Order Code RL32681

CRS Report for Congress
Received through the CRS Web

Indian Self-Determination and Education Assistance Act Contracts and *Cherokee Nation of Oklahoma v. Leavitt*: Agency Discretion to Fund Contract Support Costs

Updated March 31, 2005

-name redacted-
Legislative Attorney
American Law Division

Congressional Research Service ❖ The Library of Congress

Indian Self-Determination and Education Assistance Act Contracts and *Cherokee Nation of Oklahoma v. Leavitt*: Agency Discretion to Fund Contract Support Costs

Summary

On March 1, 2005, the Supreme Court handed down its decision in *Cherokee Nation of Oklahoma v. Leavitt*. The conflicts in the case (actually two consolidated cases) involved federal agencies' duty to fund contract support costs for contracts with Indian tribes under the Indian Self-Determination and Education Assistance Act (ISDA).

While the case in some ways turned on technical questions of statutory interpretation and appropriations law, it also presented interesting questions regarding the federal government's legal responsibility to honor ISDA contracts and how this responsibility compares to the government's general responsibility to pay contractors. This report includes background on the ISDA, a discussion of the conflicting appeals court decisions, and analysis of the Supreme Court's decision.

Contents

Introduction 1
Background 1
The ISDA Contracts and the Circuit Court Decisions 3
The Tenth Circuit Decision 4
The Federal Circuit Decision 5
The Supreme Court Decision 6
Conclusion 8

Indian Self-Determination and Education Assistance Act Contracts and *Cherokee Nation of Oklahoma v. Leavitt*: Agency Discretion fo Fund Contract Support Costs

Introduction

On March 1, 2005, the Supreme Court issued its decision in two consolidated cases, *Cherokee Nation of Oklahoma v. Leavitt*[1] and *Leavitt v. Cherokee Nation of Oklahoma.*[2] These cases presented interesting questions regarding the Indian Self-Determination and Education Assistance Act (ISDA), federal agencies' responsibility to fund administrative costs for contracts entered into with tribal governments under this act, and how this responsibility compares to the federal government's general responsibility to pay contractors.

Background

The history of the relationship between the federal government and America's Indian tribes is characterized not by sequential steps in one certain direction, but rather by periodic policy shifts dramatically altering the direction of the relationship. As a result, the history of this relationship is divided by historians into various periods, such as the allotment era (1887-1934), when the federal government sought to break up Indian reservations into individual allotments of fee simple ownership, and the termination era (1953-1968), when the federal government sought to eliminate the special limited-sovereign legal status that tribes enjoy.

Since the early 1970's, however, the United States has pursued a course of "self-determination" for Indian tribes, under which the federal government encourages the continued existence of the tribal governance structure and allows tribes increasing control over their own destinies. The centerpiece of the self-determination movement is the ISDA,[3] passed by Congress in 1975. The purpose of the act was to transfer planning, conduct, and management responsibilities for certain Indian programs normally carried out by federal agencies (e.g., hospitals and clinics) to the tribes themselves.[4] Consequently, the Department of the Interior and the Department of Health and Human Services (HHS) are authorized to enter into contracts with

---

[1] No. 02-1472.

[2] No. 03-853. The citation for the decision is *Cherokee Nation of Oklahoma v. Leavitt*, 453 U.S. __ , WL464860 (2005).

[3] P.L. 93-638 (codified, as amended, at 25 U.S.C. §§ 450-450n).

[4] 25 U.S.C. § 450a(b).

Indian tribes under which the tribes can conduct and administer these programs.[5] The Secretaries of HHS and Interior – upon request by tribal resolution – must enter into these contracts unless, within sixty days of receiving the tribal resolution, the relevant Secretary finds that certain statutory requirements have not been met.[6]

The Secretaries must devote at least as much funding to these tribally-operated programs as the Secretaries would have devoted to these programs had they been operated by the agencies themselves.[7] This amount of funding is commonly known as the "secretarial amount." In addition, the Secretaries are authorized to issue grants to tribes for a variety of purposes, including improving tribes' abilities to enter into ISDA contracts.[8]

While the ISDA became more successful as an increasing number of tribes took control of government programs operated for their benefit, the original version of the ISDA had a critical shortcoming, in that administrative costs – commonly called contract support costs (CSCs)[9] – were not covered in the secretarial amount. As a result, tribes that assumed programs under ISDA contracts often experienced serious financial shortfalls.[10] Congress moved to remedy this situation in 1988 when it added to the ISDA the following language: "There 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 out by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management."[11]

Congress also added language in the 1988 legislation conditioning the funding of CSCs on "the availability of appropriations" ("the availability clause")[12] and declaring that "the Secretary is not required to reduce funding for programs, projects,

---

[5] *Id.* at § 450f(a)(1). HHS and the Department of the Interior generally carry out their ISDA responsibilities through the Indian Health Service (IHS) and the Bureau of Indian Affairs (BIA), respectively.

[6] If the relevant Secretary finds any of the following to be true of the contract, then the Secretary can refuse to enter into the contract: 1) the services to be rendered will not be satisfactory; 2) adequate protection of trust resources is not assured; 3) the proposed project cannot be properly maintained by the proposed contract; 4) the amount of proposed funding exceeds that allowed under the ISDA; or 5) the proposal includes activities that cannot be carried out by the contractor. *Id.* at § 450f(a)(2).

[7] *Id.* at § 450j-1(a).

[8] *Id.* at § 450h.

[9] These costs generally include financial audits and administrative resources that the Secretaries would not have directly incurred themselves.

[10] *See* S. Rep. No. 100-274, at 7 (1987).

[11] P.L. 100-472, § 205 (codified at 25 U.S.C. § 450j-1(a)(2)).

[12] Parties to ISDA contracts are required to include language mirroring the availability clause in those contracts. 25 U.S.C. § 450l(a).

or activities serving a tribe to make funds available to another tribe or tribal organization" ("the reduction clause").[13]

What was perceived as the underfunding of Self-Determination Contracts – particularly with respect to CSCs – continued to be controversial, as agencies failed to fully fund CSCs even after the 1988 Amendments, citing the availability and reduction clauses. In 1999, Congress imposed a one-year moratorium on any new Self-Determination Contracts.[14] In the last few years, Congress, when appropriating funds for ISDA contracts, has placed explicit caps on CSCs, and in doing so has quelled some of this controversy. Questions still remain, however, about the liability – if any – incurred by federal agencies that underfunded CSCs for ISDA contracts before these statutory caps became the norm. To answer this question, one must inquire as to how much discretion the federal agencies possess with regard to these contracts. This issue is at the heart of the conflict in *Cherokee Nation*.

The ISDA Contracts and the Circuit Court Decisions

Both of the consolidated cases that came before the Supreme Court had roots in the same controversy. Since 1983, the Cherokee Nation (the Nation) has carried out many responsibilities transferred to it from IHS under an ISDA compact. The Nation and the HHS Secretary agreed to expand the Nation's responsibilities in 1994 to include the operation of two new IHS clinics, in 1995 to include IHS's Contract Health Care Out-Patient (CHC-OP) physician referral program, and in 1997 to include the In-Patient physician referral program. From 1994-1997, HHS failed to fully pay for the Nation's CSCs.

IHS has established a two-tiered approach for allocating annual appropriated funds to tribes for CSCs; contracts are classified as either "existing" (i.e., those that have already been in operation in previous years) or "new and expanded" (i.e., new contracts or existing contracts that have been modified in the last year).[15] IHS generally allocates funds for existing contracts according to the recommendations of the appropriation committees. Tribes with new and expanded contracts, on the other hand, are placed on a priority list (based on the date of the contract) for their shares of the fund specifically set aside by Congress for these new and expanded contracts ("the ISD Fund"). In practice, this has meant that there is not enough money in the fund to distribute to all the tribes on the list in a given year.[16] IHS did not fully fund the Cherokee Nation's CSCs for either its ongoing contracts or the new and expanded portions of those contracts.

---

[13] 25 U.S.C. § 450j-1(b).

[14] *See* S. Bobo Dean and Joseph H. Webster, Symposium: Contract Support Funding and the Federal Policy of Tribal Self-Determination, 36 Tulsa L.J. 349, 351-352 (2000).

[15] This summary of IHS's two-tiered approach is taken from the Tenth Circuit's opinion. *See Cherokee Nation v. Thompson*, 311 F.3d 1054, 1057-1058 (10th Cir. 2002) [hereinafter "Tenth Circuit Decision"]. The IHS has detailed this approach in its IHS Circular No. 96-04.

[16] *See* 10th Circuit Decision, 311 F.3d at 1057-1058.

The Cherokee Nation filed a claim for damages against the United States pursuant to the ISDA for failing to fund CSCs, and this claim eventually made its way to the Tenth Circuit, which ruled in favor of the federal government.[17] The Cherokee Nation also filed on its own an administrative claim for breach of contract under the Contracts Disputes Act[18] for failing to fund CSCs. The Federal Circuit Court of Appeals issued a ruling on this claim in favor of the Nation,[19] creating a circuit split.[20]

The Tenth Circuit Decision. At issue for the Tenth Circuit were appropriations for 1996 and 1997. The legislation in those years appropriated to IHS \$1.7 and \$1.8 billion, respectively, for the administration of the ISDA. While various reports from both the House and Senate Appropriations Committees included recommendations that \$160 million should be earmarked for CSCs for existing contracts,[21] neither statute included this restriction. The only ISDA-appropriated money required to be used for a specific purpose, then, according to the statute's language, was \$7.5 million required to "remain available" for CSCs.[22]

When IHS allocated funds for CSCs in both years, it did so according to the recommendations contained in the committee reports. Consequently, only \$160 million was allocated for ongoing CSCs. The Tribes argued that this was in clear violation of the statutes' explicit language, and that IHS had lump-sum appropriations approaching \$2 billion each year from which the Secretary was required by contract to extract monies for CSCs.

The court, however, found in favor of the government, for two primary reasons. First, the court reasoned that the reduction clause necessarily implied a congressional intent that the Secretary have some discretion with regard to those funds, in order to avoid cutting into the budget of other tribal programs. Here, the court touched on what appears to be a fundamental tension between the purpose of the ISDA and the reduction clause: Congress clearly intended to limit the discretion of federal agencies to underfund ISDA contracts, but the reduction clause implies that the federal agencies must have discretion to protect the myriad tribal programs these agencies administer.[23]

---

[17] Tenth Circuit Decision. Joining the Nation in filing this claim was the Shoshone-Paiute Tribe in Nevada, who also argued that IHS failed to fund CSCs in accordance with an ISDA contract.

[18] 41 U.S.C. §§ 601-613.

[19] *Thompson v. Cherokee Nation*, 334 F.3d 1075, 1084-1086 (Fed. Cir. 2003) [hereinafter "Federal Circuit Decision"].

[20] It should be noted that the Ninth Circuit also dealt with this issue, and, like the Tenth Circuit, ruled in favor of the government. *See Shoshone-Bannock Tribes of the Fort Hall Reservation v. Thompson*, 279 F.3d 660 (9th Cir. 2000).

[21] *See, e.g.,* H.R. Rep. No. 104-173, at 97 (1995); S. Rep. No. 104-319, at 90 (1996).

[22] P.L. 104-134; P.L. 104-208.

[23] Tenth Circuit Decision, at 1062.

The Tenth Circuit also found support for its holding in a later congressional enactment. As mentioned above, Congress in 1998 became concerned and placed a year-long moratorium on new ISDA contracts. In section 314 of that same legislation, Congress inserted the following language:

> Notwithstanding any other provisions of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by...[the 1996 and 1997 appropriations]...for payments to tribes and tribal organizations for [CSCs] associated with self-determination...contracts...with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes.[24]

The Tenth Circuit viewed this language as, in essence, enacting the aforementioned earmarking language from the 1996 and 1997 committee reports. In other words, the court ruled, Congress intended to cap the available funds for ongoing contracts at $160 million, and new and expanded CSCs to $7.5 million.[25]

The Federal Circuit Decision. The Federal Circuit began its analysis from a perspective very different from that of the Tenth Circuit. The Federal Circuit used as the touchstone for its analysis certain general principles of appropriations law[26] that, in the court's view, established a presumption that an agency is required to meet its contractual obligations if there is money available to do so. Applied to the facts before it, the Federal Circuit found that HHS had an obligation under its contract with the Cherokee Nation, and this obligation required the Secretary to reprogram unrestricted funds if necessary.[27]

The court rejected the idea that the availability and reduction clauses necessarily vest the Secretary with a certain amount of discretion as to paying CSCs. According to the court, such discretion would be contrary to the purpose of the 1988 ISDA Amendments, which was to remedy the federal agencies' traditional failure to fully fund tribal CSCs.[28] In so finding, the court again diverged significantly from the Tenth Circuit's analytical path.

The Federal Circuit next addressed Section 314 of the 1999 Appropriations Act, which the Tenth Circuit found so compelling. While the Tenth Circuit passed on the question of whether the 1999 language was meant to be retroactive or merely an interpretive guide, the Federal Circuit – foreshadowing the Supreme Court's major

---

[24] P.L. 105-277, § 314 (112 Stat. 2681-288).

[25] Tenth Circuit Decision, 311 F.3d at 1064-1065.

[26] Federal Circuit Decision, at 1084-1086.

[27] *Id.*

[28] *Id.* at 1087-1088.

concerns – quickly ruled that the 1999 Act could not have retroactive effect because the Tribe's right to payment vested well before that act was passed.[29]

The Supreme Court Decision

As mentioned above,[30] before the consolidated cases were filed, Congress had in some ways made the debate at issue moot by routinely setting caps on expenditures for CSCs when appropriating funds for ISDA contracts in recent years. Questions still remained, however, about the liability – if any – incurred by federal agencies that underfunded CSCs for ISDA contracts before these statutory caps became the norm.

In addition to the submission of various *amicus curiae* briefs, both parties to the case submitted briefs that focused in large part on the amount of discretion that Congress meant to vest in the agencies with respect to the funding of CSCs in ISDA contracts, and on other issues addressed in the conflicting circuit court opinions. The briefs also revealed the emergence of a question that neither circuit court touched on extensively in its opinion, namely, what are these CSC funding contracts – typical "government procurement contracts" or something different? This question was important, because its answer implicated certain settled principles of government procurement law.

Subsequently, some government contractors expressed concern regarding the possible implications of this case with respect to the government's obligation to pay government contractors generally, and submitted an *amici curiae* brief in favor of the Tribes, expressing the contractors' concern for the possible ramifications of the government's position in this case for non-Indian contractors who regularly do business with the federal government:

> It is critical to understand the practical effect of the government's position. Under the government's view, when a contract to be funded from a general lump-sum appropriation contains a "subject to" clause – as many such government contracts do...the contractor is obligated to perform the contract fully, yet bears the risk that the agency for whatever reasons may exhaust its general appropriation, leaving the contractor not only without payment but also without any legal remedy against the government. The contractor would be forced to rely, in other words, not on Congress' appropriations, but on the uncertain financial management of the agency.[31]

While this issue was not mentioned in either the Tenth or Federal Circuit opinion, during oral arguments, the Supreme Court Justices showed a good deal of interest in the government's obligation to honor contracts generally, and the precedent the Court's decision could set for other government contracts.

---

[29] *Id.* at 1091.

[30] *See, supra*, note 14 and accompanying text.

[31] Brief of *Amici Curiae* for the United States Chamber of Commerce, the National Defense Industrial Association, and the Aerospace Industries Association in Support of the Cherokee Nation and the Shoshone-Paiute Tribes, at 12-13.

The Court's ultimate decision reflected the prominent place this issue had attained as the consolidated cases made their way to the Supreme Court. At the beginning of its opinion, the Court stated its view of the facts before it:

> The Government does not deny that it promised to pay relevant contract support costs. Nor does it deny that it failed to pay ... [The Government] does not deny that, *were these contracts ordinary procurement contracts*, its promises to pay would be legally binding. The Tribes point out that each year Congress appropriated far more than the amounts here at issue (between $1.277 billion and $1.419 billion) for the Indian Health Service 'to carry out' *inter alia*, 'the Indian Self-Determination Act' ... These appropriations Acts contained no relevant statutory restriction[32] [emphasis in original].

The Court further noted that, when possessing adequate unrestricted funds, agencies cannot generally back out of their contractual obligations by reason of insufficient appropriations. From these starting points, the Court framed the issue before it thusly: "If [the government] is...to demonstrate that its promises were not legally binding, it must show something special about the promises here at issue."[33] In other words, in order to avoid application of the general rules of government contracts law, the burden was on the federal agencies to prove that Indian self-determination contracts are not standard government procurement contracts at all, but rather something different. In the Court's view, the agencies did not meet this burden.

Significantly, the Justices rejected the government's argument that ISDA contracts are not really "contracts" at all, but rather agreements by which tribes step into the shoes of the relevant agency. Consequently, the government argued, these tribes – like agencies – are not entitled to receive any amounts promised by Congress. The Court, however, looked at the ISDA's language – as well as its purpose – and gleaned a congressional intent that ISDA contracts be treated like normal government contracts.[34]

The Court's finding that ISDA contracts are no different than general procurement contracts allowed the Justices to easily dispose of the government's aforementioned reduction clause and availability clause arguments.[35] Indeed, the government, in its own brief, had conceded that an agency must honor normal

---

[32] *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. __ WL464860 (2005) (slip op. at 4).

[33] *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. __ WL464860 (2005) (slip op. at 5).

[34] The Court cited, for example, the 426 instances in the ISDA of the word "contract," without any special specifications. *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. __ (2005) (slip op. at 6).

[35] *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. __ WL464860 (2005) (slip op. at 8-12).

procurement contracts even if the agency has allocated the needed funds for another purpose.[36]

The Court conceded that section 314 of the 1999 Appropriations Act presented a more difficult question, in that the statutory language is easily given to two interpretations. On the one hand, the Court wrote, the language could be read to retroactively bar payment of CSCs for contracts from 1994-1997. On the other hand, the language could be interpreted, in the Court's view, as only prohibiting the use of funds left over from previous years' appropriations to pay CSCs.[37] The Court found, however, that the first interpretation presented possible constitutional difficulties, in that "A statute that retroactively repudiates the government's contractual obligation may violate the Constitution ... And such an interpretation is disfavored."[38] Faced with two interpretations – one of which presented potential constitutional problems and one that did not – the Court followed its own precedent and chose the latter.

Conclusion

In sum, the Supreme Court found that ISDA contracts are similar to government procurement contracts and, as such, they bind agencies to honor the payment terms where agencies possess sufficient unrestricted appropriated funds to meet those terms. As IHS here had enough unrestricted money to pay the ISDA contracts in question, the Court ruled in favor of the Tribes.

As mentioned above, Congress has in some ways made the debate at issue in these consolidated cases moot by routinely setting specific caps on expenditures for CSCs when appropriating funds for ISDA contracts in recent years. This case makes clear, however, that Congress must continue to do so if it expects CSCs to be capped. In other words, the decision to cap CSCs must come from Congress, because the federal agencies do not have the discretion to cap payment of CSCs.

---

[36] *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. __ WL464860 (2005) (slip op. at 9) (citing government's brief).

[37] *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. __ WL464860 (2005) (slip op. at 13-14.).

[38] *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. __ WL464860 (2005) (slip op. at 14) (citations omitted).

EveryCRSReport.com

The Congressional Research Service (CRS) is a federal legislative branch agency, housed inside the Library of Congress, charged with providing the United States Congress non-partisan advice on issues that may come before Congress.

EveryCRSReport.com republishes CRS reports that are available to all Congressional staff. The reports are not classified, and Members of Congress routinely make individual reports available to the public.

Prior to our republication, we redacted names, phone numbers and email addresses of analysts who produced the reports. We also added this page to the report. We have not intentionally made any other changes to any report published on EveryCRSReport.com.

CRS reports, as a work of the United States government, are not subject to copyright protection in the United States. Any CRS report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS report may include copyrighted images or material from a third party, you may need to obtain permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

Information in a CRS report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to members of Congress in connection with CRS' institutional role.

EveryCRSReport.com is not a government website and is not affiliated with CRS. We do not claim copyright on any CRS report we have republished.