CASE NO. 09-2281/09-2291

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SOUTHERN UTE INDIAN TRIBE,

Plaintiff-Appellant/Cross-Appellee,

v.

KATHLEEN SEBELIUS,
Secretary of the United States Department of Health and Human Services, et al.,

Defendants-Appellees/Cross-Appellants

_____

On Appeal from the United States District Court for the District of New Mexico
The Honorable William P. Johnson, Judge
05-cv-0988

RESPONSE BRIEF FOR THE CROSS-APPELLEE
REPLY BRIEF FOR THE APPELLANT

Respectfully Submitted,

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-ORAL ARGUMENT IS REQUESTED-

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INTRODUCTION

This case is *solely* about contract formation pursuant to the Indian Self-Determination and Education Assistance Act ("ISDA" or "Act"). Questions of contract performance, as raised by the Defendants-Cross Appellants/Appellees (collectively referred to herein as "IHS") are unripe, irrelevant, and must be decided by either Congress or in separate litigation.[1]

The central issue in the present case is Congress' mandate, unequivocally required by the explicit terms of the ISDA, that self-determination contracts state both the full "Secretarial amount" to be paid and the full amount of contract support costs ("CSC") based upon the reasonable costs of the contract. 25 U.S.C. § 450j-1(a)(1)-(2). Rather than conceding the clear language of the ISDA on these points, IHS relies upon a mistaken belief that if it concludes, in its sole opinion, that appropriations to pay CSC are not available – plainly an issue of contract performance, not contract formation – those statutory requirements for contract formation can be set aside.

Furthermore, by misstating the Tribe's position and disregarding the purpose and intent of the ISDA, IHS ignores the impact on the Tribe of the District Court's Second Order, an order that foreclosed any remedy the Tribe may have had for the IHS's illegal

[1] *See*, *e.g.*, *Ramah Navajo Chapter v. Salazar*, No. 08-2262 (10th Cir. argued Nov. 16, 2009), which, as noted in the Statement of Prior or Related Appeals in Defendants'-Cross Appellants'/Appellees' Principal/Response Brief, involves "whether Interior Department is liable for payment of additional contract support costs over and beyond congressionally capped appropriations for contracts entered in fiscal years 1994 to the present." *IHS Principal/Response Brief* at unnumbered page titled "Statement of Prior or Related Appeals".

declination of its ISDA contract proposal and that improperly exceeded the District Court's limited equitable authority under the ISDA.

ARGUMENT

I. IHS MISINTERPRETS THE ISDA.

Jettisoning the standard rules of statutory construction, the IHS uses one portion of one provision of the ISDA to justify both declining the Tribe's contract proposal and forcing an involuntary waiver of the Tribe's statutory right to have the congressionally-mandated amount of CSC included in the Tribe's self-determination contract. That provision, section 450j-1(b), provides that "[n]otwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations." Contrary to IHS's assertions, however, "[t]he language of § 450j-1(b) is clear and unambiguous …" and does not support either of its positions. *Babbitt v. Oglala Sioux Tribal Pub. Safety Dept.*, 194 F.3d 1374, 1378 (Fed. Cir. 1999).[2]

A. Only the "provision of funds" is conditioned upon the "availability of appropriations", not the approval of a self-determination contract nor the inclusion of CSC in that contract.

IHS argues that, prior to its declination of the Tribe's contract proposal in 2005, it knew appropriations would not be available to pay the Tribe any CSC, much less the

[2] Indeed, in the related appeal, *Ramah Navajo Chapter v. Salazar*, the government agrees that section 450j-1(b) is unambiguous. *See Ramah Navajo Chapter, Brief for the Appellees* at 12, (stating that "Under the unambiguous provisions of ISDA, the funding of ISDA contracts between the government and Indian tribes has always been legally restricted to the 'availability of appropriations'"); *and see id.* at 17 ("ISDA states in clear, unambiguous language that Interior's obligation to fund contract support costs is 'subject to the availability of appropriations.'")

amount of CSC included in the Tribe's contract proposal. Based on that knowledge, IHS claims it could not have lawfully entered into a self-determination contract with the Tribe in the first place and, if it were forced to enter into a contract, the contract had to contain provisions by which the parties agreed that appropriations were not available to pay CSC. IHS's arguments in its own appeal and in response to the Tribe's appeal rely on the same basic premise, which is that the agency's belief that it did not have available appropriations to provide the Tribe the amount of CSC required by the ISDA excused the IHS from its statutory duty to enter into a self-determination contract stating the full, statutorily-mandated CSC amount.

No provision of the ISDA is more important to an understanding and resolution of the present case than 25 U.S.C. § 450j-1(a)(2), which unambiguously declares that IHS "shall" add to the self-determination contract the full amount of CSC funds to which the contractor is entitled. IHS seeks to avoid application of Congress' unmistakable directive through a tortured interpretation of the meaning of the ISDA's "subject to the availability of appropriations" language, language which is itself, in the words of the Court of Appeals for the Federal Circuit, "clear and unambiguous." *Babbitt*, 194 F.3d at 1378.

The only statutory obligation of IHS that is limited by the availability of appropriations is the "provision of funds." 25 U.S.C. § 450j-1(b). Each self-determination contract is required to specify the full amount of CSC; however, the Secretary's legal duty to "provi[de]" that full amount is contingent upon there being "available" appropriations to do so. Therefore, although section 450j-1(a)(2) requires the

Secretary to include the full amount of CSC in the self-determination contract, the Secretary is excused from *providing* those funds if appropriations are not available.

Section 450j-1(b) does not allow IHS to condition its approval of a contract on the availability of appropriations, nor does it allow the agency to modify the statutorily-required funding amounts to be included in an ISDA contract based upon a perceived lack of available appropriations. Despite the unambiguous language of that section, however, IHS seeks to use section 450j-1(b) to excuse its obligations to enter into a self-determination contract and to include in that contract the full amount of CSC dictated by the ISDA.

B. The ISDA does not authorize the declination of a self-determination contract proposal based upon IHS's belief that there are no available appropriations.

i. Lack of Available Appropriations is Not One of the ISDA Declination Criteria.

The ISDA authorizes five declination criteria, which are the only grounds on which IHS can decline a self-determination contract proposal. 25 U.S.C. § 450f(a)(2)(A)-(E). The IHS relied upon just one of these criteria, section 450f(a)(2)(D), as the basis for declining the Tribe's proposed contract. That section states that the Secretary may decline a proposal if "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." 25 U.S.C. § 450f(a)(2)(D). IHS now lobs a meritless challenge to the District Court's finding that its declination criterion was inapplicable, a challenge based on an argument that the "applicable funding level for the Contract" should be the

amount that IHS believed was made available by Congressional appropriations, not the amount required to be included in a self-determination contract by the express terms of the ISDA. In doing so, IHS claims that the "subject to the availability of appropriations" language from section 450j-1(b) must be read into the declination criteria even though, as noted by the District Court, that language is not cross-referenced anywhere in those criteria. App. at 320. Consequently, IHS interprets section 450f(a)(2)(D) as creating an entirely new sixth declination criterion, allowing IHS to decline a contract proposal if "the amount of funds proposed under the contract is in excess of the available appropriations for the contract, as determined by the Secretary." This is a legislative change that is within the sole authority of Congress, not within IHS's authority.

ii. The Statute Does Not Support IHS's Interpretation.

IHS's argument ignores the plain language of both section 450f(a)(2)(D) and section 450j-1(b), which are clearly distinguishable and cannot be construed together. Section 450f(a)(2)(D) requires an analysis of the amount proposed by a tribe compared to "the *applicable funding level* for the contract, as determined under section 450j-1(a) of this title." 25 U.S.C. § 450f(a)(2)(D) (emphasis added). Section 450j-1(a)(2) provides that "[t]here *shall* be added to [the Secretarial amount] contract support costs which *shall* consist of an amount for the reasonable costs for 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." (Emphasis added). *See also* 25 U.S.C. § 450j-1(a)(3) (further defining the requisite level of CSC funding). As the District Court found in its First Order, "the meaning of 'applicable funding level' is not open to broad interpretation and

is specifically defined by cross reference to Section 450j-1(a)." App. at 318. The applicable funding level for CSC under section 450j-1(a) is, therefore, "an amount for the reasonable costs for 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." 25 U.S.C. § 450j-1(a)(2). The Tribe's contract proposal included a CSC amount for the reasonable costs of its self-determination contract and the IHS representatives never disputed the reasonableness of this amount during contract negotiations in 2005. App. at 103-106, 115, 126, 127, 140, 149. Nowhere in these provisions is there *any* language limiting the mandatory funding amounts if, in the *opinion* of the Secretary, there are no available appropriations.

By contrast, the amount of funds that the Secretary must actually provide to a tribal contractor, while based on the applicable funding level stated in the contract, is dependent upon the availability of appropriations. *See* 25 U.S.C. § 450j-1(b). This difference between the ISDA's requirements for stating a statutorily-determined CSC amount in the contract and actually providing that amount underscores the distinction between contract formation and contract performance. The declination criterion of section 450f(a)(2)(D) is considered during contract formation and requires IHS to analyze the amount of CSC proposed by a tribal contractor solely in relation to the applicable funding level prescribed by section 450j-1(a)(2). Where, as here, the amount proposed is consistent with section 450j-1(a)(2), IHS cannot decline the contract based on that criterion because the proposed amount does not exceed the applicable funding amount. The Secretary's duty to provide those amounts is a consideration only *after* a self-

determination contract is in place and may be limited at that point only by an actual lack of available appropriations.[3] The District Court understood this distinction and properly ruled in its June 2007 Order that IHS could not rely on the applicable funding level criterion of section 450f(a)(2)(D) to decline the Tribe's contract proposal based on the agency's belief that it lacked available appropriations to pay the amount of CSC proposed by the Tribe.

C. Whether ultimately provided or not, the statutorily applicable level of CSC must be stated in full in an ISDA contract and associated documents.

As with its appeal of the District Court's June 2007 Order, IHS responds to the Tribe's appeal of the District Court's October 2007 Order by relying on its availability of appropriations concerns to justify contract language that contravenes the ISDA. Once again, IHS fails to recognize the Act's distinction between contract formation and contract performance.

In its response, IHS claims that "the ISDA restricts the *applicable funding level* for a self-determination contract, including funding for CSC." *IHS Principal/Response Brief* at 42 (emphasis added). In support of this proposition, IHS cites section 450j-1(b),

[3] Notably, IHS has historically been taken to task for its erroneous conclusions about the lack of available appropriations. *See, e.g., Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005); *Shoshone-Bannock Tribes of Fort Hall Reservation v. Leavitt*, 408 F. Supp. 2d 1073 (D. Or. 2005). The Bureau of Indian Affairs has engaged in similarly flawed analyses of the availability of appropriations. *See, e.g., Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). Whether appropriations are actually "available", particularly for years in which Congress placed a "cap" on such appropriations following *Cherokee*, remains a dispute subject to litigation between the agency and tribes. *See, e.g., Ramah Navajo Chapter v. Salazar.*

which, as discussed above, only limits the agency's obligation to *provide funds* under an existing contract. This assertion improperly conflates the agency's obligations during contract formation with its obligations to provide funding for a contract after its formation. As with the improper application of the declination criteria described above, although section 450j-1(b) may ultimately excuse IHS from providing funding during contract performance, that section cannot be read to restrict a tribal contractor's right to contract formation in the manner directed by the ISDA.

The ISDA contains explicit directives to the Secretary dictating the precise amount of CSC that the Secretary must include in a self-determination contract. 25 U.S.C. § 450j-1(a)(2); *see also* 25 U.S.C. § 450j-1(a)(3). Despite IHS's attempts to treat the annual funding agreement ("AFA") as a separate document not subject to the ISDA's requirements, the statutorily-dictated amount of CSC must also be included in that document. The Model Agreement included in the ISDA states that the AFA must include language specifying the CSC amount and that the amount of CSC stated in the AFA "shall not be less than the *applicable* amount determined pursuant to section 106(a) [25 U.S.C. § 450j-1(a)(2)]." 25 U.S.C. § 450*l*(c) (model agreement § 1(b)(4)) (emphasis added). Despite IHS's position that no appropriations were available to pay CSC and, therefore the amount of CSC "currently owe[d]" must be stated in the AFA as $0, the ISDA requires that the applicable funding level of CSC, calculated in the manner required by § 450j-1(a)(2), must be included in the AFA. That amount was not "$0".

The proper procedure called for by the express terms of the ISDA first requires that the full amount of CSC be stated in the self-determination contract. 25 U.S.C. §

450j-1(a)(2). If Congress does not appropriate sufficient funds to provide the stated CSC amount, or if IHS believes that insufficient funds have been appropriated, then IHS would not provide the stated CSC funding to the self-determination contractor. 25 U.S.C. § 450j-1(b). If the self-determination contractor concluded that IHS was in error regarding its determination of the availability of appropriations, then the ISDA permits that determination to be tested pursuant to the Contract Disputes Act. 25 U.S.C. § 450m-1(d). Given the frequency with which IHS has been shown to be wrong in its determination of the lack of available appropriations, *see* footnote 3, *supra*, testing these IHS determinations is a critical right extended to self-determination contractors by Congress.

At its heart, this case is about an effort by IHS to short-circuit the mandated procedure at the contract formation stage and strip away the right of self-determination contractors to have IHS determinations about the lack of available appropriations tested pursuant to the Contract Disputes Act. IHS asserts that the agency's belief that no appropriations are available to pay the Tribe the statutorily-mandated amount of CSC justifies modifying the AFA to exclude any current CSC obligation, whether funds are actually available or not, in a manner designed to eliminate potential Contract Disputes Act claims. IHS and the District Court's October 2007 Order both fail to recognize that, if appropriations are truly not available, the agency would be excused from providing those funds by section 450j-1(b) once the issue is tested in a claim under the Contract Disputes Act.

D. The federal government has admitted that section 450j-1(b) unambiguously addresses its funding concerns, which undermines its own arguments in the present case.

IHS noted in its Principal/Response Brief that a related appeal, *Ramah Navajo Chapter v. Salazar*, is pending before this Court. That case involves a question of contract performance, which is whether appropriations are actually available to be provided to an ISDA self-determination contractor. For the reasons described herein, the questions before the Court in *Ramah* differ from the issues of contract formation in this case; however, the position adopted by the federal government in *Ramah* undermines the position taken by IHS in this case.

In *Ramah*, the government argues that, despite the specific applicable funding levels included in various ISDA self-determination contracts, as calculated pursuant to section 450j-1(a), the government was excused from providing those amounts where appropriations were not available to do so. In support of its position, the government argues that the meaning of the "subject to the availability of appropriations" language in section 450j-1(b) clearly and unambiguously limits an agency's responsibility to provide funding for ISDA contracts, regardless of the applicable funding levels stated in the contracts themselves. *See Ramah Navajo Chapter*, *Brief for the Appellees* at 16-25. Counsel for the government aptly points out that "Congress has the final word as to how much money the United States, through its agencies, can obligate on given programs or contracts." *Id.* at 21.

Congressional authority over the ISDA process, while understood by the federal government in *Ramah*, has been consistently ignored by IHS in this case. Congress, not

IHS, has explicitly stated the CSC funding levels that *shall* be included in ISDA self-determination contracts and the AFA and, through incorporation of the Model Contract, the terms that must be included when the parties cannot agree on modifications. Furthermore, through its appropriations process, Congress decides the amount of money available for IHS to fulfill those obligations. Congress has not authorized the position taken by IHS in this case, in which IHS has made its own determination about the availability of appropriations and, whether accurate or not, has relied on that determination to frustrate the contract formation process required by the ISDA, all the while ignoring the unambiguous excuse from performance offered by Congress if IHS's pre-contract determination about available appropriations turns out to be accurate. Neither IHS nor the District Court can short-circuit the process created by Congress in an effort to preemptively insulate IHS from such claims by forcing the addition of self-determination contract language that deprives a tribe of its rights in violation of the clear directives of the ISDA.

II. THE TRIBE SHOULD NOT BE PRECLUDED FROM PROTECTING ITS LAWFUL INTERESTS.

IHS's response brief improperly speculates about the motivations underlying the Tribe's damages claims; the Tribe has never asserted that it would be entitled to damages for operational or other expenses it did not actually incur. Regardless, however, the Tribe would undeniably be in a different position had IHS not illegally declined its contract proposal to assume operation of the health clinic in October 2005. As noted in the Tribe's opening brief, had the contract been granted in 2005, the Tribe could have

generated certain income, such as interest on the contract amounts and from improved third-party collections. By requiring that the contract start date be the date on which the Tribe actually took control of the clinic, *e.g.* October 1, 2009 (after protracted litigation over the illegal declination of the Tribe's contract proposal), the District Court foreclosed any efforts of the Tribe to recover those amounts that it might otherwise have received but for IHS's illegal actions. Contrary to the fears of IHS and the District Court, the Tribe's interest in ensuring an October 1, 2005 start date is not to seek a windfall but, rather, that the Tribe, like any other aggrieved plaintiff, simply be restored to the position it lawfully would have enjoyed but for IHS's illegal declination, as well as to ensure that the Tribe is not prejudiced by its decision to seek review of IHS's illegal declination of its contract proposal.

III. THE ISDA DOES NOT GRANT AUTHORITY TO DISTRICT COURTS TO ENTER INJUNCTIVE RELIEF AGAINST TRIBAL CONTRACTORS IN AN ACTION BROUGHT PURSUANT TO 25 U.S.C. § 450m-1(a).

IHS downplays the powerful remedies authorized by the ISDA against government officials who fail to carry out Congress' directives regarding the ISDA. These remedies are authorized only in suits *against* federal officials. The ISDA says nothing about granting the District Court authority to fashion remedies against tribes and in favor of the very federal officials who have thwarted the ISDA contracting process.

As IHS notes in its Principal/Response Brief, section 450m-1(a) of the ISDA authorizes district courts to take "original jurisdiction over any civil action or claim against the appropriate Secretary arising under [the Act]." This section continues by

noting that such courts may order appropriate relief, which includes various remedies explicitly identified by the ISDA, all of which are against the federal government, its officers, or employees, and none of which are against tribes. IHS places significant weight on the fact that section 450m-1(a) states that "the district courts may authorize appropriate relief …" and argues that appropriate relief includes the District Court's remedy, *i.e.*, ordering the Tribe to accept contract terms to which it objected.

The substantial legislative history behind section 450m-1(a) demonstrates that Congress intended this section to create remedies for tribes against federal officials, not remedies for federal officials against tribes. *See Appellant's Opening Brief* at 30-32. Congress designed section 450m-1(a) to address the "consistent failures [of IHS and other agencies] over the past decade to administer self-determination contracts in conformity with the law." S.Rep. No. 100-274, 100th Cong.1st Sess. 37 (1987). Thus, it is no surprise that section 450m-1(a) authorizes only suits against the "appropriate Secretary", without mention of any potential for counterclaims, and allows for "appropriate relief", including a list of remedies that flow in just one direction: against the federal agencies which have consistently violated the Act.

In this case, the District Court ordered that language proposed by IHS, but consistently opposed by the Tribe, be inserted into the Tribe's ISDA contract. This Order defied the ISDA's mandate that *only* those provisions of the Model Agreement or other provisions upon which the parties agree are to be included in an ISDA contract. 25 U.S.C. § 450*l*(a). Ordering the inclusion of IHS's terms also had the effect of improperly allowing one party to the contract to dictate terms in contravention of both IHS's own

standards and general concepts of contract law. *See, e.g.*, *Internal Agency Procedures Handbook for Non-Construction Contracting under Title I of the Indian Self-Determination and Education Assistance Act* 5-12 (1999), *available at* http://www.gao.gov/archive/1999/rc99150.pdf (IHS's own rules requiring that the contract shall only contain provisions from the Model Agreement or that are agreed to by the parties); *In re Woodcock*, 45 F.3d 363, 367 (10th Cir. 1995); *Central Coast Const. v. Lincoln-Way Corp.*, 404 F.2d 1039, 1045 (10th Cir. 1968); *Prater v. Ohio Education Ass'n*, 505 F.3d 437, 443 (6th Cir. 2007) ("the option of either party to modify a contract unilaterally would defeat the essential purpose of reaching an agreement in the first place—to bind the parties prospectively.") In this case, the District Court impermissibly ordered injunctive relief against the Tribe in contravention of the ISDA's limited remedies, all of which are intended to favor aggrieved tribal parties, not federal agencies.

CONCLUSION

IHS misconstrues the meaning of the ISDA's "subject to the availability of appropriations" language, which only excuses IHS from providing funds to an ISDA contractor during performance of a self-determination contract, but does not authorize IHS to change the declination criteria of the ISDA. IHS's other obligations under the ISDA, including those requiring the agency to grant a contract that conforms to the Act's terms without regard to the availability of appropriations, are not excused by that language. IHS cannot rely on its concerns over contract performance to justify its failures to comply with the ISDA's explicit contract formation requirements. The District Court was correct to reverse IHS's declination of the Tribe's contract proposal on

these grounds; however, it failed to recognize that the same reasoning should have been applied to prohibit IHS's attempt to force the Tribe to accept modifications to Congressionally-mandated CSC language in violation of the express terms of the ISDA. By ordering the Tribe to accept such modifications, the District Court exceeded the limited remedial authority granted by the ISDA, which allows tribes alone to address violations of the Act by federal agencies. Lastly, contrary to the misplaced concerns of IHS and the District Court, the contract start date should ensure that the Tribe is not prejudiced by IHS's illegal declination of its 2005 contract proposal and the Tribe's decision to enforce its right to review of that illegal declination.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 28.1(e)(3 and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief was prepared using Microsoft Word 2007 and complies with the type and volume limitations set forth in Rules 28.1 and 32 of the Federal Rules of Appellate Procedure. I further certify that the font used is 13 point Times New Roman, for text and footnotes, and that the computerized word count for the foregoing brief (excluding exempt materials) is 3,994.

by: */s/ Suzanne P. Singley*
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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that the text of the hard copy of the foregoing RESPONSE BRIEF FOR THE CROSS-APPELLEE REPLY BRIEF FOR THE APPELLANT, and the text of the digital (PDF) form submitted *via* the Court's ECF system are identical. A virus check was performed on the electronic document, using Symnantec AntiVirus Corporate Edition version 10.1.4.4000, Virus Definition File Dated: 03/31/2010 Rev. 5 and no virus was detected. In addition, I certify that all required privacy redactions have been made.

by: */s/* Suzanne P. Singley
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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2010, I filed the foregoing RESPONSE BRIEF FOR THE CROSS-APPELLEE REPLY BRIEF FOR THE APPELLANT by causing a digital version to be filed through the Tenth Circuit's electronic service (ECF), and by causing the original and seven copies to be sent by UPS overnight delivery within two business days. I also caused a digital version of the brief to be served upon the following counsel by ECF:

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