with the most recent version of the following commercial virus scanning program, which indicates that the submissions are free of viruses.

Program:	Microsoft Forefront Endpoint Protection 2010
Version:	1.107.206.0
Last Updated:	June 23, 2011

s/
JOHN S. KOPPEL
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 23d day of June, 2011, I filed and served the foregoing Petition for Rehearing and Rehearing En Banc by submitting a digital copy via the ECF system and causing 18 hard copies to be dispatched to the Clerk of this Court by Federal Express overnight delivery, and by effecting service via the ECF system and causing hard copies to be served upon the following by Federal Express overnight delivery:

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