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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

SOUTHCENTRAL FOUNDATION, )  
an Alaskan corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
YVETTE ROUBIDEAUX, DIRECTOR, )  
U.S. INDIAN HEALTH SERVICE, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Case No. 3:13-cv-00164-SLG

**PLAINTIFF'S MEMORANDUM IN  
SUPPORT OF SECOND MOTION FOR  
PRELIMINARY INJUNCTION**

**INTRODUCTION**

Pursuant to 25 U.S.C. §450m-1(a) of the Indian Self-Determination and Education Assistance Act (ISDA or Act), the Southcentral Foundation (SCF) seeks immediate injunctive relief to compel the Director of the Indian Health Service (IHS) to preserve the funds currently promised to SCF to be made available under the 2014 award for the IHS national Methamphetamine and Suicide Prevention Initiative (MSPI), and the national Domestic Violence Prevention Initiative (DVPI) pending the outcome of the underlying litigation.<sup>1</sup>

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<sup>1</sup> The terms "Secretary" and "Director" are used interchangeably because the ISDA imposes legal obligations on the Secretary of Health and Human Services, 25 U.S.C. §450b(i), but the

As in Plaintiff's first Motion for Preliminary Injunction,<sup>2</sup> this dispute is not about the core amounts SCF is entitled to receive to carry out MSPI and DVPI activities this year. Instead, this dispute once again arises due to the agency's effort to limit its liability over "contract support costs" associated with these undisputed program funds.<sup>3</sup> Again, the agency's position stands in contrast to recent Supreme Court decisions holding the government liable for paying all contract support costs associated with ISDA programs.<sup>4</sup> In order to receive 2014 MSPI and DVPI program funds, the agency has required SCF to submit a written statement agreeing that these are "all-inclusive" awards, such that any CSC owed must come from the amounts provided as program funding, or to agree the agency has no obligation to pay SCF any additional sums for indirect CSC.<sup>5</sup> Requiring SCF to submit such a statement assumes the outcome of the exact

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Secretary has delegated these duties to the IHS Director, and it is the Director who is imposing the current requirements on receipt of these funds.

<sup>2</sup> See Dockets 3 (Mem. for Preliminary Inj.), 5 at 2 (Mot. Mem.).

<sup>3</sup> See 25 U.S.C. §450j-1(a)(2) (requiring that "contract support costs" "shall be added" to the program funds paid under an ISDA contract); 25 U.S.C. §458aaa-7(c) ("The Secretary shall provide funds under a funding agreement under this part in an amount equal to the amount that the Indian tribe would have been entitled to receive under self-determination contracts under this subchapter, including ... amounts for contract support costs specified under section 450j-1(a)(2), (3), (5), and (6) of this title"). "Contract support costs" are largely overhead ("indirect") costs and certain employee health care and other fringe benefit ("direct") costs. See generally IHS Manual 6-3.2.D; 6-3.2.E.

<sup>4</sup> See *Salazar v. Ramah Navajo Chapter*, 567 U.S. \_\_\_, 132 S. Ct. 2181, 2186 (2012) (*Ramah*); *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 133 S. Ct. 22 (Mem.) (2012), reversing 629 F.3d 1296 (Fed. Cir. 2010), on remand *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 501 Fed. Appx. 957 (Fed Cir. 2012). See also *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005).

<sup>5</sup> Docket 64 at 2 ¶ 2 (Notice of Supp. Info.); Docket 64-2 (Ex. B to Notice).

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dispute the parties have been litigating for almost a year. Thus, SCF requests this court grant its motion for preliminary injunction in order to preserve the status quo and avoid prejudice pending the outcome of the underlying litigation.

### **STATEMENT OF FACTS**

Southcentral Foundation has already laid out the background facts at length in its earlier filings.<sup>6</sup> To summarize, since the inception of the MSPI and DVPI programs, SCF and IHS have had a long-standing disagreement over whether the agency is required to pay contract support costs (CSC) on top of the amounts awarded as program funds. This dispute came to a head during negotiations for the award of 2012 and 2013 MSPI and DVPI program funds. After nearly a year of failed negotiations, SCF made a final offer to the agency, requesting amounts for direct and indirect CSC in addition to the amounts agreed upon for program costs. The Director rejected SCF's final offer and this litigation followed.

The current dispute arose during negotiations for the award of 2014 MSPI and DVPI program funds. Specifically, IHS told SCF that if it "chooses not to include the indirect costs (IDC) as part of your overall MSPI and DVPI awards, please submit an acknowledgment on SCF letterhead that SCF chooses not to include IDC and IHS does not owe any additional amount related to these all-inclusive awards."<sup>7</sup> Thus, in order to receive 2014 program funds, the agency is forcing SCF to concede its position in the underlying litigation.

SCF has also been recently notified that it must complete its application for these funds by August 1, 2014, so the necessary amendments to SCF's funding agreement can be signed by

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<sup>6</sup> See Docket 5 (Mem. in support of Pl.'s Mot. for Preliminary Inj.) at 4-13; Docket 44 (Pl.'s Mot. for Summary Judgment) at 4-20.

<sup>7</sup> Docket 64 at 2 ¶ 2; Docket 64-2.

August 15, 2014.<sup>8</sup> The only part of SCF's application that is missing is this written statement.<sup>9</sup> SCF has also been informed that it must sign the funding agreement amendment for these funds by August 15, 2014 in order to participate in the allocation of funds<sup>10</sup>; if SCF does not sign by that date, presumably the funds will be awarded to other entities and thus become unavailable to SCF. Therefore, once again, SCF is being put in the position of being forced to agree to what it believes is an illegal contract term or risk losing the MSPI and DVPI program funding. SCF has worked with the agency to informally resolve this matter, seeking to add language to the proposed funding agreement that would reserve this matter pending the outcome of the underlying litigation, but the agency has obstinately refused to compromise.<sup>11</sup>

#### **STANDARD FOR ISSUANCE OF AN INJUNCTION**

This case involves a statutory injunction authorized by the second clause of 25 U.S.C. §450m-1(a):

In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).<sup>12</sup>

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<sup>8</sup> See Exhibit A (7/28/2014 Email from Beverly Cotton, Director, Division of Behavioral Health, IHS).

<sup>9</sup> Docket 66-1 (Ex. A to Sherman Decl.: Cotton 7/25/14 Email).

<sup>10</sup> *Id.*

<sup>11</sup> See Docket 66 ¶¶ 2-12 (Sherman Decl.).

<sup>12</sup> (Emphasis added).

SCF believes that the agency is violating the ISDA, specifically 25 U.S.C. §450j-1(a)(2)-(3), by forcing SCF to agree that no additional amounts for CSC are owed in addition to the MSPI and DVPI program funds. Thus, SCF hereby requests an injunction to prevent this violation and preserve the status quo until the parties are informed on the appropriate law by an Order of this Court.

As noted earlier, the original 1988 version of §450m-1(a) reflected sharp congressional criticism of repeated agency misconduct in the approval and award of contract terms, and in the funding of approved contracts.<sup>13</sup> This provision was enacted to ensure tribal contractors could obtain adequate relief from the courts:

The amendments made by [§450m-1(a)] are necessary to give self-determination contractors viable remedies for compelling BIA and IHS compliance with the Self-Determination Act. The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs. Existing law affords such contractors no effective remedy for redressing such violations. Tribal contractors are denied access to injunctive relief to compel agency compliance with the law where the effect of any court order would be to require the Federal government to add funds to the plaintiff's contract.<sup>14</sup>

This provision was enacted to give tribal contractors “access to injunctive relief to compel agency compliance with the law.” That is all SCF seeks here.

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<sup>13</sup> See Docket 5 at 14-15 (Mem. in support of Pl.'s Mot. for Preliminary Inj.).

<sup>14</sup> S. REP. NO. 100-274, at \*37 (1987). See also *id.* at \*34 (“The Committee amendment affords self-determination contractors the opportunity to secure injunctive relief against the Bureau of Indian Affairs or the Indian Health Service for violations of the Self-Determination Act (or the terms of contracts under the Act) rather than being put to the cost of having to file multiple, annual claims to recover contract damages resulting from such violations, while the same violations continue unchecked.”).

Although SCF believes it is entitled to an injunction under 25 U.S.C. §450m-1(a), SCF notes that it also meets the Ninth Circuit’s standard four-factor test for issuance of an injunction. That test examines: (1) whether a Plaintiff is likely to succeed on the merits; (2) whether Plaintiff will suffer irreparable harm if such relief is not granted; (3) whether the balance of equities tips in Plaintiff’s favor; and (4) whether a preliminary injunction is in the public interest.<sup>15</sup>

SCF is not seeking a mandatory injunction or mandamus relief, but only seeks to preserve the current position of the parties pending the outcome of this litigation.

## **ARGUMENT**

### **I. SCF IS ENTITLED TO A STATUTORY INJUNCTION.**

The ISDA applies to the MSPI and DVPI funds because “Indian tribes or Indians are primary or significant beneficiaries” of the programs; the MSPI/DVPI programs are administered by the “Indian Health Service;” IHS administers the MSPI/DVPI programs under an “Act of Congress authorizing” IHS to provide services “for the benefit of Indians because of their status as Indians”; and the MSPI and DVPI funds were appropriated for “Indian Health Services,” in order “to carry out [*inter alia*] . . . the Indian Self-Determination Act.”<sup>16</sup> Since these are ISDA funds, the funding provisions of Title I control. The ISDA provides that contract support costs “shall be added” and “shall include” certain direct and indirect costs.<sup>17</sup> The agency is now refusing to add indirect costs to the 2014 award of MSPI and DVPI funds. Such a position is

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<sup>15</sup> *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009) (*citing Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)).

<sup>16</sup> *See, e.g.*, Docket 52 at 9 (Reply) (*citing Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2134-35 (2007) (MSPI); SCF FY 2012 Funding Agreement, Ex. A, at 14.*

<sup>17</sup> 25 U.S.C. §§450j-1(a)(2)-(3).

clearly contrary to law, and thus under §450m-1(a), SCF is entitled to injunctive relief to prevent this action that is “contrary to” the ISDA.

## **II. SCF IS ENTITLED TO AN INJUNCTION UNDER THE DEFAULT NINTH CIRCUIT TEST.**

### **A. SCF is likely to succeed on the merits of the underlying litigation.**

SCF is likely to succeed on the merits of the underlying case, principally its assertion that the MSPI and DVPI are ISDA funds, and as such, the Director is mandated by law to add additional amounts for CSC.<sup>18</sup> There is no serious dispute that the MSPI and DVPI initiatives are ISDA funds; that is, they are for the “benefit of Indians” and they are “administered” by IHS—indeed, Congress expressly created them within the annual Acts appropriating funds to the Indian Health Service.<sup>19</sup> Moreover, the Director does not have the discretion to require a tribal contractor to pay CSC from its program funds.<sup>20</sup>

Additionally, IHS has a heavy burden to meet in the underlying litigation. This results from the fact that when rejecting a funding or contracting proposal, the Director must make “a specific finding that clearly demonstrates or that is supported by a controlling legal authority . . . that . . . the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian Tribe is entitled under this [Act]”<sup>21</sup> and in any ensuing “civil action” “the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity

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<sup>18</sup> See Docket 44 at 21-32, 34-40 (Mot. for Summary Judgment); Docket 52 at 7-18 (Reply).

<sup>19</sup> E.g., Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524, 735 (2009).

<sup>20</sup> Docket 44 at 35-36 (citing 25 U.S.C. §450k(a)(1); *Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338,1344 (D.C. Cir. 1996)).

<sup>21</sup> 25 U.S.C. §458aaa-6(c)(1)(A) (emphasis added).

of the grounds for rejecting the offer . . . .”<sup>22</sup> This burden is coupled with the fact that the law is to be interpreted in SCF’s favor and SCF’s contract must be interpreted to facilitate the inclusion of programs.<sup>23</sup> Even without these favorable presumptions, IHS has not met its burden here.

**B. SCF will suffer irreparable harm if the injunction is not granted because it may lose its 2014 MSPI and DVPI program funds.**

SCF has been informed that if it does not submit the written statement requested by the agency—a statement it believes constitutes a violation of the ISDA—it will not receive its 2014 MSPI and DVPI program funds and these funds will presumably be allocated to other entities. Once the Director allocates these 2014 funds, SCF cannot recover them later. Even if SCF’s position is vindicated, the funds will have already been spent because according to appropriations law, the Director must obligate 2014 funds by the end of the fiscal year or she loses the ability to spend those funds.<sup>24</sup> Moreover, the Director has discretion to choose the

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<sup>22</sup> §458aaa-6(d) (emphasis added). Title I contains nearly as stringent a standard. §450f(e) (noting Secretarial burden to “clearly demonstrat[e] the validity of the grounds for declining the contract proposal”).

<sup>23</sup> See Docket 52 at 6 n.16 (citing cases enumerating the Indian canon of construction); Docket 44 at 22-23 (citing ISDA provisions mandating laws and regulations be interpreted in a way that facilitates the inclusion of PSFAs in a Tribe’s funding agreement).

<sup>24</sup> See *City of Houston, Tex. v. Dep’t of Housing & Urban Dev.*, 24 F.3d 1421, 1426-27 (D.C. Cir. 1994) (“[T]he equity powers of the courts allow them to take action to preserve the status quo of a dispute and protect their ability to decide a case properly before them. In such situations, the courts simply suspend the operation of a lapse provision and extend the term of already existing budget authority. If, however, budget authority has lapsed before suit is brought, there is no underlying congressional authority for the court to preserve. It has vanished, and any order of the court to obligate public money conflicts with the constitutional provision vesting sole power to make such authorization in the Congress. Equity empowers the courts to prevent the termination of budget authority which exists, but if it does not exist, either because it was never provided or because it has terminated, the Constitution prohibits the courts from creating it no matter how compelling the equities.” (quoting *National Ass’n of Regional Councils v. Costle*, 564 F.2d 583 (D.C.Cir.1977))).



entities that will receive these program funds and since there is no ISDA provision mandating that SCF receive MSPI and DVPI program funds, SCF would not be able to recover them in a Court of law once they are spent.<sup>25</sup> Thus, the harm SCF will suffer if the injunction is not granted will truly be irreparable.

**C. The balance of equities favors awarding an injunction.**

SCF is asking the Court to preserve the status quo by keeping the subject funds in abeyance and preserving its position regarding its right to CSC on these funds. If SCF is correct in its position, the agency will have to award the program amounts and add funding amounts for CSC. If SCF is incorrect, SCF can submit the requested written statement and still receive the base program funding for the 2014 MSPI and DVPI awards. Either way, SCF should receive the program funds, so it is only fair that an injunction be issued preserving these funds pending the outcome of the litigation. As noted above, if these funds are not preserved, the agency may spend them elsewhere, preventing SCF from ever being able to recover them, even in a subsequent lawsuit. Moreover, the agency will not be harmed in preserving these funds pending the outcome of the underlying litigation as the Court has informed the parties that it will issue a decision shortly and the agency has indicated that it intends to award these funds to SCF regardless. If an injunction is not issued, SCF will be coerced into ceding an entire year's worth of litigation, nullifying the costs spent on attorney fees and the efforts expended on trying to

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<sup>25</sup> See *City of Houston, Tex. v. Dep't of Housing & Urban Dev.*, 24 F.3d 1421, 1426-27 (D.C. Cir. 1994) (“[E]ven if a plaintiff brings suit before an appropriation lapses, this circuit’s case law unequivocally provides that once the relevant funds have been obligated, a court cannot reach them in order to award relief. . . . Thus, to avoid having its case mooted, a plaintiff must both file its suit before the relevant appropriation lapses *and* seek a preliminary injunction preventing the agency from disbursing those funds.” (emphasis in original)).

vindicate its legal rights. The agency should not be allowed to win its case through coercion. Moreover, if these funds are lost, it will place at risk services to thousands of Alaska Natives. This point alone counsels towards issuing an injunction.

**D. Awarding an injunction is in the public interest.**

These funds are available for mental health, substance abuse, and domestic violence programming in Alaska's most populous area and surrounding villages. These programs are vital as these issues are among the most prevalent problems threatening the health and well-being of Alaska Natives.<sup>26</sup> If SCF is forced to discontinue these activities, a substantial proportion of the Alaska Native population will lose access to this programming.

As prior briefing made plain, in order to provide these programs SCF must also shoulder the administrative costs that go along with them. Substance abuse counselors need pay checks, audits must still be completed, supplies must be purchased, and other costs must be incurred in order to provide these services. SCF is not asking the Court to award these additional funds. SCF is merely asking the Court to ensure that SCF is not prejudiced by pursuing its legal remedies—that it does not lose these crucial program funds while waiting for a resolution of the underlying issue. If the Court does not grant the requested injunction, SCF will either have to agree to something it reasonably believes is a violation of law, or lose altogether its allocation of MSPI and DVPI funds. Once the agency spends these funds for 2014, they cannot be recovered. Thus, granting this injunction is in the public interest.

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<sup>26</sup> See Docket 44 at 5-6 (Committee concerned about rising use of methamphetamines and rates of youth suicide in Indian country; Chairman Obey statement explaining disproportionately high rate of domestic violence and child abuse in AI/AN communities).

## CONCLUSION

For the foregoing reasons, SCF is entitled to an injunction maintaining the status quo of this litigation until the underlying merits are decided by an Order of this Court.

Respectfully submitted this 30<sup>th</sup> day of July 2014.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July 2014 true and correct copies of the foregoing Plaintiff's Memorandum in Support of Second Motion for Preliminary Injunction and accompanying Exhibit were served electronically via the Court's CM/ECF system upon:

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