

**Federal Circuit Court of Appeals holds the United States liable under the Indian Self-Determination Act for underpaying the Cherokee Nation s self-governance compact in fiscal years 1994, 1995 and 1996**

On July 3, 2003 the U.S. Court of Appeals for the Federal Circuit held the United States liable in damages for the Indian Health Service s failure to fully pay the Cherokee Nation contract support costs, including indirect costs, due under the Indian Self-Determination Act. The decision represents a powerful reaffirmation of the Nation s policy of Indian self-determination. A copy of the decision is available on the court s website at [www.fedcir.gov/dailylog.html](http://www.fedcir.gov/dailylog.html) and is also available from the Westlaw legal database at 2003 WL 21511710. NCAI filed an amicus brief in the appeal highlighting Congress core purposes in enacting and amending the Indian Self-Determination Act, and in several instances the opinion discusses the same legislative history addressed in NCAI s brief. Additional information about the case is available from the Cherokee Nation s attorney Lloyd Miller at the Sonosky Chambers law firm ([Lloyd@sonosky.net](mailto:Lloyd@sonosky.net) or telephone 907-258-6377).

The Federal Circuit case grew out of IHS s decision in the early and mid-1990's to not pay tribal self-determination contractors any contract support costs beyond the amounts recommended in congressional committee reports, even though the actual appropriations acts at the time did not limit the amounts IHS could pay. IHS defended its actions by arguing that it possessed discretion to not reprogram other funds to pay tribal contractors. IHS also argued that to have paid more would have adversely impacted programs serving other tribes. Further, IHS argued that in 1998 Congress enacted an appropriations act rider (called Section 314 ) which retroactively clarified that IHS could not lawfully pay more in the earlier years.

The Federal Circuit ruled in the Cherokee Nation s favor on all counts. It concluded that IHS was required to reprogram other funds to meet its contract obligations to the Cherokee Nation, and that nothing in the appropriations acts at the time affected IHS s duty to reprogram. It also held that reprogramming additional funds would not have required IHS to dip into programs serving other tribes, for two reasons. First, IHS could have dipped into the millions of dollars it set aside each year to fund its own inherent federal functions, and second, IHS could have used part of the several million dollars left unspent at the end of each year. Finally, the Court found that Congress later enactment of Section 314 was not sufficiently clear to constitute a retroactive change in the law as it existed in the earlier years.

Instead, the Court read section 314 as only limiting what IHS could do with the leftover funds still remaining from the earlier years at the time Section 314 was enacted. In all these respects the Federal Circuit expressly disagreed with the contrary rulings issued last year by the Ninth Circuit (in *Shoshone-Bannock Tribes v. Secretary*) and by the Tenth Circuit (in *Cherokee Nation and Shoshone-Paiute Tribes v. Thompson*).

The new Federal Circuit decision is also critically important because it comes at the precise time when a Supreme Court petition to review the Tenth Circuit's contrary decision against Indian tribes in *Cherokee Nation and Shoshone-Paiute Tribes* is still pending. The development of a new and direct inter-circuit conflict concerning the government's liability for failing to fully pay self-determination contracts in the mid-1990s substantially increases the possibility the Supreme Court will decide to review the Tenth Circuit decision.

The Supreme Court will consider whether to hear the Tenth Circuit case in a closed conference on September 29, 2003, and will likely announce a decision on October 6, 2003. Additional information about the Supreme Court petition is also available from Lloyd Miller at the Sonosky Chambers firm, which represents the petitioning tribes in that case.