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DISTRICT OF ARIZONA
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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF ARIZONA

11 Navajo Nation,)	No. Civ. 98-0336 PCT RGS
)	
12 Plaintiff,)	
)	
13 v.)	RESPONSE TO DEFENDANT'S
)	MOTION TO DISMISS
14 Secretary of the Department)	
of Health and Human Services,)	
)	
15 Defendant.)	

16 The Navajo Nation responds to the Secretary's Motion to
17 Dismiss as follows:

18 **I. INTRODUCTION**

19 The Secretary of the Department of Health and Human
20 Services ("Secretary") offers three specific reasons why this Court
21 should dismiss the appeal which the Navajo Nation filed pursuant to
22 25 U.S.C. §§450f(b)(3) and 450 m-1(a). The Secretary has argued
23 that the Temporary Assistance to Needy Families ("TANF") Program is
24 not a "program" in the sense that the federal government provides
25 direct services to any qualified applicant. Further, the Secretary
26 has argued that the TANF program is not contractible under the
27 Indian Self-Determination Act ("ISDA") because the TANF Program
28 fails the statutory requirement that a program be "for the benefit
of Indians because of their status as Indians...." 25 U.S.C.

16

1 §450f(a)(1)(E). Finally, the Secretary contends that Congress, by
2 crafting a statutory scheme which allows Indian tribes to receive
3 a specific TANF grant, has thereby eliminated ISDA as a mechanism
4 for an Indian tribe to provide this welfare assistance to its
5 members. For several reasons set forth below, the Navajo Nation
6 disagrees with the Secretary's analysis that the TANF program is
7 not contractible under ISDA.

8 II. ARGUMENTS

9 A. The TANF Program Is A "Program, Service, Function or 10 Activity" as Stated under The Indian Self Determination Act.

11 There is no requirement under ISDA that the "program,
12 function, service or activity" to be contracted be performed
13 directly by the federal government prior to the contract taking
14 effect. The Secretary would have this Court determine that in
15 order to be contractible under ISDA, the benefits of a "program,
16 function, service or activity" must be such that the federal
17 government would deliver them directly to the beneficiaries absent
18 an ISDA contract. See, Defendant's Memorandum at 5-6. However,
19 this is not a position supported by either the ISDA statutory
20 scheme or the practice of the federal government in contracting
21 pursuant to ISDA.

22 Under the ISDA,

23 a "self-determination contract" means a contract
24 (or grant or cooperative agreement utilized under
25 section 9 [450e-I] of this act) entered into under
26 title I of this Act between a tribal organization
27 and the appropriate Secretary for the planning,
28 conduct and administration of programs or services
which are otherwise provided to Indian tribes and
their members pursuant to Federal law.

25 U.S.C. §450b(j)

1 This section merely states that the services are provided
2 to Indian tribes and their members pursuant to Federal law, it does
3 not state that the Secretary must provide them directly. Despite
4 the Secretary's assertion, ISDA does not contain a requirement that
5 the Secretary must have directly performed the program, service,
6 function or activity to be contracted.¹

7 In fact, ISDA does not define "program," other than the
8 reference included in §450f(a) which specifies that "programs,
9 functions, services or activities shall include administrative
10 functions ... which support the delivery of services to Indians."
11 25 U.S.C. §450f(a)(1). Certainly, there are no provisions in ISDA
12 that limit a "program" to services directly performed by the
13 Secretary.

14 Moreover, the practice of the federal government has been
15 to enter into ISDA contracts for activities which the federal
16 government does not directly perform. For example, construction is
17 specifically noted as an activity which is contractible, even
18 though neither the Department of the Interior, nor the Department
19 of Health and Human Services employ individuals who construct
20

21 ¹ In support of her position, the Secretary cites FGS
22 Constructors, Inc. v. Carlow, 64 F.3d 1230 (8th Cir. 1995).
23 However, notwithstanding that Court's statement that

24 Under a self-determination contract, the federal
25 government supplies funding to a tribal organization,
26 allowing the tribal organization to plan, conduct and
27 administer a program or service that the federal
28 government otherwise would have provided directly. Id
at 1234. (citing 25 U.S.C. sec 450f, b(j)) (emphasis
added),

there is simply no statutory basis for the 8th Circuit's
determination that for an ISDA contract to be developed, the
federal government must have otherwise directly performed the
program, service, function or activity.

1 buildings. Furthermore, this activity is not unique to Indian
2 tribes. Similarly, the Department of Health and Human Services
3 does not directly perform Community Health Representatives/Outreach
4 activities, yet such activities are contractible, and in fact can
5 only be performed under an ISDA contract or grant.

6 In both these examples, the federal government
7 administers these contracted activities, rather than performing
8 them directly. Despite Defendant's attempt to distinguish its role
9 in implementing TANF, an administrative function is specifically
10 allowed to be contracted under ISDA.

11 Moreover, it is noteworthy that welfare assistance is
12 provided directly by the federal government if a state cannot or
13 will not provide these services to members of a tribe. However,
14 these welfare assistance services are performed by the Department
15 of the Interior, through the Bureau of Indian Affairs ("BIA"),
16 rather than by the Department of Health and Human Services.² Under
17 25 C.F.R. Part 20, the BIA has developed a welfare and social
18 services scheme which specifically references the availability of
19 Aid to Families with Dependent Children (25 C.F.R. 20.1(t)) and
20 eligibility requirements which track the state's AFDC eligibility
21 determinations (25 C.F.R. 20.21(e)).³

22 The great differences, however, between the BIA social
23 services program and the Department of Health and Human Services
24 TANF program are funding and availability. BIA funding has been
25

26 ² Frequently, these welfare assistance services are
27 contracted through ISDA, as the Navajo Nation has done since the
28 early 1980's.

³ The BIA has proposed revisions to its regulations to
reflect the change from AFDC to TANF.

1 cut significantly in recent years. In enacting the Personal
2 Responsibility and Work Opportunity Reconciliation Act of 1996
3 ("PRWORA"), Congress included specific authorization for the
4 Department of Health and Human Services to enter into agreements⁴
5 with Indian tribes for the delivery of TANF program services.

6 ISDA does not contain the limitation suggested by the
7 Secretary that to be contractible the program must have been
8 performed directly by the federal government. However, to the
9 extent that this Court agrees with such a limitation, the federal
10 government has directly provided welfare assistance to Indian
11 tribes and their members through the BIA welfare assistance
12 program.

13 B. The TANF Program Exists, in Part, as A Program Designed
14 to Benefit Indians Based on Their Status as Indians.

15 The second argument posited by the Secretary is that the
16 TANF program cannot be contractible because it is not a program,
17 service, function or activity which is designed to benefit Indians
18 because of their status as Indians, as required by the ISDA. 25
19 U.S.C. 450f(a)(1)(E).⁵ However, such a conclusion is not borne out

21 ⁴ Although these TANF funding documents are designated as
22 "grants," they are effectively agreements in the traditional
23 sense, as they offer the recipient funding to perform certain
24 activities. However, by designating them grants, the federal
25 government can avoid certain federal procurement laws which would
make no sense in a government-to-government relationship, e.g.,
advertising and bidding requirements. This limitation with
respect to contracting does not exist under ISDA, as there is a
specific general exemption from federal contracting laws. 25
U.S.C. 450j(a).

26 ⁵ The whole statutory section in question is relevant and
27 states:

28 Sec 450f(a)(1). The Secretary is directed, upon
the request of any Indian tribe by tribal resolution,
to enter into a self-determination contract or

1 by either statutory analysis or the federal government's
2 administrative practices.

3 As the Secretary herself notes, Congress included
4 specific provisions in PRWORA designed to provide Indian Nations
5 with funding to conduct TANF activities. 42 U.S.C. 612. This
6 section, entitled "Direct Funding and Administration by Indian
7 Tribes," specifies that the Secretary shall pay to Indian tribes
8 with an approved TANF plan:

9 ... an amount equal to the total amount of the
10 Federal payments to a State or States under section
11 403 [42 U.S.C. §603] (as in effect during such
12 fiscal year) for fiscal year 1994 attributable to
13 expenditures (other than child care expenditures)
by the State or States under parts A and F (as so
in effect) for fiscal year 1994 for Indian families
residing in the service area or areas identified by
the Indian tribe ...

14 42 U.S.C. §612(a)(1)(B)(i) (Emphasis added). This statutory
15 language creates a program, function, service or activity which is
16 designed to "benefit Indians because of their status as Indians" as

17
18 contracts with a tribal organization to plan, conduct,
19 and administer programs or portions thereof, including
construction programs -

20 ...
21 (E) for the benefit of Indians because of their
22 status as Indians without regard to the Agency or
Office of the Department of Health and Human Services
or the Department of the Interior within which it is
performed.

23 The programs, functions, services, or activities
24 that are contracted under this paragraph shall include
25 administrative functions of the Department of the
26 Interior and the Department of Health and Human
27 Services (whichever is applicable) that support the
28 delivery of services to Indians, including those
administrative activities supportive of, but not
included as part of the service delivery programs
described in this paragraph that are otherwise
contractible. The administrative functions referred to
in the preceding sentence shall be contractible without
regard to the organizational level within the
department that carries out such functions.

1 required under ISDA. In other words, a tribe would not receive a
2 TANF grant separate from the state under PRWORA if not for the
3 unique status of Indians.

4 Moreover, the Secretary has established a specific
5 program within her administration devoted to assisting Indian
6 tribes in the development and implementation of TANF programs.
7 This Office is called the Tribal Services Division.

8 Given this statutory and administrative focus on the
9 development of Tribal TANF programs, it is difficult to understand
10 how the Secretary concludes that this provision is not designed to
11 benefit Indians because of their status as Indians.

12 C. An Indian Nation's Opportunity to Undertake an ISDA
13 Contract is Not Foreclosed Simply Because the Personal
14 Responsibility and Work Opportunity Reconciliation Act of
1996 Includes a Separate Provision Allowing Tribes to
Obtain a Grant to Operate a TANF Program.

15 In her Memorandum in support of the Motion to Dismiss,
16 the Secretary essentially argues that Congress, by enacting 42
17 U.S.C. §612, which allows Indian tribes to receive a grant to
18 undertake a TANF program, has limited Indian tribes only to that
19 mechanism. However, nowhere in PRWORA did Congress amend ISDA to
20 exclude the TANF program from contractibility. Rather it is the
21 position of the Navajo Nation that both a PRWORA grant (42 U.S.C.
22 §612) and an ISDA contract (25 U.S.C. 450f) are funding mechanisms
23 for Indian Nations to consider in developing a TANF program.

24 The Secretary would have this Court rule that Congress,
25 by its failure to state expressly that the ISDA should be used as
26 the funding mechanism, intended that only the grant mechanism in 42
27 U.S.C. §612 can be used for a Tribal TANF program. However, while
28 the Nation agrees that Congress was aware of and acknowledged the

1 existence of ISDA by noting that the fiscal accountability
2 provisions of ISDA would apply to a TANF grant, this recognition
3 does not lead to the conclusion that Congress intended that ISDA
4 contracting would not apply to the TANF program.

5 Finally, in support of her position, the Secretary states
6 that because the provisions of ISDA conflict with the provisions of
7 42 U.S.C. §612, the specific procedures of PRWORA must govern over
8 the general ISDA provisions.⁶ However, the statutory conflicts
9 claimed by the Secretary do not exist.⁷ This is not to suggest
10 that there are no differences between ISDA and PRWORA. Significant
11 differences exist, particularly in the availability of start-up
12 funds, indirect costs, and other contract support, distinct from
13 the base amount of a contract under the ISDA. See 25 U.S.C.
14 §450j(a)(2), (3) and (5).

15 The Secretary alleges that ISDA and PRWORA are
16 inconsistent in two specific areas: funding reductions and
17 reporting. According to the Defendant's argument, under ISDA the
18 Secretary cannot reduce funding except under certain specific
19 conditions (25 U.S.C. §450j-1(b)), while PRWORA allows the
20 Secretary to reduce funding under other circumstances (42 U.S.C.
21

22 ⁶ Defendant's Memorandum at 9, citing Hellon & Assocs.
23 v. Phoenix Resort Corp., 958 F.2d 295, 297 (9th Cir. 1992);
Edmond v. United States, 117 S.Ct. 1573, 1578 (1997).

24 ⁷ While the Secretary may perceive ISDA and PRWORA to be
25 irreconcilably incompatible, any such conflict can be resolved.
26 A key tenant of statutory interpretation is to harmonize
27 statutory provisions where possible; only as a last resort should
28 a statute be found invalid. See, e.g., Sutherland, Statutory
Construction, Section 51.02. In this particular instance, the
statutory schemes can be harmonized to offer Tribes the
opportunity to apply for either a grant under 42 U.S.C. § 612 or
a contract under 25 U.S.C. § 450f to undertake TANF services.

1 §609(a)(1),(3) and (6)). Additionally, the Secretary points to the
2 reporting requirements of PRWORA, 42 U.S.C. §611, and the provision
3 in ISDA which makes reporting requirements negotiable (other than
4 the single agency audit report), 25 U.S.C. §450c(f). On the basis
5 of these statutory provisions, the Secretary has concluded that the
6 statutory schemes are incompatible, and thus an ISDA contract
7 cannot be used for a TANF program. However, this interpretation
8 does not reflect a full understanding of ISDA.

9 Under the ISDA, a tribe or tribal organization may
10 develop and submit a proposal for the particular program, service,
11 function or activity (or portion thereof). This proposal, among
12 other items, must include the standards which will apply to the
13 ISDA contract. See 25 C.F.R. 900.8(g)(4).⁸

14 These program standards may include the substantive
15 sections of PRWORA, which would apply to an ISDA contract.⁹ Of
16 course, failure to include them could arguably result in a
17 declination of the contract proposal under 25 U.S.C.
18 §450f(a)(2)(C), which provides that the Secretary can decline the

19
20 ⁸ This regulation specifies what must be contained in an
21 initial ISDA contract proposal. It is also noteworthy that these
22 regulations were promulgated jointly by the Secretary of the
23 Department of the Interior and the Secretary of the Department of
24 Health and Human Services after a negotiated rule-making between
25 the two Departments and Tribal representatives. See generally
26 Federal Register, vol. 61, No. 122, Monday, June 24, 1996, pg.
27 32482-32501 for an explanation of the negotiated rule-making
28 process and the Regulations generally.

29 ⁹ The Navajo Nation's proposal did not include all the
30 substantive provisions of every federal law which would or could
31 apply to the ISDA contract. Rather the Nation focused on
32 practical issues such as eligibility criteria. Any specific laws
33 which the Secretary would have included as program standards
34 could have been addressed during the contract negotiation phase,
35 as the Nation has done with the federal government in other ISDA
36 contracting.

1 | proposal because,

2 | the proposed project or function to be contracted for
3 | cannot be properly completed or maintained by the
4 | proposed contract.

4 | However, this declination provision must be read in
5 | context with the regulations governing ISDA. Particularly, 25
6 | C.F.R. 900.24 provides that:

7 | The Secretary may not decline to enter into a
8 | contract with an Indian tribe or tribal
9 | organization based on any objection that will
10 | be overcome through the contract.

10 | The primary focus of this regulation is to require a dialogue
11 | between the Indian tribe or tribal contractor and the Secretary to
12 | work out any concerns resulting from the proposal. However, in
13 | this instance the Secretary has made no serious efforts to discuss
14 | or otherwise negotiate any of the provisions of the Nation's
15 | proposal to develop a contract. Rather, the Secretary summarily
16 | declined the Nation's proposal, without considering any of its
17 | other responsibilities under the ISDA.¹⁰

18 |
19 | ¹⁰ Although the Secretary issued a declination letter and
20 | offered appeal rights pursuant to ISDA, the Secretary has never
21 | engaged in any sort of meaningful discussions, negotiations or
22 | attempts to resolve the declination concerns raised either before
23 | or after issuing the declination letter. Under 25 U.S.C.
24 | §450f(b)(2), the Secretary is obligated to "provide assistance to
25 | the tribal organization to overcome the stated objections."
26 | However, instead, the Secretary has merely pointed to some
27 | superficially inconsistent statutory provisions, unilaterally
28 | determining that these threshold issues prevented contracting.
Congress made its views very clear on these types of issues when
it passed the 1988 amendments to ISDA:

25 | The current practice of Federal agencies that impose
26 | "threshold criteria" on a self-determination contract
27 | application is clearly inconsistent with the intent of the
28 | Indian Self-Determination Act.

28 | Senate Report 100-274, accompanying S.1703 the Indian Self-
Determination and Education Assistance Act Amendments of 1987.
P.23. Moreover, Congress found it necessary to amend ISDA

1 Similarly, if other federal law required that certain
2 reports be made available to the Secretary, this level of reporting
3 could be negotiated into the contract, since reporting requirements
4 beyond the single agency audit report are negotiable under 25
5 U.S.C. §450c(f)(2). Again, if negotiations on this issue could not
6 resolve the concerns, a proposal regarding reporting requirements
7 would be subject to the declination criteria of 25 U.S.C. §
8 450f(a)(2)(C), as set forth above.

9 D. The Secretary's Interpretation Conflicts with Policy
10 Expressed in Statutes and Regulations.

11 Although the Secretary posits that TANF is not a
12 contractible program under ISDA, there is nothing that prevents
13 TANF from being contracted under ISDA. Neither TANF nor ISDA
14 prohibit it. On the contrary, the express policies behind ISDA and
15 its implementing regulations promote the contracting. In fact,
16 even the Secretary believed that her decision was subject to the
17 appeal procedures under ISDA, as she complied with ISDA statutory
18 requirements regarding a declination when she refused the contract
19 proposal submitted by the Navajo Nation.

20 The strongest statements supportive of an interpretation
21 that the TANF program is contractible arise in the Congressional
22 and Secretarial policy statements which accompany ISDA and
23 attendant regulations.

24 The Congress declares its commitment to the maintenance
25 of the Federal Government's unique and continuing
26 relationship with, and responsibility to, individual
27 Indian tribes and to the Indian people as a whole through
the establishment of a meaningful Indian self-

28 further to include an additional declination criteria in 1994 to
prevent the agency from using "contractibility" as a threshold
issue.

1 determination policy which will permit and orderly
2 transition from the Federal domination of programs for,
3 and services to, Indians to effective and meaningful
4 participation by the Indian people in the planning,
5 conduct, and administration of those programs and
6 services.

7
8
9
10
11 25 U.S.C. §450a(b).

12 Congress has further declared that each provision of the
13 [Indian Self-Determination] Act and each provision of
14 contracts entered into thereunder shall be liberally construed
15 for the benefit of the tribes or tribal organizations to
16 transfer the funding and related functions, services,
17 activities, and programs (or portions thereof), that are
18 otherwise contractible under the Act, including all related
19 administrative functions, from the Federal government to the
20 contractor.

21 25 C.F.R. 900.3(a)(5)

22 Yet even more powerful, and at odds with this declination
23 and Motion to Dismiss are the Secretarial Policies contained in the
24 regulations implementing the ISDA:

25 It is the policy of the Secretary to facilitate the
26 efforts of Indian tribes and tribal organizations
27 to plan, conduct and administer programs,
28 functions, services and activities, or portions
thereof which the Departments are authorized to
administer for the benefit of Indians because of
their status as Indians. The Secretary shall make
best efforts to remove any obstacles which might
hinder Indian tribes and tribal organizations
including obstacles that hinder tribal autonomy and
flexibility in the administration of such programs.

29 25 C.F.R. 900.3(b)(1).

30 It is the policy of the Secretary that the
31 contractibility of programs under this Act should
32 be encouraged. In this regard, Federal laws and
33 regulations should be interpreted in a manner that
34 will facilitate the inclusion of those programs or
35 portions of those programs that are for the benefit
36 of Indians under section 102(a)(1)(A) through (D)
37 of the Act [25 U.S.C. 450f(a)(1)(A) through (D)],
38 and that are for the benefit of Indians because of
39 their status [as] Indians under section
40 102(a)(1)(E) [25 U.S.C. 450f(a)(1)(E)].

41 25 C.F.R. 900.3(b)(8).

1 These Congressional and Secretarial Policies guide the
2 interpretation of the Indian Self-Determination Act, regulatory
3 policy statements which the Secretary of Health and Human Services
4 has conveniently ignored in considering the Navajo Nation's
5 contract proposal.

6 **IV. CONCLUSION**

7 Under ISDA "the Secretary shall have the burden of proof
8 to establish by clearly demonstrating the validity of the grounds
9 for declining the contract proposal." 25 U.S.C §450f(e). Here the
10 Secretary has offered three reasons why the Navajo Nation's
11 contract proposal should be declined: that TANF is not a program,
12 service, function or activity; that the TANF program is not a
13 program designed to benefit Indians because of their status as
14 Indians; and that there are inconsistencies between PRWORA and
15 ISDA. Underlying the Secretary's argument is a basic belief that
16 ISDA does not apply to the Secretary's administration of PROWRA.
17 The Nation disagrees with the Secretary and believes that she has
18 failed to meet the burden imposed by Congress in her declination of
19 the Nation's proposal.¹¹

20 Respectfully submitted, this 19th day of June, 1998.

21 NAVAJO NATION DEPARTMENT OF JUSTICE
22 Herb Yazzie, Attorney General

23
24 By: 

25 Britt E. Clapham, II
 Senior Ass't Attorney General

26 ¹¹ The ISDA at 25 U.S.C. §450f(e) legislatively recognizes
27 a general presumption favoring Indian rights. For a more
28 explicit discussion of this presumption and the Secretary of
Health and Human Services' historic failure to respect those
rights in ISDA contracting, see Shoshone-Bannock Tribes of Fort
Hall Reservation v. Shalala, 1997 WL 79168 (D.Or. 1997).