

**TESTIMONY
OF
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ON THE
BIA AND GAO REPORTS
ON
RISK MANAGEMENT/TORT LIABILITY
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE**

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Mr. Chairman and Members of the Committee, thank you for the opportunity to provide testimony on the Bureau of Indian Affairs (BIA) findings and recommendations pursuant to the Indian Tort Claims and Risk Management Act of 1998. Our task was to survey all federally recognized tribes to determine the degree, type and adequacy of liability coverage of Indian tribes and to offer legislative recommendations that may be appropriate to improve the provision of insurance coverage to Indian tribes and which would achieve the purpose of providing relief to persons who are injured as a result of an official action of a tribal government.

To fulfill this mandate, we organized an ad hoc advisory team of tribal leaders, attorneys who represent Indian tribes, insurance industry representatives, consultants who specialize in Indian policy matters, and federal employees who assisted in the development of a survey instrument.

The survey instrument was sent out to all federally recognized Indian tribes and Alaska native villages in April 1999. We received direct responses from 144 tribes and information was provided to us from insurance carriers for an additional 65 tribes. Of the 209 responses, some 60 percent were from Indian tribes from the lower 48 states and the remaining 38 responses, were from Indian tribes and native villages within the State of Alaska.

HISTORY

In order to understand the status of tort law within Indian Country, it is important to briefly review the historical development of American jurisprudence. Included in the jurisprudence common law tradition, "received" by the New World colonies in 1763, was the principle or doctrine of sovereign immunity. That doctrine, originating primarily from within the ruling monarchies of western Europe, is simply stated: A subject within the kingdom could not sue the sovereign because, presumptively, the king could do no wrong. When the American colonies coalesced into a secular confederation of states and eventually into a republic, the notion of sovereign immunity was adopted by the national government of the newly formed states and commonwealths. Under this proposition, the federal government was not liable for personal injuries or property damage suffered by private

citizens and caused by the negligence or wrongful acts of its employees. The status of federal governmental liability remained in this posture well into the mid-twentieth century until the passage of the Federal Tort Claims Act (FTCA) in 1946.

THE FEDERAL TORT CLAIMS ACT

With the passage of the FTCA, Congress provided redress to private citizens for harm caused by the federal government through the actions or omissions of its employees. See 28 U.S. Code Annotated, § § 1291, 1346 (b), (c), 1402 (b), 1504, 2110, 2401 (b), 2402, 241 1 (b), 2412 (c), 2671-2680 (1994).

From its original form, the FTCA has undergone numerous amendments to identify the specific torts that fall within the scope of its coverage. The FTCA has evolved into a remedy against the federal government for the acts or omissions of its employees and agents. The FTCA sets forth certain conditions that must be met before a claim may be considered. These can be seen in the following limitations set forth in the FTCA: (1) The FTCA prohibits any claim for punitive damages; (2) It establishes strict time requirements for when claims must be filed; (3) It provides specific direction on the administrative procedures all claims must follow, otherwise they will not be considered; and (4) The FTCA does not allow for jury trials. The FTCA establishes the federal district court as the forum with exclusive jurisdiction to hear FTCA claims once administrative remedies have been exhausted.

Today, 25 years after the enactment of Public Law 93-638, approximately two-thirds of the BIA appropriated program funds are administered by the Indian tribes, themselves, either under contracts or through compacts under provisions of the Indian Self-Governance Act of 1990.

INDIAN SELF-DETERMINATION AND EDUCATIONAL ASSISTANCE ACT OF 1975

When Public Law 93 -63 8, as amended, was passed by Congress, coverage under the FTCA was *not* initially extended to tribal governments or tribal organizations that contracted to perform federal functions or provided services in accordance with provisions of the Self-Determination Act. As originally envisioned, the costs of liability insurance for these contracted programs were to be borne by the tribes or tribal organizations, themselves. In turn, tribes included private insurance costs in either their direct or indirect program costs. Section 102(c)¹ of Public Law 93-638 authorized the Secretary to require that Indian tribal contractors obtain adequate liability insurance coverage policies which would contain waivers of the right of the insurance carrier to assert sovereign immunity as a defense in any lawsuit filed by an individual injured by the actions of a tribal employee operating

¹ 25 U. S. Code Annotated Section 450f(c), Public Law 93-638, Title 1, Section 102, January 4, 1975, 88 Stat. 2206.

within the scope of the contracted program.² Because of the concerns cited above, Congress decided to take some steps to remedy these problems.

Under provisions of Public Law 101-121, Congress temporarily expanded the definition of "federal" employees to include Indian tribes and tribal contractors. This action allowed contracted programs to fall under the umbrella of FTCA coverage. Thereafter, in 1991, pursuant to the Interior and Related Agencies Appropriation Act, Public Law 101-512, Congress permanently extended FTCA liability coverage to Indian Tribes and tribal organizations funded under provisions of Public Law 93-638. The relevant language included the following:

With respect to claims resulting from the performance of functions during fiscal year 1991 and thereafter, or claims asserted after September-20, 1990, but resulting from the performance of functions prior to fiscal year 1991, under a contract, grant agreement, or cooperative agreement authorized by the Indian Self-Determination and Education Assistance Act of 1975, as amended... an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs ... while carrying out any such contract or agreement and its employees are deemed employees of the Bureau.... while acting within the scope of their employment in carrying out the contract or agreement; provided that after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the FTCA.

Prior to Public Law 93-638, BIA and IHS operated programs on the reservation for the benefit of eligible Indians. Work was performed through career employees on behalf of the Federal Government. Therefore, the immunity provided by the FTCA did not require much adjustment as all work typically fell within the scope of employment. With the passage of Public Law 93-638, it became necessary to extend FTCA coverage to tribal contractors who had entered into contracts to operate programs previously performed by Federal Government employees. Prior to the amendment, the practice of the tribes was to provide liability insurance among administrative costs charged to contracted programs. Thus, the FTCA coverage is not an expansion of the Federal Government liability because the contracted programs were merely substituted for the Federal employees who

²Note that Section 10(l) of the Self Determination statute recognizes and leaves unmodified the sovereign immunity of Indian tribes: "Nothing in this Act shall be construed as... affecting, modifying, diminishing, or otherwise impairing the sovereign immunity enjoyed by an Indian tribe." See, 25 U. S. Code Annotated, Section 450n, "Sovereign immunity and trusteeship rights unaffected." A recent case on the subject of Indian tribal sovereign immunity is Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 118 S.Ct. 1700, 1702 (1998) in which the U. S. Supreme Court upheld the sovereign immunity defense by a tribe in a civil suit involving breach of contract. The Court held that the immunity extended to contracts whether made on or off the reservation and that as a matter of federal law "an Indian tribe is subject suit only where Congress has authorized the suit or the tribes has waived its immunity." As to the situation in Alaska, there is presently a case, Cigna Insurance Co. and Native Village of Mekoryuk, et al. v. Moses, on appeal before the Alaska Supreme Court on the issue whether native villages established pursuant to provisions of the 1971 Alaska Native Claims Settlement Act can raise the sovereign immunity defense when they are sued.

performed those functions under those contracted programs. Essentially the exposure of the Federal Government for FTCA claims is the same as it was prior to the passage of Public Law 93-638. Since coverage was extended to tribes, they have continued to maintain private liability insurance.

We have found that in comparison to some of the state Tort Claims Acts that tribes maintain higher levels of liability insurance coverage than those allowed under statutory schemes by the states. According to the Public Risk Management Association's Tort Liability Today, A Guide for State and Local Governments, 3rd edition of 1998, in the states of Arizona, California, Washington, Michigan and Connecticut there is no statutory limit on the amount of damages that could be awarded to an injured party for a tort claim against the state. However, in the remaining states where tribes exist, the state occurrence limits for tort claims range from a low of \$50,000 in Nevada to a high of \$5,000,000 in Nebraska. Altogether, these 23 states average around \$900,000 in limits placed on tort claims against the states, excluding the five that do not have statutory limits. At the same time, although not all tribes in these states responded, those that did respond, reported general liability insurance coverage of either one or two million dollars. The comparison data shows that the majority of those tribes provide a higher occurrence limit under tribal insurance policies than the states allow under state occurrence limits. We also noted that only 5 of the 92 tribes in this comparison have occurrence limits under \$1 million, while the states' occurrence limits are set at \$500,000 or less for 30 states in the lower 48.

BIA/GAO REPORT FINDINGS AND RECOMMENDATIONS

We asked tribes to tell us the number and type of claims that were filed against them for personal injury or property damage which may have occurred as a result of official government activity. The total number of claims we found were 19,286 for all 146 tribes that responded to our question. Of those claims, almost 93 percent of the claims arose in tribes which had gaming operations. The chart located at page 6 of the report shows the breakdown between gaming and non-gaming claims. However, it is worth mentioning that the greatest number of claims were filed by tribal employees and our survey did not distinguish between Indian and non-Indian claimants.

We would also like to direct your attention to the question concerning the manner in which claims were handled, i.e. paid, not paid, referred, FTCA coverage or the defense of sovereign immunity raised, the number of times that sovereign immunity was raised as a defense was very minimal. One of the insurers on the advisory group reported that, between 1996 and 1999, his company reviewed and disposed of over 9,000 claims made against their clients, which consisted of tribes, tribal organizations or tribal enterprises. Of these claims 4,641 were either general liability or automobile claims and not once was the defense of sovereign immunity raised. It was further reported that only 40 of the more than 9,000 claims ever went to litigation.

Another important item brought to our attention during the course of this study by some tribes was the issue of FTCA coverage extending not only to those contractors charged with carrying out the terms of the contract, but those tribal officials that may be named as defendants in a tort action because they were signatories on the contract. This occurred in two cases we are aware of, where the facts and allegations were completely different. We mention this issue because it was raised by

the tribes and because it may cause some confusion over when FTCA coverage is applicable and when the tribe's own liability coverage applies.

The GAO report identified four unique legal issues and both DOJ and GAO have provided commentary on these issues. We would like to provide our comments on these four issues, as well.

1. FTCA does not provide statutory authority for the removal of FTCA cases filed in tribal courts. The Federal district courts have exclusive jurisdiction to hear cases arising from FTCA claims. The Act also provides for the removal of these types of cases filed in state courts but provides no similar removal authority for cases filed in tribal courts. The Department of Justice has suggested that the lack of available tribal removal mechanism for FTCA cases should be remedied. We concur with the Department of Justice's recommendations that the federal removal statute, 28 U.S.C. § 1442, should be amended to permit removal of FTCA claims from tribal courts to federal district courts.

2. Court decisions have differed on whether the "law of the place" should be tribal law for those incidents occurring on Indian land or state law as the phrase has historically been interpreted. The GAO has stated the issue but hasn't taken a position on how it should be interpreted or recommended a legislative remedy.

3. Legal arguments have been made that FTCA bars claims against tribal law enforcement officers for intentional torts, such as assault, battery, false imprisonment, and false arrest because tribal officers are not considered "investigative or law enforcement officers of the United States Government." The Department of Justice points out that whether tribal police or other law enforcement personnel were acting outside the scope of their authority as law enforcement officers is a difficult question which can only be determined by an evaluation of the particular facts and circumstances involved. We concur with the assessment and are prepared to assist the Department of Justice in identifying the situations that give rise to their concerns so that we can train and educate our law enforcement personnel to reduce or eliminate liability for intentional torts.

4. There are legal questions regarding FTCA coverage for tribal officials who exercise oversight over contracted programs but who do not participate in the day-to-day program operations. This is issue identified within the Nebraska and Washington State cases, and the Department of Justice, and the determination of whether to substitute a tribal official defendant can only be made on a case-by-case basis. The Department of Justice also states that it has no policy, formal or informal, denying FTCA coverage to tribal council members or senior administrative personnel. We are willing to work with the Department of Justice to discuss coverage policies. This would help both tribes and insurance brokers better determine the likelihood of FTCA coverage for certain activities and would make it easier for tribes to avoid purchasing unnecessary levels of insurance coverage.

CONCLUSION

During the month of June, the Navajo Nation sponsored an event in Albuquerque, New Mexico, devoted to risk management practices, tort liability, health issues and other insurance related topics. The event was attended by over 400 tribal leaders and representatives from across the country. Because of the overwhelming response of the participants and the desire to interact with one another on these important issues affecting tribal sovereignty and ensuring that persons injured by Tribal government action have an adequate tribal remedy, the Navajo Nation will sponsor a similar event, next year. We feel that these types of events, the findings of the IHS Assessment Report, and the recommendations of the BIA and GAO Reports are important and will continue to foster discussions regarding tort claims and risk management concerns.

This concludes my prepared statement and I will be happy to answer any questions you may have.