

Honorable James O. Browning  
United States Courthouse  
333 Lomas Blvd., N.W., Ste 780  
Albuquerque, NM 87102

August 24, 2005

Re: Lana E. Marcussen v. Leavitt, et. al., CIV 04-1429 JB/DJS

Dear Judge Browning:

I have received a copy of the letter from the U.S. Attorney to you dated August 19, 2005 and now comply with your request for a letter response on the completion of providing the documents agreed to in the Stipulated Order of June 28, 2005. The only documents not provided by the Health and Human Services (HHS) and Department of Interior (DOI) are the Aid to Families with Dependent Children (AFDC) Title IV-D and Title IV-E agreements and ISDA 638 contract(s) with the Navajo Nation. I believe the DOI has copies of these records and has not complied with my FOIA request.

It is my belief that the DOI has copies of these Title IV-D and Title IV-E agreements and the ISDA 638 contract(s) it must have approved for them to have legal effect in New Mexico. The U.S. Attorney has never said that the DOI does not have these agreements. Even this most recent letter, obfuscates this fact. On Page 3, the next to last paragraph states: "Earlier in this case it was clear that DHHS was the correct federal agency to receive Plaintiff's FOIA requests and not DOI. Now in her recent letters she is revisiting this issue. We can definitively state that, if the federal government had any of the documents she is seeking, the correct agency would be DHHS, not DOI." While this statement is true if the agreements I still seek were under TANF, they were not executed under TANF, they were implemented under AFDC.

For some reason, the U.S. Attorney is still confusing AFDC and TANF. Beginning in the last full paragraph on Page 2, the U.S. Attorney again confuses the two programs. While it is true that the TANF program used to be called the AFDC program, the revisions to AFDC converting it into TANF were substantial. I admitted in the hearing on May 24<sup>th</sup> that no tribal TANF agreements dated from 1991 through June 1996 could exist. The documents I have requested are from 1991 to 1996. TANF did not go into effect until July 1, 1996.

There was a later change to the TANF statute that does allow tribes to administer their own programs as stated in the U.S. Attorney's letter that I did not request under FOIA. TANF bestowed direct oversight authority on HHS giving it primary responsibility over the federal administration of all parts of the welfare program even against the Bureau of Indian Affairs for tribal welfare programs as stated by the U.S. Attorney. TANF contains numerous separation of power and oversight protections. These safeguards did not exist under AFDC. Under AFDC, the HHS did not have direct oversight authority over state administered specific programs including

Title IV-D and Title IV-E. Any agreements between New Mexico and the Navajo Nation under AFDC would only have required the approval of the Secretary of Interior.

All Indian tribes are wards of the federal government. One of the statutes that enforces this ward/trustee relationship is 25 U.S.C. § 81. This statute was revised in 2000 as part of the TANF changes to allow direct tribal administration of TANF programs under HHS. Prior to the amendments in 2000, 25 U.S.C. § 81 required that the Secretary of the Interior approve all contracts and agreements made between an Indian tribe and any other entity. Any agreement that was not so approved by the Secretary of the Interior was void as a matter of statutory and federal Indian common law. These Title IV-D and Title IV-E agreements which probably are joint power agreements with New Mexico as stated in the U.S. Attorney's letter could not have been valid and enforceable until approved by the Secretary of the Interior. Under 25 U.S.C. § 81, before its amendment in 2000, the United States assumed the risk and liability for these tribal agreements that it approved. After 2000, the Indian tribes were required to have a waiver of tribal sovereign immunity in the agreements and accept their own risk and liability.

To summarize the point, there is no reason to believe that HHS would be the federal agency that would have copies of these AFDC Title IV-D and Title IV-E agreements or ISDA contracts with the Navajo Nation. The only federal department that was required to take action on these Navajo Nation agreements was the Department of the Interior. Because DOI did not have direct responsibility for tribal AFDC administration but contributed separate federal funds for tribal agencies, an agreement between each tribe and the DOI/BIA was required. This agreement according to the Navajo Nation case filed against HHS in 1997 was an ISDA 638 contract. This is the case file that is missing from the Clerk's Office at the Federal Courthouse in Phoenix.

The federal departments are required under FOIA and the APA to provide the requested documents. HHS does not have a history of avoiding document production and I do accept the representations of the U.S. Attorney that they have searched their records and provided the documents they possess. The HHS has provided the AFDC state plans as requested. Unfortunately, DOI has an entirely different reputation. I will not waste the Court's time in reciting the problems of DOI record keeping and disclosure revealed in the Elouise Cobell litigation that has now been going on for 9 years. Since the test case I filed in Phoenix was based on the same legal arguments being used in Cobell, I can understand the great reluctance of the DOI to disclose these documents. However, the documents requested in this case are very specific and easily reproduced unlike the requests in Cobell that include the records for over 60,000 individual Indian trust accounts.

Getting copies of these specific agreements with the Navajo Nation was the main reason this case was filed. The long factual recitation in the Complaint was to detail the reasons I believed that the New Mexico courts were not applying state law. These Joint Power Agreements under New Mexico law would have allowed the state courts and state agencies to use "their own or each others powers." It is not in the interests of anyone for me to be forced to speculate about what these agreements and contracts say in a civil rights action.

Therefore, I request this Court require the DOI through the Secretary of the Interior to provide the administrative record for all the agreements and contracts it approved with the Navajo Nation from 1991 through 1996 under the APA regarding Title IV-D and Title IV-E of the Social Security Act under the program known as AFDC or any other federal welfare program for the Indian tribes. The administrative record must include all correspondence and legal opinions. This is the appropriate remedy for a federal agency that refuses to comply with a FOIA request. It is possible that there will be very few records until 1992 when the AFDC child support program was expanded. The FOIA request is for records dated from 1991 to 1996. I included 1991 to find out what existed prior to the expansion of the AFDC program. This specific relief is contained in the current Complaint and does not require amendment or an expansion of the case.

In order for me to comply to the Court's Order of August 3, 2005 a decision regarding whether this case will expand to the APA must be made as soon as feasible. As promised, I will not amend the Complaint to invoke civil rights claims that include New Mexico state defendants until this Court approves. This case remains only a request for the production of the requested documents. If the case is dismissed, it will force me to file a new civil rights action with an APA claim. In many ways, this is in my interest but would force me to speculate on the effect of the missing documents. I am willing to wait to avoid unnecessary and potentially disruptive speculation while the administrative record is produced by DOI. If the DOI still refuses, the civil rights claims may be added by amending the complaint to give the Court sufficient authority to compel compliance to federal law.

Sincerely,