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Federal contractors on edge as Indian tribes wait for claims

By [Kimberly Kindy](#), Published: December 22

OWYHEE, Nev. — When the federal government reneged on its agreement to fully compensate the Shoshone-Paiute tribes for running a hospital on the Duck Valley reservation, the Washington contracting world barely noticed.

But after similar contracts were broken with hundreds of other Native American tribes and the debts they were owed snowballed to an estimated \$2 billion, federal contractors joined their court battle, alarmed that the practice might eventually ensnare them as well.

Now, more than a year after the U.S. Supreme Court ruled for a second time in favor of the tribes and ordered the government to pay up, the two federal agencies that are on the hook — the Indian Health Service and the Bureau of Indian Affairs — have settled fewer than 1 percent of the claims, agency records show. The Obama administration, meantime, is asking Congress to approve a proposal that would permanently limit how much Native Americans could be paid in the future for certain costs associated with government contracts.

All this has federal contractors on edge again.

“This should put some fear into the small, medium and large contractors,” said Sen. Mark Begich (D-Alaska), who represents 229 tribes that have unpaid claims estimated at \$350 million. “This was a Supreme Court case, not based on Indian law, but contract law, and the federal government decided it could make partial payments.”

At issue are contract support costs that are spelled out in the agreements, under which the government pays tribes to run education, public safety and health programs on reservations. The support costs — which include items like travel expenses, legal and accounting fees, insurance costs and worker’s compensation fees — typically account for 20 percent of the value of the contract, according to Lloyd Miller, a lawyer who represented the tribes at the Supreme Court.

For decades, when the Indian Health Service and Bureau of Indian Affairs have run short of money, they have notified tribes that such support costs would be paid only in part, if at all. Agency officials have told both

Congress and the Supreme Court that the government does not have enough funds in its budget to pay the agreed amount of the contracts.

“There is not enough money to go around to do all of the things the United States should do in Indian Country,” said Kevin Washburn, assistant secretary for Indian affairs with the Interior Department, during a congressional hearing last month about the unpaid claims.

The tribes, not surprisingly, call that excuse unacceptable.

“Can you imagine telling your landlord, ‘Sorry, I’m only going to pay you 80 percent of the rent this month?’ ” said Noni Manning, a Shoshone-Paiute tribal member and former tribal finance manager. “In the rest of the world, a contract is a contract.”

Federal contractors care deeply about whether the government will continue to pay contract support costs because most non-tribal service contracts with federal agencies provide for such expenses, according to several contracting experts. These costs typically account for about 30 percent of the value of a contract, the experts said.

The U.S. Chamber of Commerce has warned that the government could be setting a dangerous precedent for the federal contracting industry.

“The government’s position would have the effect of making contracts illusory by giving it a broad right to refuse payment at the stated price for services rendered,” the Chamber argued in a friend-of-the-court brief to the Supreme Court early last year.

Tribes take hospital’s reins

The Duck Valley Indian Reservation spans nearly 453 square miles of mountains and deserts in Nevada and Idaho. The small medical building is on the edge of Owyhee, the reservation’s downtown, where cattle, horses and dogs roam freely amid a motel, deli, grocery store and two-pump gas station.

In the mid-1990s, the Shoshone-Paiute tribes decided to follow the lead of other tribes and took over operations of the modest hospital from the Indian Health Service through what’s called a self-determination contract. Such contracts were the product of the 1975 Indian Self-Determination Act, which allowed the government to contract with tribes to run their own social service programs.

“We thought we could do a better job than the federal government,” said Dennis Smith, the tribes’ chairman. “Too often our elders would be sent far away for treatment, and they would return to us in a pine box.”

Financial documents show that the Indian Health Service agreed to pay the tribe \$5 million in “direct costs” to run the facility the first year and an additional \$2 million in contract support costs.

But three months after signing the agreement, the agency said it didn’t have money to pay any of the contract support costs. One year of nonpayment turned into two for the Shoshone-Paiute tribes, and then it became the norm.

So the tribes joined with the Cherokee Nation and sued the Indian Health Service, which is part of the Department of Health and Human Services, ultimately winning an initial Supreme Court victory in 2005. Within a

few months of that ruling, the Indian Health Service settled up, reimbursing nearly all of the money that the agency had calculated it owed in back payments to the Cherokee and Shoshone-Paiute tribes.

Yet despite the court ruling, the government said it was still short of money and continued to balk at making some payments due under the Native American contracts. Medical and other services provided by tribes continued to erode.

The Shoshone-Paiute tribes downgraded their hospital in 2007 to a health clinic, open only on weekdays and only until 5 p.m. It became either a three-hour drive north to Boise, Idaho, or a two-hour drive south to Elko, Nev., to the nearest hospital for tribal members and the cowboys who work on their ranches.

Pregnant women were sent off by ambulance, at times giving birth along the side of the road. Elders died before they even reached the hospital. Accidents in the evening and early morning — once handled by emergency-room doctors and nurses — started to fall to a team of emergency medical technicians .

“We handle everything from the common cold to broken bones to suicides now,” said Kenneth Pete, an EMT who directs the clinic’s team.

Since the hospital emergency room closed, calls for EMTs have shot up from 130 to 500 each year. The three ambulances each have more than 100,000 miles on them and will need to be replaced soon, Pete said. Funds that once went to patients in need of referrals to pain specialists, physical therapists or dermatologists now finance the growing costs of the emergency response team, Tribal Health Administrator Anthony Marshall said.

Contractors watch case

The tribes decided to return to the Supreme Court. Once again, they found an influential ally in the Chamber of Commerce, which filed a brief in support of the tribes as it did in 2005. The Chamber raised constitutional concerns and said the government’s argument — that it could not pay more than what Congress had budgeted for the contracts — would do harm well beyond Native American reservations.

“This proposed regime is grossly unfair to contractors, but it also does not serve well the government, which will find it difficult to find contracting partners willing to take on such risk,” the Chamber said in its brief.

The Supreme Court agreed and said in its ruling last year that “the Government is responsible to the contractor for the full amount due under the contract, even if the agency exhausts the appropriations in service of other permissible ends . . . This principle safeguards both the expectations of Government contractors and the long-term fiscal interests of the United States.”

The tribes celebrated and hoped the claims might be settled within months.

But then agency officials began questioning the accuracy of their own calculations of what they owed the tribes — contained in “shortfall reports” submitted annually to Congress — and said each figure had to be reexamined before any settlement.

The Indian Health Service said in a statement to The Washington Post that the shortfall reports are mere estimates and “are not suitable for determining the amount owed for past claims.” The Bureau of Indian Affairs has taken the same position.

But the reports have been certified as accurate by the agencies' chief financial officers. Ron Demaray, the former associate director for self-determination services for the Indian Health Service and now a consultant to some tribes, said the reports in recent years have come within 1 percent of actual costs incurred by tribes.

The federal agencies have also asked Congress to individually cap the value of future self-determination contracts so that support costs would essentially be eliminated. Indian Health Services said the possibility of imposing contract-by-contract caps was raised by the Supreme Court. In its opinion last year, the court listed several options for controlling future costs, adding that it was not commenting on their desirability.

Several members of Congress are resisting the administration's proposal. "They are not going to be able to sustain this position either legally or politically," said Rep. Tom Cole (R-Okla.), one of two Native Americans in Congress.

Michael Fischetti, executive director of the National Contract Management Association, said his trade group is monitoring the tribes' dispute.

"If you asked for the service or product and you received it, the contractor has the right to payment, whether it's Indian tribes or anyone else," Fischetti said. He added, "If you didn't want the goods or services, well, don't incur the obligations; don't enter into a contract."

The Chamber of Commerce sent a letter in October to Health and Human Services Secretary Kathleen Sebelius asking that the administration withdraw the cap proposal and work with tribes to settle claims. Chamber officials say they've received no response.

"What we are calling on them to do is come together and work on a solution, instead of just saying, 'We are going to pay you less,' " said Ron Eidshaug, the chamber's vice president for congressional and public affairs.

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