

ORAL ARGUMENT IS REQUESTED

Nos. 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 Health and Human Services, *et al.*,

Defendants-Appellees/Cross-Appellants.

ON APPEAL AND CROSS-APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

The Honorable William P. Johnson, District Judge

REPLY BRIEF FOR THE APPELLEES/CROSS-APPELLANTS

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INTRODUCTION AND SUMMARY

This case concerns the proper construction of the Indian Self-Determination and Education Assistance Act (“ISDA” or “Act”), as amended, 25 U.S.C. §§ 450-450n, which permits Indian tribes like plaintiff to assume operation of health care programs previously run by the Secretary of Health and Human Services (“the Secretary”) for the benefit of Indians. Tribes enter into self-determination contracts

pursuant to the Act with the Indian Health Service (“IHS”), an arm of the Department of Health and Human Services, under which the Secretary provides funding equal to the amount of funds she otherwise would have provided if the program remained under IHS’s operation and control. *Id.* at § 450j-1(a)(1). In addition, the Act requires that contract support costs (*e.g.* certain start-up costs and overhead expenses) be added to the funding amount provided by the Secretary.

Southern Ute Indian Tribe (“Southern Ute” or “the Tribe”) sued the Secretary claiming that the Tribe had a statutory entitlement to be awarded a contract with IHS containing a promise for full and immediate payment of its contract support costs (“CSC”) in a new contract it proposed, even though the Tribe’s CSC demand exceeded Congress’s statutorily-restricted appropriations for such costs in the relevant fiscal year. The district court ruled in the Tribe’s favor in an order issued on June 15, 2007, holding that IHS did not have discretion to decline the entire contract on the basis of insufficient congressional appropriations to pay CSC, or the Tribe’s refusal to agree to language not contained in the statutory model contract.¹ Doc. 50

¹ In a subsequent order issued on October 18, 2007, the district court ruled that CSC funding language proposed by IHS did not violate the ISDA, and that the start date of the proposed contract should be the date the Tribe actually assumed operation of the Southern Ute Health Center. Doc. 66 at 6, 9 (J.A. Vol. II at 461, 464). The
(continued...)

at 19 (J.A. Vol. I at 325).

As demonstrated in our opening brief, however, the Tribe has no statutory right to funding of CSC – nor to a promise of such funding – in excess of congressionally restricted appropriations. First, with regard to Southern Ute’s claim of a statutory “entitlement” to a contract designating the full amount of its CSC need, we explained (Br. 11-12, 42-44) that funding for self-determination contracts, including CSC, is subject to a clear, unambiguous statutory contingency that overrides any other payment obligation: “Notwithstanding any other provision . . . , the provision of funds under this subchapter is *subject to the availability of appropriations . . .*” 25 U.S.C. § 450j-1(b) (emphasis added). For the fiscal year at issue, Congress specifically declared that “not to exceed \$267,398,000 shall be for payments to tribes . . . for [CSC] associated with contracts . . . or annual funding agreements between the [IHS] and a tribe . . . pursuant to the [ISDA] prior to or during fiscal year 2005, of which *not to exceed* \$2,500,000 may be used for [CSC] associated with new . . . self-determination contracts . . . or annual funding agreements.” Consolidated

¹(...continued)

district court’s ruling on those issues is the focus of Southern Ute’s appeal (No. 09-2281). Those issues are beyond the scope of this reply brief, and were addressed in our Principal Brief for the Cross-Appellants/Response Brief for the Appellees.

Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 3084 (2004) (emphasis added). Because the appropriated amount represented no increase from the prior fiscal year, IHS faced a significant shortfall in funds to pay CSC to tribes with existing contracts, whose funding could not be reduced, and thus had no money to undertake additional obligations by agreeing to new self-determination contracts requiring the payment of CSC.

Moreover, Southern Ute has no statutory entitlement to a contract designating full payment of CSC if agreeing to a new contract requiring CSC funding would require the Secretary to reduce funding for other tribal contractors. *See* 25 U.S.C. § 450j-1(b) (emphasis added) (“[T]he 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.”). The Act therefore does not obligate IHS to enter an ISDA contract containing a promise to pay CSC where no funds for such costs exist. Thus, as we argued (Br. 33-36), the district court was wrong in holding that the IHS had no discretion to base its declination of a self-determination contract on a lack of appropriations.

We further showed (Br. 36-38) that the Secretary’s declination of the Tribe’s contract proposal was required by the Anti-Deficiency Act, which prohibits federal

officers and employees from making or authorizing “an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.” 31 U.S.C. § 1341(a)(1)(A). Moreover, as we also demonstrated (Br. 38-40), agreeing to provide funds in excess of the statutory funding limit would violate the Appropriations Clause, which prohibits the payment of money out of the United States Treasury unless it has been appropriated by an act of Congress. Art. I, § 9, Cl. 7. The district court therefore erred in holding that IHS lacks discretion to decline a contract proposal where a tribe insists upon including a specific amount for CSC, despite the absence of any appropriated funds to pay such costs.

Southern Ute has wholly failed to refute our arguments. Rather, the Tribe’s primary response to our showing is a convoluted exegesis of the ISDA’s funding provisions, which turns basic principles of contract law upside down. Indeed, the Tribe’s assertion that this case “is *solely* about contract formation,” and that questions of “contract performance . . . are unripe, [and] irrelevant,” (Response Br. 1) borders on the frivolous. It is hornbook law that the rudimentary elements of a contract involve a promise or set of promises by two or more parties “the performance of which the law in some way recognizes as a duty.” 1 Williston, Contracts § 1:1 (4th ed. Lord 1990). It therefore makes no sense to argue that questions of contract

performance can, or should, be divorced from the consideration of the central issue in this case – *i.e.*, whether, during new contract negotiations, the ISDA requires IHS to accede to a tribe’s demand to include a promise to pay CSC without regard to the availability of appropriations.

We now take this opportunity to correct some of the numerous mischaracterizations of the government’s position, and of the law, that permeate the Tribe’s brief.

ARGUMENT

1. The Law Does Not Support Southern Ute’s Contention That Contract Performance Is “Irrelevant” To Contract Formation.

A. *Nothing in the ISDA requires IHS to approve a tribe’s proposal to enter into a self-determination contract with a promise to pay CSC if the agency has insufficient funds to fulfill such a contractual obligation.*

Contrary to Southern Ute’s contention, it is the Tribe, and not IHS, that “misinterprets the ISDA.” Response Br. 2. Clearly, nothing in the ISDA supports the Tribe’s argument that IHS must award a self-determination contract promising to pay CSC without taking into consideration whether Congress has appropriated sufficient (or any) funds to the agency for such purposes. In other words, the ISDA does not require IHS to enter into a contract that it will instantly breach. As discussed in our

opening brief (at 33-34), while the ISDA requires IHS to enter into a self-determination contract upon the request of a tribe, the government's obligation to award and fund such contracts is subject to certain conditions and limitations. Most importantly for this case, § 450j-1(b) states in clear and unambiguous language that, “[n]otwithstanding any other provision” of the ISDA regarding contract funding and CSC, “the provision of funds under this subchapter is subject to the availability of appropriations.” 25 U.S.C. § 450j-1(b). Reading that provision to bar IHS from promising to pay CSC where Congress declines to appropriate funds is in line with the longstanding interpretation of that provision given by the courts. *See Shoshone-Bannock Tribes v. Secretary of HHS*, 279 F.3d 660, 667 (9th Cir. 2002) (“The phrase ‘subject to the availability of appropriations’ is ‘clear and unambiguous’”) (citation omitted); *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep’t*, 194 F.3d 1374, 1378 (Fed Cir. 1999) (“The language of § 450j-1(b) is clear and unambiguous; any funds provided under an ISDA contract are ‘subject to the availability of appropriations.’”), *cert. denied*, 530 U.S. 1203 (2000); *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1345 (D.C. Cir. 1996) (Congress “clearly” included the “subject to the availability of appropriations” proviso of § 450j-1(b) “to make evident that the Secretary is not required to distribute money if Congress does not allocate

that money to him under the Act”).²

In addition, as explained in our main brief (at 34-35), the ISDA expressly sanctions IHS’s declination of a tribe’s contract proposal where “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). The “applicable funding level” is in turn restricted by “the availability of appropriations.” *Id.* § 450j-1(b). When Southern Ute submitted its contract

² The government has consistently argued that § 450j-1(b)’s language, which restricts the funding of all aspects of self-determination contracts to the “availability of appropriations,” is clear and unambiguous. *See, e.g.*, Principal Br. 42 (“The ISDA states in clear, unambiguous language that IHS’s obligation to fund CSC is ‘subject to the availability of appropriations.’”). We are puzzled, therefore, by Southern Ute’s assertion that “[c]ontrary to IHS’s assertions” § 450j-1(b) is clear and unambiguous. Response Br. 2. The Tribe then cites the Federal Circuit’s decision in *Oglala, supra*, the same case that we cited for the same proposition in our opening brief (at 43), and claims that the government’s interpretation of § 450j-1(b) is at odds with the government’s construction of that same provision in *Ramah Navajo Chapter v. Salazar*, No. 08-2262 (10th Cir. argued Nov. 16, 2009), a related case involving the Department of the Interior that is pending on appeal in this Court. *See* Response Br. 2 & n.2. Southern Ute’s contentions in this respect represent just one instance of the Tribe’s many mischaracterizations of IHS’s position in its brief. In *Ramah*, a tribal contractor is seeking additional CSC under its contracts that would be in excess of the capped appropriations for the FYs at issue. In contrast, here, Southern Ute sought to force IHS to agree to enter a new contract for CSC in a FY where the capped appropriation had already been fully obligated. In both cases, § 450j-1(b)’s “subject to the availability of appropriations” proviso operates, in Southern Ute’s words, to “excuse” the government from providing monies it does not have.

proposal mid-way through FY 2005, there were simply no remaining unrestricted appropriations from which IHS could promise to pay, or actually pay, new CSC to the Tribe. Under those circumstances, the agency had discretion under the ISDA to decline the Tribe's contract proposal.

Southern Ute again misconstrues the ISDA by insisting that §450f(a)(2)(D) and §450j-1(b) "cannot be construed together." Response Br. 5. Statutory language cannot be construed in a vacuum. *Davis v. Michigan Dep't. of Treasury*, 489 U.S. 803, 809 (1989). Indeed, it is "a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* See also *United States v. Morton*, 467 U.S. 822, 828 (1984).

B. *Southern Ute's interpretation is not supported by general principles of contract law.*

Nor does Southern Ute's position find support under general principles of contract law. A "contract" has traditionally been defined as "a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." 1 Williston, Contracts § 1:1 (4th ed. Lord 1990); Restatement (First) Contracts § 1 (1932). A more modern definition of the term describes a contract as "the relations among parties to the process of projecting

exchange into the future.” Macneil, *The New Social Contract* 4 (1980). This definition is said to “underscore[] that the economic core of [a] contract is an exchange between at least two parties and that [a] contract is an instrument for planning future action.” Calamari and Perillo, *Contracts* § 1.1 (6th ed. 2009). Thus, under any definition of the term, Southern Ute’s argument that contract formation and contract performance are totally unrelated is illogical.

A contract formation question is a question of whether a party agrees to accept the obligation to perform a duty. In this case, that question must be framed by the threshold question of whether IHS could accept the obligation to perform the duty of paying funds to Southern Ute pursuant to its proposed contract. As we explained in our opening brief, and reiterate *infra*, at 12, IHS faced insuperable statutory limitations on its ability to perform the proposed contract. There were no funds with which IHS could pay the Tribe. Hence, for the Tribe to suggest, as it does, that the question of contract formation here is not determined by the legal truth that IHS could not perform is, at best, an absurd argument without context.

IHS’s interpretation of the ISDA is further reinforced by *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), where the Supreme Court opined that “Congress, in respect to the binding nature of a promise, meant to treat alike promises made under

the [ISDA] and ordinary contractual promises (say, those made in procurement contracts).” *Id.* at 639. The *Cherokee* Court further explained that “the law normally expects the Government to avoid . . . [breaching contracts] by refraining from making . . . contractual commitments” it cannot fulfill. *Id.* at 642. Thus, consistent with *Cherokee*’s construction of general contract law principles, IHS cannot promise to pay an amount that the agency knows it will be unable to pay.

Further, contrary to Southern Ute’s characterization, IHS possessed more than some baseless “belief” or “opinion” (*see* Response Br. 1, 3, 4-5,6, 7, 9) that no unrestricted appropriations were available to fund the Tribe’s CSC demand. As discussed previously (Principal Br. 14-15, 37), congressional appropriations earmarked for FY 2005 CSC payments were inadequate to fund both existing self-determination contracts and new contract proposals. Daniel Madrano, who was then IHS’s Acting Director of Finance and Accounting, explained in his declaration in support of the agency’s motion for summary judgment that as of October 1, 2005, IHS had obligated all but \$1.00 of its CSC appropriation to existing contracts, thus leaving the agency with no unrestricted funds to undertake new contractual obligations requiring the payment of CSC. Doc. 15-2, Madrano Decl. ¶ 9 (J.A. Vol. I at 236). Because the Tribe never disputed the accuracy of the facts stated in Mr. Madrano’s

declaration in district court, it cannot now be heard to complain that IHS merely “believed” that its appropriation was inadequate to fund the Tribe’s contract proposal for CSC.

Moreover, as discussed in our opening brief (at 36-38), promising to pay amounts beyond appropriations in the agency’s coffers would have violated the Anti-Deficiency Act, thereby subjecting the federal officer or employee who violated the Act to possibly severe adverse personnel actions. *See* 31 U.S.C. §§1341, 1349. It is a settled principle of appropriations law that “compliance with the Anti-Deficiency Act is determined first on the basis of *when an obligation occurs*, not when actual payment is scheduled to be made.” *Principles of Federal Appropriations Law*, at 6-57 (3d ed. Vol. II 2006) (emphasis added).³ In addition, assumption of an obligation to pay CSC without regard to the availability of appropriations for that purpose would have been contrary to the Appropriations Clause. Art. I, § 9, Cl. 7. These limitations necessarily determined that the proposed contract could not be formed because it could not be performed.

In yet another misstatement of the government’s position, and of the law, Southern Ute declares that “this case is about an effort by IHS to short-circuit the

³Available at: <http://www.gao.gov/special.pubs/d06382sp.pdf>.

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.” Response Br. 9. Thus, the argument continues, “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.” *Id.*

The Tribe’s suggestion that Congress created a scheme where, when it fails to enact sufficient CSC appropriations, IHS will be required to enter into contracts with tribes that the agency knows it will breach – that is, contracts upon which tribal contractors would have to sue in order to obtain payment of CSC – is plainly absurd. It is preposterous to ascribe to Congress such a bizarre intent. If Congress intended for IHS to fully fund all (potential) ISDA contractors’ CSC needs, it would have enabled it to do so by enacting annual appropriations bills providing for sufficient funding, or by giving IHS “contract-authority,” *see Train v. City of New York*, 420 U.S. 35, 39 n.2, 45-46 n.10 (1975) – and not by mandating the circuitous legal route suggested by *Southern Ute*.⁴

⁴ Similarly, the Tribe’s argument that it is “the provision of funds” under § 450j-1(b) that is “subject to the availability of appropriations,” rather than the approval of (continued...)

2. The Tribe Is Mistaken That The ISDA Contains
A Formula For Calculating CSC.

ISDA's funding provisions do not contain clear standards for payment of funds, nor does the Act specify precise amounts or formulae for calculating the amount of CSC funds to be paid under a contract. *See Samish Indian Nation v. United States*, 419 F.3d 1355, 1364-65 (Fed. Cir. 2005). Rather, the Act states that CSC "consist of an *amount for* the reasonable costs for" certain administrative overhead expenses associated with carrying out the contract. 25 U.S.C. § 450j-1(a)(2) (emphasis added). The Tribe therefore errs in maintaining that it is entitled to a "statutorily-mandated CSC amount." Response Br. 3; *see also id.* at 8 (stating, erroneously, that the ISDA "contains explicit directives to the Secretary dictating the precise amount of CSC that the Secretary must include in a self-determination contract").⁵ Nothing in the ISDA

⁴(...continued)

a self-determination contract, that is subject to the statutory limitation (Response Br. 2-4) lacks merit. As discussed in our opening brief (at 5-6, 29, 49-50) and in the above text, given the Supreme Court's holding in *Cherokee* that the government was bound by its contractual promise to pay, and in light of Congress's failure to enact sufficient CSC appropriations for the relevant FY, the ISDA simply did not require IHS to commit to a new contractual obligation to pay CSC when it knew it had no funds with which it could comply with its future duty of performance.

⁵ Just as Southern Ute has it wrong in arguing that language in the ISDA dictates the precise amount of CSC that must be included in a self-determination contract, it erroneously argues that IHS takes the position that the annual funding agreement (continued...)

states that “an amount” for CSC is the full amount identified by a tribe in its contract proposal.

In sum, as we demonstrated in our opening brief, IHS’s declination decision was authorized by the ISDA itself, and indeed was required by the Anti-Deficiency Act and the Appropriations Clause of the Constitution. None of the Tribe’s arguments concerning the alleged unrelatedness of contract formation and contract performance refute those arguments.

CONCLUSION

For the foregoing reasons, as well as those presented in our opening brief, this Court should reverse the district court’s holding that IHS had no discretion to decline the Tribe’s contract proposal. If, however, the Court disagrees with the government’s arguments on this point, the Court should still affirm the district court’s October 2007 Order, which is being challenged by Southern Ute in its appeal. If the Court rejects the government’s arguments on all issues, it should nevertheless provide some guidance as to how IHS should respond when faced with the same situation in the

⁵(...continued)

(“AFA”) is a separate document to which the provisions of the Act do not apply. *See* Response Br. 8. On the contrary, as we expressly stated in our opening brief “the AFA is an integral and inseparable component of the ISDA contract . . .” (Principal Br. 46).

future, *i.e.*, where a tribe refuses during contract negotiations to agree on CSC funding, despite the lack of congressional appropriations for CSC.

Respectfully submitted,

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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 Corel WordPerfect X4 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 14 point Times New Roman, for text and footnotes, and that the computerized word count for the foregoing brief (excluding exempt material) is 3538 words.

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that the text of the hard copy of the foregoing “REPLY BRIEF FOR THE APPELLEES/CROSS-APPELLANTS 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 Microsoft Forefront Client Security (version 1.79.2152.0, last updated April 19, 2010), and no virus was detected. In addition, I certify all required privacy redactions have been made.

/s/Jeffrica Jenkins Lee

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April 2010, I filed the foregoing “REPLY BRIEF FOR THE APPELLEES/CROSS-APPELLANTS” by causing a digital version to be filed through the Tenth Circuit’s electronic service (ECF), and by causing 7 copies to be sent by Federal Express overnight delivery within 2 business days. I also caused a digital version of the brief to be served upon the following counsel by ECF:

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