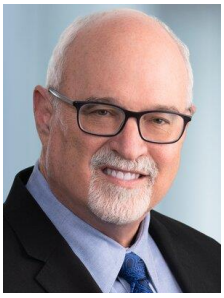
Takeaways From High Court's Tribal Health Admin Cost Ruling

By **Stephen Hart, Christy Hubbard and Wyatt Williams** (July 31, 2024)



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After a mind-numbing deep dive into the minutia of a key federal Native American law statute, on June 6, the U.S. Supreme Court agreed in a 5-4 decision with two Native American tribes — San Carlos Apache Tribe and Northern Arapaho Tribe — on how that statute should be interpreted. The cases are Becerra v. Northern Arapaho Tribe and Becerra v. San Carlos Apache Tribe.

Each tribe had elected under the Indian Self-Determination and Education Assistance Act to administer its own healthcare program under the act's self-determination contracts with the Indian Health Service.[1]

Such contracts allow tribes to assume responsibilities for administering health programs that would otherwise be operated by the IHS. When a tribe enters into a self-determination contract, the act requires the IHS to provide the tribe with two types of funds:

- The secretarial amount — this is the same amount of money that the IHS would have spent on the program if it administered it; and
- Contract support funds — these are the overhead and administrative costs required for the tribe to remain in compliance with the contract.[2]

The intent of a self-determination contract is to put tribes on equal footing with the IHS to administer health programs to their own communities. On its own, the secretarial amount would not achieve this because tribes do not have the same ability as the IHS to cover administrative and overhead costs.

While administering the program, the tribe will additionally collect program income. This is income from third parties, namely Medicare, Medicaid and private insurers, and the collections are authorized by the Indian Health Care Improvement Act.[3]

Self-determination contracts require tribes, as a condition of being in compliance, to spend program income to further the purpose of the self-determination contract. In other words, to be in compliance with the IHS contract, the tribe must spend the third-party Medicaid, Medicare and private insurance payments it receives on the program.

For example,[4] consider that a tribe is contracting to take over a program that the IHS spends $1 million to administer. To administer, the tribe might spend $100,000 in overhead and administrative costs. But, while administering the program, the tribe also collects $500,000 in third-party payer (e.g., Medicare) program income.

To remain in compliance with the IHS contract, the tribe must spend this $500,000 of

income to further the purpose of the IHS contract, but doing so might require $50,000 in additional overhead and administrative costs, i.e., program income contract support costs.

The question in this case is whether the additional $50,000 in contract support costs must be paid by the tribe out of the program income itself, or if the IHS must reimburse these costs since it is dictating where they must go. A simplified version of both scenarios is laid out below.

The Tribe pays the Program Income Contract Support Costs. Tribe receives:	**IHS Reimburses the Tribe for Program Income Contract Support Costs. Tribe receives:**
Secretarial Amount - $1 Million	Secretarial Amount - $1 Million
Contract Support Costs - $100,000	Contract Support Costs - $100,000
Third Party Program Income - $500,000	Third Party Program Income - $500,000
Program Income Support Costs - $0	Program Income Support Costs - $50,000

Historically, the IHS has interpreted the ISDA to require tribes to pay the program income contract support costs out of the program income itself. The result is that tribes have less money to reinvest into healthcare programs, and the IHS pays tribes a smaller amount in contract support costs.

The IHS estimated that if it interpreted the statute the way the San Carlos and Northern Arapaho tribes did, it would cost an additional $800 million to $2 billion to cover the difference. The IHS is currently appropriated about $8 billion annually and would require additional appropriations to cover the difference.

Prior to this case, the U.S. Courts of Appeals for the Ninth and Tenth Circuits had concluded that the tribes were entitled to reimbursement for these program income administrative costs.[5] Both decisions included references to the canon of statutory construction that holds if statutory language involving Native American tribes is ambiguous, the ambiguity should be resolved in a tribe's favor.

Neither the majority nor the dissent of the Supreme Court made its decision based on this canon of statutory interpretation. Instead, the dissent relied on the government's long-term interpretation of the act as a basis for its position, while the majority recited the fact that the self-determination contract explicitly states that each provision of the ISDA and each provision of the contract shall be liberally construed for the benefit of the tribe.

The Majority Decision

Chief Justice John Roberts, joined by Justices Sonia Sotomayor, Elena Kagan, Ketanji Brown Jackson and Neil Gorsuch, held that the ISDA requires the IHS to reimburse tribes for the contract support costs required to collect and spend program income.

The court noted that because tribes are required to collect and spend program income as a condition of their contracts, the reasonable administrative and overhead costs of that

activity fall within the definition of "contract support costs."

Self-determination contracts require contracting tribes to use "program income earned … in the course of carrying out a self-determination contract," to "further the general purposes of the contract."[6]

The general purposes of the contract are "functions, services, activities, and programs" transferred from the federal government to the tribe. Therefore, tribes must collect and spend this income as a condition of the contract itself. Because contract support costs are tied to activities required to remain in compliance with the contracts, the contract support costs of collecting and spending program income are reimbursable.

Additionally, the court clarified that both direct and indirect contract support costs of spending program income are eligible for reimbursement. Direct contract support costs are "direct program expenses for the operation of the Federal program that is the subject of the contract."[7]

Indirect contract support costs are "any additional administrative or other expense incurred by [a tribe] in connection with the operation of the Federal program, function, service, or activity pursuant to the contract."[8]

Therefore, when a tribe collects and spends program income to further the functions, services, activities and programs that it assumes from the IHS, including indirect reasonable administrative and overhead costs, those costs are eligible for reimbursement.

The Dissent

Justice Brett Kavanaugh wrote the dissent and was joined by Justices Clarence Thomas, Samuel Alito and Amy Coney Barrett. They also conducted a deep dive into the statutory language of the ISDA and the Indian Health Care Improvement Act referenced above. Their interpretation did not require the IHS to reimburse tribes for the contract support costs of collecting and spending program income.

Regarding the statutes, the dissent highlighted that there are two separate statutes: (1) the ISDA authorizing the self-determination contract, secretarial amount and contract support funds; and (2) the Indian Health Care Improvement Act, authorizing tribes to collect program income.

Because the funding sources are authorized under different statutes, the dissent argued the ISDA's authorization of contract support costs does not extend to funding that is collected from the Indian Health Care Improvement Act.

The dissent pointed to ISDA language limiting contract support funding to costs "directly attributable" to self-determination contracts and prohibiting costs with "any entity other than the IHS."

The dissent also found it important that program income could be spent on a wider scope of projects than the IHS would be able to spend it on, e.g., building new health facilities.

Key Takeaways

The purpose of the ISDA and self-determination contracts is to put tribes on equal footing with the IHS to administer programs to their citizens and surrounding communities.

The primary effect of the Becerra v. San Carlos Apache case is that the IHS will have to reimburse contract support costs to tribes with self-determination contracts when those tribes are collecting and spending third-party, e.g., Medicare, program income.

Additionally, the IHS is not currently adequately funded to cover the costs of this decision, so it will need to seek appropriations to cover the funding gap. Tribal leaders should continue working with national organizations and their representatives to encourage the IHS to seek the funds it needs and for Congress to properly fund both the IHS and the self-determination contract programs.

Furthermore, Justice Gorsuch, who is originally from Colorado, continues to be a reliable voice for tribal concerns, but tribes still do not have a reliable Supreme Court majority. This case follows that continued trend.[9]

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[1] 25 U.S.C. § 5301 et seq.

[2] Contract Support Costs are defined as "reasonable costs for activities which must be carried on by a [tribe] as a contractor to ensure compliance with the terms of the [self-determination] contract," and includes "direct program expenses for the operation of the Federal program" and "any additional administrative or… overhead expense incurred by the [tribe] in connection with the operation of the Federal program, function, service, or activity pursuant to the contract." 25 U.S.C. § 5326(a)(2)-(3).

[3] 25 U. S. C. §1601 et seq.

[4] Part of this illustration is adapted from Justice Kavanaugh's dissent.

[5] San Carlos Apache Tribe v. Becerra , 53 F. 4th 1236, 1245 (9th Cir. 2022); Becerra v. Northern Arapaho Tribe , 61 F. 4th 810 (10th Cir. 2023).

[6] 25 U.S.C. § 5329(a)(1).

[7] § 5325(a)(3)(A)(i).

[8] § 5325(a)(3)(A)(ii).

[9] In Haaland v. Brackeen, Roberts, Sotomayor, Kagan, Jackson, Barrett, Gorsuch and Kavanaugh made up the majority, while Thomas and Alito dissented.

In Arizona v. Navajo Nation, Roberts, Thomas, Alito Kavanaugh and Barrett made up the majority, while Gorsuch, Sotomayor, Kagan and Jackson dissented.

Finally, in Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, Roberts, Thomas, Alito, Sotomayor, Kagan, Kavanaugh, Barrett and Jackson made up the majority, while Gorsuch alone dissented.