United States General Accounting Office

GAO

Report to the Chairman, Committee on Indian Affairs, U.S. Senate

July 2000

FEDERAL TORT CLAIMS ACT

Issues Affecting Coverage for Tribal Self-Determination Contracts

GAO

Accountability * Integrity * Reliability

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FTCA Federal Tort Claims Act

United States General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

B-285425

July 5, 2000

The Honorable Ben Nighthorse Campbell
Chairman, Committee on Indian Affairs
United States Senate

Dear Mr. Chairman:

The Indian Self-Determination and Education Assistance Act was passed in 1975 to encourage tribes to participate in and manage programs that for years had been administered on their behalf by the departments of the Interior and of Health and Human Services. The act authorizes tribes to take over the administration of such programs through contractual arrangements with the agencies that previously administered them: Interior's Bureau of Indian Affairs and Health and Human Services' Indian Health Service.[1] For the Bureau, the programs that can be contracted by tribes include law enforcement, education, social services, road maintenance, and forestry, and for the Health Service, the programs include mental health, dental care, hospitals, and clinics.

Under the first 15 years of the Self-Determination Act, tribal contractors generally assumed liability for accidents or torts (civil wrongdoings) caused by their employees. However, in 1990, the federal government permanently assumed this liability when the Congress extended Federal Tort Claims Act (FTCA) coverage to tribal contractors under the Self-Determination Act. Originally enacted in 1946, FTCA established a process by which individuals injured by federal employees could seek compensation from the federal government. As a result of extending this coverage to tribal contractors, individuals injured by tribal employees may, under certain circumstances, seek compensation from the federal government. For example, if while responding to a call for assistance, a tribal police officer is involved in an automobile accident, the injured parties may be able to seek compensation from the federal government for their personal injuries and property damage.

[1]Throughout this report, the term "tribes" will refer both to tribes and tribal organizations eligible to contract programs under the Indian Self-Determination and Education Assistance Act. Also, the term "contracts" will refer to contracts, grants, self-governance agreements, cooperative agreements, or annual funding agreements entered into pursuant to the Indian Self-Determination and Education Assistance Act, as amended.

To gain an understanding of how this coverage works, you asked us to (1) describe the process for implementing FTCA coverage for tribal self-determination contracts, (2) determine the FTCA claims history for tribal self-determination contracts for fiscal years 1997 through 1999, and (3) discuss FTCA coverage issues that are unique to tribal contractors.

Results in Brief

Federal regulations implementing FTCA prescribe the process that federal agencies must follow in resolving claims arising from the negligent or wrongful acts of federal employees. With the extension of FTCA coverage to tribal contractors, tribal employees under a self-determination contract are considered federal employees for the purpose of FTCA coverage. According to FTCA regulations, claims are subject first to an administrative review and determination by the federal agency whose actions gave rise to the claim. At the administrative level, the departments of the Interior and of Health and Human Services handle these claims. If a claim is not resolved administratively, a lawsuit may be filed in federal court, where the Department of Justice would defend it. Administrative and legal settlements may be paid from agency funds, the U.S. Treasury, or tribes' private liability insurance if duplicative coverage exists.

Data on FTCA claims involving tribal contractors are not readily available because neither Interior nor Health and Human Services is required to track these claims separately from FTCA claims involving federal employees. However, in response to our request for claims data, these departments identified 342 claims, filed from fiscal years 1997 through 1999, that arose from programs contracted from the Bureau of Indian Affairs and the Indian Health Service. At both agencies, these claims involved a small number of tribes, and the damages claimed totaled about $700 million. About two-thirds of these claims involved Bureau programs, most notably law enforcement. The remaining one-third of these claims involved Health Service programs, of which about one-half involved patient care activities. Although some of these claims remain open, about 70 percent of the claims (involving about $333 million in claimed damages) have been brought to closure at a cost of more than $2 million (84 percent paid by the federal government, 16 percent paid by private insurers). Of the claims brought to closure, 127 resulted in settlement payments and 108 were denied.

Our review identified a number of issues unique to FTCA coverage for tribal contractors. On the administrative side, the U.S. government may be paying more than necessary to resolve claims involving tribal contractors.

To the extent that tribes use federal funds to purchase private liability insurance, it is possible that the federal government is paying twice—once for tribes' insurance premiums and once to settle tribal FTCA claims. The potential for duplicative liability coverage exists for tribal contractors because of tribes' long-standing practice of carrying private insurance to cover a wide range of activities, including those subsequently covered under FTCA. Neither Interior nor Health and Human Services routinely checks to determine whether tribal contractors have private liability insurance that could cover these claims. To protect against the government paying more than necessary to resolve these claims, this report recommends that the departments routinely check for duplicative liability insurance. On the legal side, several issues have emerged from recent lawsuits that illustrate areas for which FTCA coverage is not a perfect fit for tribal contractors. For example, in some cases, lawsuits involving FTCA claims have been filed in tribal courts, although federal courts have exclusive jurisdiction to hear such cases. Cases filed in tribal court can be problematic because FTCA does not provide the necessary authority to remove such cases from tribal court to federal court, where they belong.

We provided a draft of this report to the departments of the Interior, Health and Human Services, and Justice for their review and comment. The Department of the Interior agreed with our finding that the U.S. government could potentially pay both for the claims and the liability insurance to cover them. The Department also highlighted its two main concerns regarding FTCA coverage for tribal contractors. First, the incentives to reduce the number of claims are not present for tribal contractors, and second, from time to time, a tribe, or its employees, has not cooperated with the Department in resolving a claim. The Department of Health and Human Services agreed with the facts presented in the report and with its recommendation. The departments of the Interior and Justice provided technical clarifications, which we incorporated as appropriate.

Background

The Federal Tort Claims Act was enacted in 1946 and provides a limited waiver of the U.S. government's sovereign immunity. It specifies the instances in which individuals injured by the wrongful or negligent acts or omissions of federal employees can seek restitution and receive compensation from the federal government through an administrative process and, ultimately, through the federal courts.

The Indian Self-Determination and Education Assistance Act of 1975 allowed Indian tribes to contract to administer certain federal Indian

programs. As originally enacted, tribal contractors assumed liability for torts caused by tribal employees performing official duties. The act authorized the Secretaries of the Interior and of Health and Human Services to require that tribal contractors obtain private liability insurance. People injured by the actions of tribal contractors could file claims against tribal employees or their tribes.

By the late 1980s, the Congress recognized that some tribes were using program funds to purchase insurance, which reduced the funds available to provide direct program services. Thus, the Congress amended the Self-Determination Act in 1988 and required that beginning in 1990, the Secretaries of the Interior and of Health and Human Services obtain or provide liability insurance or equivalent coverage for the tribes. Also in the late 1980s, the Congress began to enact statutes extending FTCA coverage to tribal self-determination contracts. In 1990, this coverage was extended permanently, thus giving injured parties the right to file tort claims against and recover monetary damages from the U.S. government for injuries or losses resulting from the negligent actions of tribal employees. See appendix I for more detail on the three statutory provisions that extended FTCA coverage to tribal contractors.

Federal Indian programs that tribes can contract under the Self-Determination Act fall under the jurisdiction of the departments of the Interior and of Health and Human Services. Within these departments, the primary agencies responsible for administering Indian programs are the Bureau of Indian Affairs and the Indian Health Service, which have a combined annual appropriation that now exceeds $4 billion. Indian tribes administer about one-half of these programs, or about $2 billion annually. As of March 2000, there were 556 federally recognized tribes. Agency officials estimate that nearly all of the federally recognized tribes administer at least one contract from the Bureau or the Health Service either directly or as a member of a tribal consortium.

The Bureau and Health Service programs administered by a tribe under the Self-Determination Act may represent only a portion of that tribe's total activities. The other programs tribes operate outside of the Self-Determination Act may include other federal programs, such as federal housing assistance for Native Americans under the Department of Housing and Urban Development, early childhood educational and care programs under the departments of Education and of Health and Human Services, and tribal enterprises, such as gaming operations and smokeshops or convenience stores. These programs have generally not been extended

FTCA coverage. The tribes themselves are liable for any injuries or damages caused by these programs, and they may choose to protect themselves against this liability by purchasing private liability insurance.

FTCA Regulations Prescribe Administrative and Judicial Review of Claims

The federal regulations implementing FTCA prescribe the process that federal agencies must follow in resolving claims arising from the negligent or wrongful acts of federal employees. With the extension of FTCA coverage to tribal contractors, tribal employees under a self-determination contract are considered federal employees for the purpose of FTCA coverage. According to FTCA regulations, claims are subject first to administrative review and determination by the federal agency whose actions gave rise to the claim. Claims must include evidence and information about the actions giving rise to the injury and the injury sustained, and must be presented in writing to the responsible agency within 2 years. The claim must also request a specific amount of compensation. Once a claim has been filed, the agency has 6 months in which to review the claim before the claimant may file suit in federal court. The administrative review can result in a claim's being denied, settled, or undecided. For a complete diagram of the FTCA claims process, see appendix II.

Claims arising from Bureau programs are filed with Interior's Office of the Solicitor, and claims arising from Indian Health Service programs are filed with Health and Human Services' Claims Branch. At Interior, nine solicitor field offices have been delegated responsibility for handling FTCA claims for Bureau programs. Although regulations implementing the Self-Determination Act require that claims be filed with the solicitor's headquarters in Washington, D.C., in practice claims are forwarded to the cognizant solicitor field office. The office responsible for reviewing a claim depends on the location where the incident occurred. Recently, two solicitor offices have delegated authority to process certain claims of $2,500 or less to the local Bureau regional office.

At Health and Human Services, claims are handled centrally at agency headquarters. All claims must be filed with the Claims Branch in Rockville, Maryland. The Claims Branch reviews all claims for completeness and requests additional documentation as necessary. For nonmedical claims of $10,000 or less, the Claims Branch can issue the initial administrative determination; those claims over $10,000 are forwarded to the Office of General Counsel for a determination. A more rigorous review process exists for medical claims. Each medical claim must undergo three reviews:

(1) a site review at the facility where the incident occurred; (2) an independent medical review from an off-site provider(s) in the pertinent field; and (3) a review by the Public Health Service's Quality Review Panel. The recommendations of the Quality Review Panel on the medical merits of the claim are then returned to the Claims Branch. The Claims Branch can issue the initial administrative determination for medical claims of $10,000 or less, while claims over this amount are forwarded to the Office of General Counsel.

The claimant must go through the administrative claims process before filing suit in federal court. Interior and Health and Human Services can approve settlements of less than $25,000. The Department of Justice must approve larger settlements. Settlements of $2,500 or less are paid directly from agency funds, and larger settlements are paid from the Judgment Fund in the U.S. Treasury.[2] Ultimately, if the claimant is dissatisfied with the administrative determination, the claimant may file suit in federal court. The Department of Justice handles lawsuits arising from FTCA claims. FTCA claims involving tribal contractors may be turned over, or "tendered," to private insurers when tribes have private liability insurance policies that provide coverage for the same incidents covered under FTCA.

Several Hundred Claims Have Been Filed Involving Tribal Self-Determination Contracts

Data on FTCA claims involving tribal contractors are not readily available because neither Interior nor Health and Human Services is required to track these claims separately from FTCA claims involving federal employees. However, in response to our request for claims data, these departments identified 342 claims filed from fiscal years 1997 through 1999 for programs contracted by tribes from the Bureau and the Health Service. These claims involved tribally contracted programs for 76 contractors (60 of the 556 federally recognized tribes and 16 organizations). Total damages claimed were $706 million (see table 1).

[2]The Judgment Fund is a permanent indefinite appropriation available to pay certain settlements and judgments against the federal government.

Table 1: Claims Arising From Tribally Contracted Programs From the Bureau of Indian Affairs and the Indian Health Service, Fiscal Years 1997-99

Dollars in millions

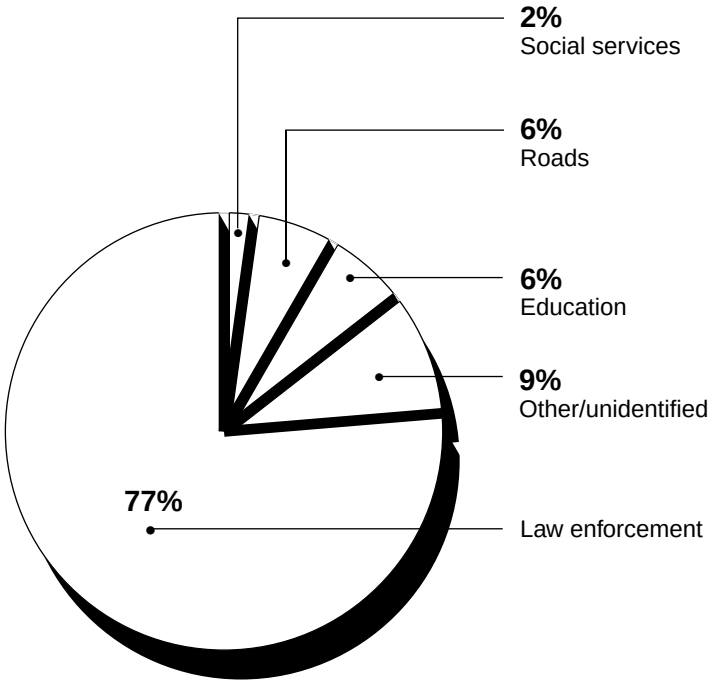
Program agency	Number of claims for tribally contracted programs	Percentage of total claims	Amount claimed	Percentage of total amount
Bureau of Indian Affairs	228	67	$219	31
Indian Health Service	114	33	487	69
Total	**342**	**100**	**$706**	**100**

About two-thirds of the claims involved Bureau programs, most notably law enforcement. The claims for the Bureau programs involved 46 contractors, and the median claim amount was about $71,000. The remaining one-third of the claims involved Health Service programs, of which about one-half involved patient care activities. The claims for the Health Service programs involved 40 contractors, 10 of which were also involved with claims at the Bureau, and the median claim amount was $1 million. Although some of these claims remain open, about 70 percent have been brought to closure, at a cost of about $2 million out of the $333 million claimed in these cases. Of the claims brought to closure, 127 resulted in settlement payments and 108 were denied.

Tribal Claims at the Bureau Result Largely From the Law Enforcement Programs of a Few Tribes

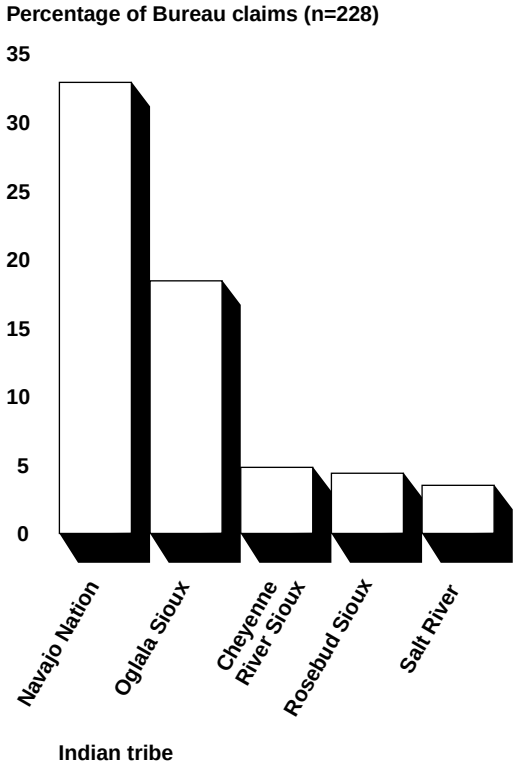
At the Bureau, law enforcement programs accounted for the largest category of claims involving tribal contractors (77 percent) filed during this period. Bureau and Solicitor officials attribute this statistic to the fact that law enforcement is a high-risk program. Of the law enforcement claims, the largest percentage (about 40 percent) involved vehicle accidents, followed by negligence, excessive force, and false arrests. The next two largest categories of claims arose from education and roads programs. See figure 1 for a breakdown of tribal claims by the type of Bureau program contracted.

Figure 1: Claims Arising from Tribally Contracted Programs From the Bureau of Indian Affairs, by Program Type, Fiscal Years 1997-99



The claims for Bureau programs involved 46 contractors (45 federally recognized tribes and 1 organization). The largest tribe, and the largest contractor of Bureau programs—the Navajo Nation—accounted for the largest percentage (33 percent) of claims arising from tribally contracted Bureau programs. The Oglala Sioux Tribe of the Pine Ridge Reservation accounted for about 18 percent of the claims for Bureau-contracted programs and is the fifth largest tribe, according to the Bureau's most recent labor force report. Five tribes accounted for 64 percent of the claims for Bureau programs, while an additional 41 tribes accounted for the remainder. See figure 2 for the five tribes with the most claims for Bureau-contracted programs.

Figure 2: The Five Tribes With the Most Claims for Bureau-Contracted Programs, Fiscal Years 1997-99

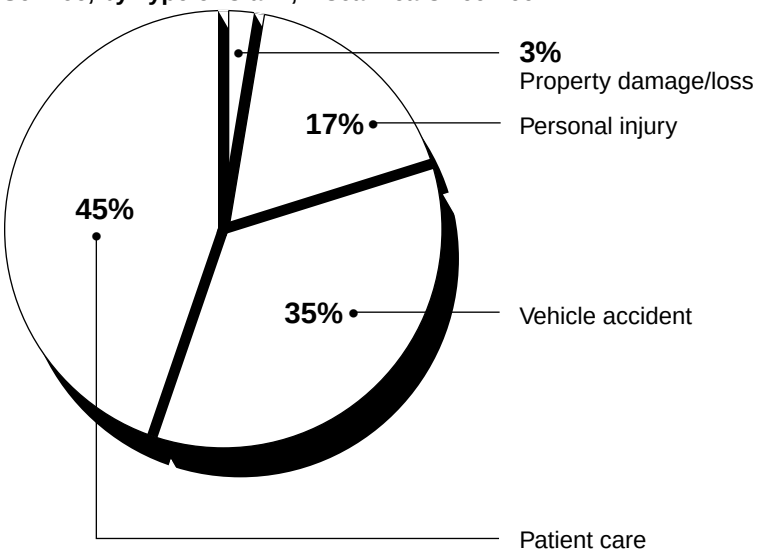


At the Bureau, tribal claims ranged from a low of $39 to a high of $50 million, with a median claim amount of about $71,000. Both the low and high claims involved torts that occurred while a claimant was in custody at a tribally contracted law enforcement facility. The $39 claim stemmed from the loss of personal cash while the claimant was in police custody. A partial award of $23 was paid on this claim, which reflected the official record of property that was placed in custody. The $50 million claim involved the wrongful death of an individual while in tribal police custody. This claim was denied at the administrative level because the Office of the Solicitor did not have a complete administrative record on which to base a decision. The tribe refused to provide the necessary information for the administrative decision. After being denied at the administrative level, the claimant filed suit in federal court. No court decision has been rendered.

Tribal Claims at the Health Service Result From Patient Care and Vehicle Accidents at a Few Tribes

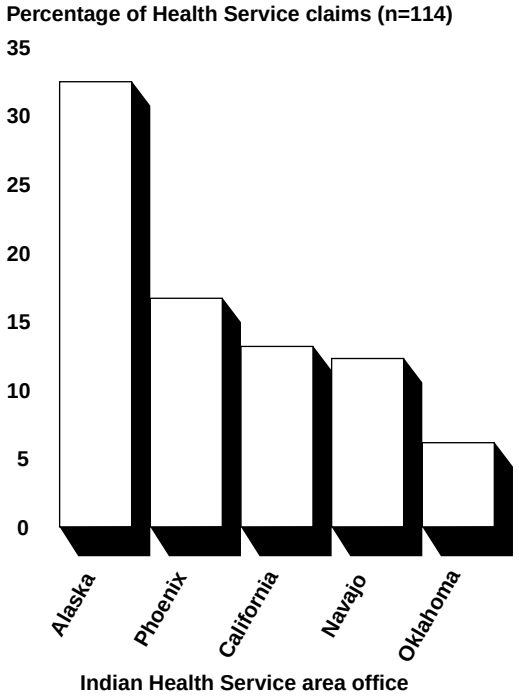
Health and Human Service's Claims Branch tracks claims by the type of claim and not by program. At the Health Service, patient care claims accounted for nearly 45 percent of all claims involving tribal contractors (51 out of 114 claims) filed during this period. Claims involving vehicle accidents constituted about 35 percent of the total, and personal injuries, about 17 percent (see fig. 3).

Figure 3: Claims Arising from Tribally Contracted Programs From the Indian Health Service, by Type of Claim, Fiscal Years 1997-99



The claims for Health Service programs involved 40 contractors (25 federally recognized tribes and 15 organizations), 10 of which also were involved in claims for Bureau programs. The 114 Health Service claims were more evenly distributed among the contractors than the Bureau claims. The Health Service contractor with the most claims—the Navajo Nation—had 14 claims, about 12 percent of the total. However, the Health Service claims data are more meaningful when grouped together by Health Service area office. Claims involving tribally contracted programs originating within the jurisdiction of the Health Services' Alaska Area Office accounted for about 33 percent of the claims, while claims within the Phoenix Area Office accounted for over 16 percent (see fig. 4).

Figure 4: The Five Indian Health Service Area Offices With the Most Claims Involving Tribally Contracted Programs, Fiscal Years 1997-99



At the Health Service, claims from contracted programs ranged from a low of $75 to a high of $100 million, with a median claim amount of $1 million. The $75 claim involved damages to a car that was parked adjacent to a tribally contracted facility. A tribal contract employee was treating a wooden fence with water sealant when some of the overspray damaged the finish on the claimant's car. The $75 claim to remove the spray and to wax the car was paid in full. The $100 million claim involved an alleged misdiagnosis that resulted in delayed treatment for breast cancer. This claim was denied because the evidence failed to establish that the claimant's condition was due to an act or omission of the tribal physician.

Status of Claims and Lawsuits

By the time of our review, the departments of the Interior and of Health and Human Services had denied 172 of the 342 claims and had awarded damages on 103; 67 claims were still pending.[3] Lawsuits were filed for 84 of the claims that had been denied or were still pending. Of these lawsuits, 13 had been dismissed, 24 resulted in damage awards, and 47 are still pending. Although some of the claims and lawsuits remain open, about 70 percent of claims have been brought to closure at a cost of about $2 million—$1.7 million paid by the federal government and $327,500 paid by private insurers. According to agency officials, the small, simple claims for minor incidents, such as a "fender bender," are generally resolved quickly, while the large, complex claims may take longer to resolve. Although only $2 million has been paid to date to resolve tribal claims filed from fiscal years 1997 through 1999, this figure will likely increase as the remaining claims are resolved. In aggregate, the percentage of tribal claims approved and the amount awarded are comparable with the resolution of other FTCA claims at Health and Human Services.[4]

At both agencies combined, only about 10 percent of all federally recognized tribes (60 out of 556) were involved in FTCA claims from fiscal years 1997 through 1999. A number of reasons were provided to explain why so few tribes had claims involving their self-determination programs. According to agency officials, even though FTCA coverage was extended about 10 years ago, it is still not well-known or understood by attorneys, tribes, or potential claimants. Also, to the extent that tribes continue to carry duplicative private liability insurance, claimants may be referred to private insurers rather than to the federal government for compensation.

[3]The status of the claims filed changes frequently as new administrative determinations are made, lawsuits are filed, or settlement agreements are reached. The data presented in this report were collected at various offices between November 1999 and May 2000.

[4]A similar comparison was not possible for Interior because of the lack of agencywide data on the disposition of tort claims.

FTCA Coverage for Tribal Self-Determination Contracts Presents Some Unique Issues

Our review identified a number of issues unique to FTCA coverage for tribal contractors. The U.S. government may be paying more than necessary to resolve claims involving tribal contractors because, during the administrative review of these claims, neither Interior nor Health and Human Services routinely checks to determine whether tribal contractors have duplicative private liability insurance that could cover these claims. Although this check is required by the Department of Justice for claims that go to litigation, and in fact has been done for some claims at the administrative level, most claims have been resolved without a check for duplicative insurance. The potential for duplicative liability coverage exists for tribal contractors because of tribes' long-standing practice of carrying private insurance to cover a wide range of activities, including those subsequently covered under FTCA.

Several unique legal issues have also emerged from recent litigation that illustrate areas for which FTCA coverage is not a perfect fit for tribal contractors. For example, under FTCA, federal courts have exclusive jurisdiction to resolve claims brought under the act, and the act provides for the removal of such claims from state courts. However, there is no similar removal authority for such claims filed in tribal courts. In addition, other legal issues have arisen about whether state law or tribal law should be used to adjudicate claims, whether tribal law enforcement officers should be considered federal law enforcement officers, and whether FTCA coverage has been extended to senior tribal officials, such as tribal council members.

The U.S. Government May Be Paying More Than Necessary to Resolve Claims Involving Tribal Contractors

The U.S. government may be paying more than necessary to resolve claims involving tribal contractors because, during the administrative review of these claims, neither Interior nor Health and Human Services routinely checks to determine whether tribal contractors have duplicative private liability insurance that could cover these claims. In 1975, when tribes began contracting to operate federal programs, they also assumed liability for those programs. Accordingly, many tribes acquired private insurance as one means to protect themselves against tort claims. The extension of FTCA coverage to tribal contractors in 1990, however, did not prohibit tribes from continuing to acquire private insurance and thus created the potential for duplicative liability coverage. Subsequent amendments to the Self-Determination Act in 1994 reiterated tribes' right to obtain private insurance, thereby perpetuating the risk of duplication. Although comprehensive liability insurance is no longer needed for tribal self-determination programs, tribes still need some private insurance as protection against claims not covered under FTCA.[5]

Unless tribes have taken steps to modify their insurance policies to specifically exclude acts covered under FTCA, they most likely have liability coverage that duplicates their FTCA coverage. An analysis of 20 private insurance policies, published in February 1998 by the George Washington University, found that none of these policies specifically excluded activities covered under FTCA.[6] To the extent that tribes use federal funds to purchase private liability insurance, it is possible that the federal government is paying twice—for tribes' insurance premiums and to settle tribal FTCA claims.

[5]Examples of claims not covered under FTCA include those arising from activities outside of a tribal contractor's scope of employment, non-self-determination activities, violation of constitutional rights, subcontractor activities, breach of contract, and workers' compensation. In 1998, the Congress directed the Secretary of the Interior to conduct a study of tribes' insurance (P.L. 105-277, title VII, Oct. 21, 1998). At the time of our review, the Secretary had not released the results of that study.

[6]*Assessment of Access to Private Liability Insurance for Tribes and Tribal Organizations With Self-Determination Contracts/Compacts*, The George Washington University Medical Center, Center for Health Policy Research (Feb. 1998).

For claims that go to litigation, Justice's practice is to ascertain whether the affected tribe has private insurance covering the claim. If so, Justice will look to private insurers to resolve these claims when it is in the best interests of the United States. For claims at the administrative level, neither Interior nor Health and Human Services has policies or procedures in place that require personnel handling FTCA claims to routinely check for duplicative insurance. Although staff at Interior's headquarters told us that they follow Justice's practice of checking for duplicative insurance, we found that only two solicitor offices routinely do so.[7] At these two locations, administrative and/or legal responsibilities for several claims were turned over to private insurers. Three of these claims have been resolved and resulted in payments from private insurance companies totaling about $327,500, or about 30 percent of payments made by these two offices (3.5 percent at one office and 100 percent at the other). This amount also represents about 16 percent of all payments made to date for claims involving tribal contractors from fiscal years 1997 through 1999. At Health and Human Services, the Claims Branch and the Office of General Counsel also do not routinely check for duplicative insurance. Some of the reasons given by Interior and Health and Human Services officials for not doing cross-checks include the absence of departmental policy, belief that this responsibility belongs to Justice, and the lack of statutory authority to pursue private insurers.

Unique Legal Issues Have Arisen Since FTCA Coverage Was Extended to Tribes

Four unique legal issues have emerged from recent litigation of tribal FTCA claims. These issues illustrate areas for which FTCA coverage is not a perfect fit for tribal contractors. Two of these issues are currently being litigated in federal courts around the country. The four legal issues are discussed briefly below.

- FTCA does not provide statutory authority for removing FTCA cases filed in tribal courts. Under the act, federal courts have exclusive jurisdiction to hear cases arising from FTCA claims, and the act provides statutory authority for removing such cases filed in state courts, yet no similar removal authority exists for such cases filed in tribal courts.

[7]For the remaining seven solicitor offices, four had made payments on claims involving tribal contractors without routinely checking for duplicative private insurance. However, one of these four offices handles claims primarily from the Navajo Nation, which is self-insured. The other three solicitor offices, which received a total of eight claims involving tribal contractors during fiscal years 1997 through 1999, had not made any payments on those claims at the time of our review.

Cases filed in tribal court can be problematic because FTCA does not provide the necessary authority to remove such cases from tribal court to federal court, where they belong.

- Legal questions have been raised about whether tribal FTCA claims should be adjudicated on the basis of tribal law or state law. Under FTCA, the federal government is liable for the negligent acts of its employees to the extent that a private person would be liable "in accordance with the law of the place where the act or omission occurred."[8] Recent 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.

- Legal arguments have been made recently that tribal law enforcement officers enforcing tribal laws should not be considered federal law enforcement officers. Under FTCA, claims for intentional torts, such as assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution, are barred except for claims against "investigative or law enforcement officers of the United States Government." If tribal law enforcement officers are not considered federal law enforcement officers, then claims for intentional torts involving those officers would be barred under FTCA.

- A recent decision by the Department of Justice not to provide FTCA coverage for tribal council members involved in litigation arising from the tribe's law enforcement contract with the Bureau has raised legal questions about the coverage for indirect tribal employees.

For more details on these four unique legal issues affecting FTCA coverage for tribal contractors, see appendix III.

Conclusions

Given tribes' historical liability for self-determination programs prior to 1990, their current liability for their non-self-determination programs, and the complexity and uncertainty of FTCA coverage, it is understandable why some tribes may choose to have comprehensive private liability insurance that covers all their programs. The Self-Determination Act allows tribes to use federal funds to purchase insurance. Even though tribes are allowed to

[8] 28 U.S.C. 1346(b) and 2672.

purchase private insurance that may duplicate their FTCA coverage, neither the Department of the Interior nor the Department of Health and Human Services routinely checks to see if this has happened before paying claims involving tribal contractors. Ideally, the possibility of duplicative insurance will decrease in the future as tribes become more familiar with how FTCA coverage works and take steps to amend their private insurance policies accordingly. However, as long as federal funds continue to be used by tribes to purchase duplicative insurance, the government should receive the benefits of those policies.

Recommendation

To ensure that the federal government is not paying more than is necessary to resolve FTCA claims involving tribal contractors, we recommend that the Secretaries of the Interior and of Health and Human Services direct their claims processing personnel to determine if duplicative private liability insurance exists and tender the claims to the private insurers when it is in the best interests of the United States to do so.

Agency Comments

We provided a draft of this report to the departments of the Interior, Health and Human Services, and Justice for their review and comment. The Department of the Interior agreed with our report that the U.S. government could potentially pay both for the claims and the liability insurance to cover them. The Department also stated that the report should identify two anomalies created by the fact that the federal government, not the tribes, is ultimately liable for these claims. First, the incentives to reduce the number of claims are not present for tribal contractors, and second, from time to time, a tribe, or its employees, has not cooperated in resolving a claim. With respect to the first concern, our analysis of the claims arising from Bureau-contracted programs showed that over 75 percent of the tribal contractors had three claims or fewer over the 3-year period from fiscal year 1997 through 1999. Only five tribal contractors had more than eight claims over this period (see fig. 2). Some risk management programs could be targeted to a handful of tribes, but the majority of tribal contractors had only been involved with one or two claims. With respect to the second concern, Solicitor and Bureau officials provided us with isolated examples during our review of situations in which tribal contractors had not cooperated with the Department in resolving a claim. However, since the Department does not track these claims, or compile any agencywide information on problems in resolving these claims, we were unable to determine the extent of this problem. We agree with the Department that more analysis of these

problems and possible solutions to address them are necessary. The Department of the Interior also provided technical comments, which we incorporated as appropriate. The Department's comments are in appendix IV.

The Department of Health and Human Services agreed with the facts presented in the report and with its recommendation. The Department also provided more specific details on the Indian Health Service's involvement in the FTCA claims process. The Department's comments are in appendix V.

The Department of Justice provided technical clarifications, which we incorporated as appropriate.

Scope and Methodology

To assess how the departments of the Interior and of Health and Human Services have implemented FTCA coverage for tribal contractors, we interviewed officials from Interior, Health and Human Services, and Justice and reviewed pertinent legislation, regulations, and departmental guidance to identify procedures for handling FTCA claims involving tribal contractors.

For this review, we sought to determine the FTCA tribal claims history for the Bureau of Indian Affairs and the Indian Health Service for fiscal years 1997 through 1999. Since neither Interior nor Health and Human Services uniformly tracks FTCA claims involving tribal contractors separately from FTCA claims involving federal employees, our ability to develop a tribal claims history required the cooperation of individual agencies and offices to identify tribal claims processed at those locations. We established parameters for our claims history and planned our fieldwork on the basis of preliminary estimates of claims volume and information about the claims process provided by these agencies and offices.

For the Bureau, we obtained tribal claims data from each of the nine Interior solicitor offices that handle Bureau claims. These offices operate autonomously, and the claims data they track and the claims files they maintain can vary by office. Although we relied on these offices to identify all tribal claims received between fiscal years 1997 and 1999, we visited five of these offices to assist with their data collection efforts and to verify the data. The offices selected for site visits were those whose estimated claim volumes were the highest.

Two solicitor offices began in 1996 to track tribal and nontribal claims separately. Since these two offices handle high claim volumes, we focused our data collection efforts on fiscal years 1997 through 1999. Tribal claim histories for the other seven offices, whose claim volumes are substantially lower, were determined by reviewing individual FTCA claims files to determine whether the claims arose from tribally contracted or federally run programs.

For the Health Service, we obtained claims data from Health and Human Service's Claims Branch, headquartered in Rockville, Maryland, and its Office of General Counsel, headquartered in Washington, D.C. The Claims Branch and the Office of General Counsel maintain separate systems for tracking tort claims. Although neither office formally tracks claims involving tribal contractors, they use informal methods to identify such claims. We used this information to compile a list of claims involving tribal contractors received from fiscal years 1997 through 1999. Because of the lack of available files for the older resolved claims, we did not review the entire universe of 565 Health Service claims for fiscal years 1997 through 1999 to determine whether all the claims involving tribal contractors had been identified.

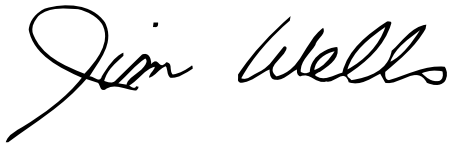
To identify FTCA issues unique to tribal FTCA claims, we interviewed personnel involved in processing administrative claims and attorneys involved in defending lawsuits arising from such claims. We asked claims personnel from the departments of the Interior and of Health and Human Services whether they routinely check for duplicative private insurance when processing claims involving tribal contractors. Given the unique legal issues identified by agency officials, we also reviewed relevant FTCA claims files, related litigation files, and court decisions.

We conducted our review from October 1999 through June 2000 in accordance with generally accepted government auditing standards.

We are providing copies of this report to interested congressional committees, the Honorable Bruce Babbitt, Secretary of the Interior; the Honorable Donna E. Shalala, Secretary of Health and Human Services; the Honorable Janet Reno, Attorney General of the United States; and other interested parties. We will also make copies available to others on request.

If you or your staff have any questions about this report, please call me at (202) 512-3841. Key contributors to this report were Linda Chu, Chet Janik, and Jeff Malcolm.

Sincerely yours,



Jim Wells
Director, Energy, Resources,
and Science Issues

Three Provisions Extended FTCA Coverage to Tribal Contractors

Since the late 1980s, three separate provisions have been enacted that extend FTCA coverage to tribal contractors. See figure 5 for a chronology of the enactment of the three provisions and subsequent amendments.

Figure 5: Chronology of the Three Provisions That Extended FTCA Coverage to Tribal Contractors.

Date	FTCA coverage provisions			The Indian Self-Determination and Education Assistance Act
	(1) 25 U.S.C. 450f(d)	(2) 25 U.S.C. 450f(note)	(3) 25 U.S.C. 2804(f)	
1975				**1975 originally enacted** The act authorized the Secretaries of Interior and Health, Education, and Welfare (now Health and Human Services) to require that any tribe requesting to enter into a contract pursuant to the act obtain liability insurance.
12/22/87	Coverage added for medical-related claims (P.L. 100-202, 101 Stat. 1329-246).			
09/27/88	1st amendment to coverage for medical-related claims (P.L. 100-446, 102 Stat. 1817).			
1988				**1988 amendments** Repealed the provisions that the tribes obtain liability insurance and added a new section making the Secretaries of the Interior and of Health and Human Services "responsible for obtaining or providing liability insurance or equivalent coverage" for tribal contractors beginning in 1990.
10/23/89		General coverage added for 1990 (P.L. 101-121, title III, sec. 315, 103 Stat. 744).		
08/18/90			Special law enforcement coverage added (P.L. 101-379, sec. 5(f), 104 Stat. 476).	
11/05/90		General coverage extended permanently (P.L. 101-512, title III, sec. 314, 104 Stat. 1959-1960).		
11/29/90	2nd amendment to coverage for medical-related claims (P.L. 101-644, title II, sec. 203(b), 104 Stat. 4666).			
11/11/93		1st amendment to general coverage (P.L. 103-138, title III, sec. 308, 107 Stat. 1416).		
1994				**1994 amendments** Provided that tribes could use their contract funds to purchase insurance.
10/25/94	3rd amendment to coverage for medical-related claims (P.L. 103-413, title I, sec. 102(8), 108 Stat. 4253).			

The following text presents the current language of the three provisions.

25 U.S.C. 450f(d)

(d) Tribal organizations and Indian contractors deemed part of Public Health Service

For purposes of section 233 of Title 42, with respect to claims by any person, initially filed on or after December 22, 1987, whether or not such person is an Indian or Alaska Native or is served on a fee basis or under other circumstances as permitted by Federal law or regulations for personal injury, including death, resulting from the performance prior to, including, or after December 22, 1987, of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, or for purposes of section 2679, Title 28, with respect to claims by any such person, on or after November 29, 1990, for personal injury, including death, resulting from the operation of an emergency motor vehicle, an Indian tribe, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under this section or section 450h of this title is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of Title 28, and including an individual who provides health care services pursuant to a personal services contract with a tribal organization for the provision of services in any facility owned, operated, or constructed under the jurisdiction of the Indian Health Service) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement: *Provided,* That such employees shall be deemed to be acting within the scope of their employment in carrying out such contract or agreement when they are required, by reason of such employment, to perform medical, surgical, dental or related functions at a facility other than the facility operated pursuant to such contract or agreement, but only if such employees are not compensated for the performance of such functions by a person or entity other than such Indian tribe, tribal organization or Indian contractor.

25 U.S.C. 450(f) note

Claims Resulting from Performance of Contract, Grant Agreement, or Cooperative Agreement; Civil Action Against Tribe, Tribal Organization, etc., Deemed Action Against United States; Reimbursement of Treasury for Payment of Claims

With respect to claims resulting from the performance of functions during fiscal year 1991 and thereafter, or claims asserted after September 30, 1990, but resulting from the performance of functions prior to fiscal year 1991, under a contract, grant agreement, or any other agreement or compact authorized by the Indian Self-Determination and Education Assistance Act of 1975, as amended (88 Stat. 2203; 25 U.S.C. 450 et seq.) or by title V, part B, Tribally Controlled School Grants of the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988, as amended, (102 Stat. 385; 25 U.S.C. 2501 et seq.), an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees are deemed employees of the Bureau or Service 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 Federal Tort Claims Act; *Provided further,* That beginning with the fiscal year ending September 30, 1991, and thereafter, the appropriate Secretary shall request through annual appropriations funds sufficient to reimburse the Treasury for any claims paid in the prior fiscal year pursuant to the foregoing provisions: *Provided further,* That nothing in this section shall in any way affect the provisions of section 102(d) of the Indian Self-Determination and Education Assistance Act of 1975, as amended (88 Stat. 2203; 25 U.S.C. 450 et seq.).

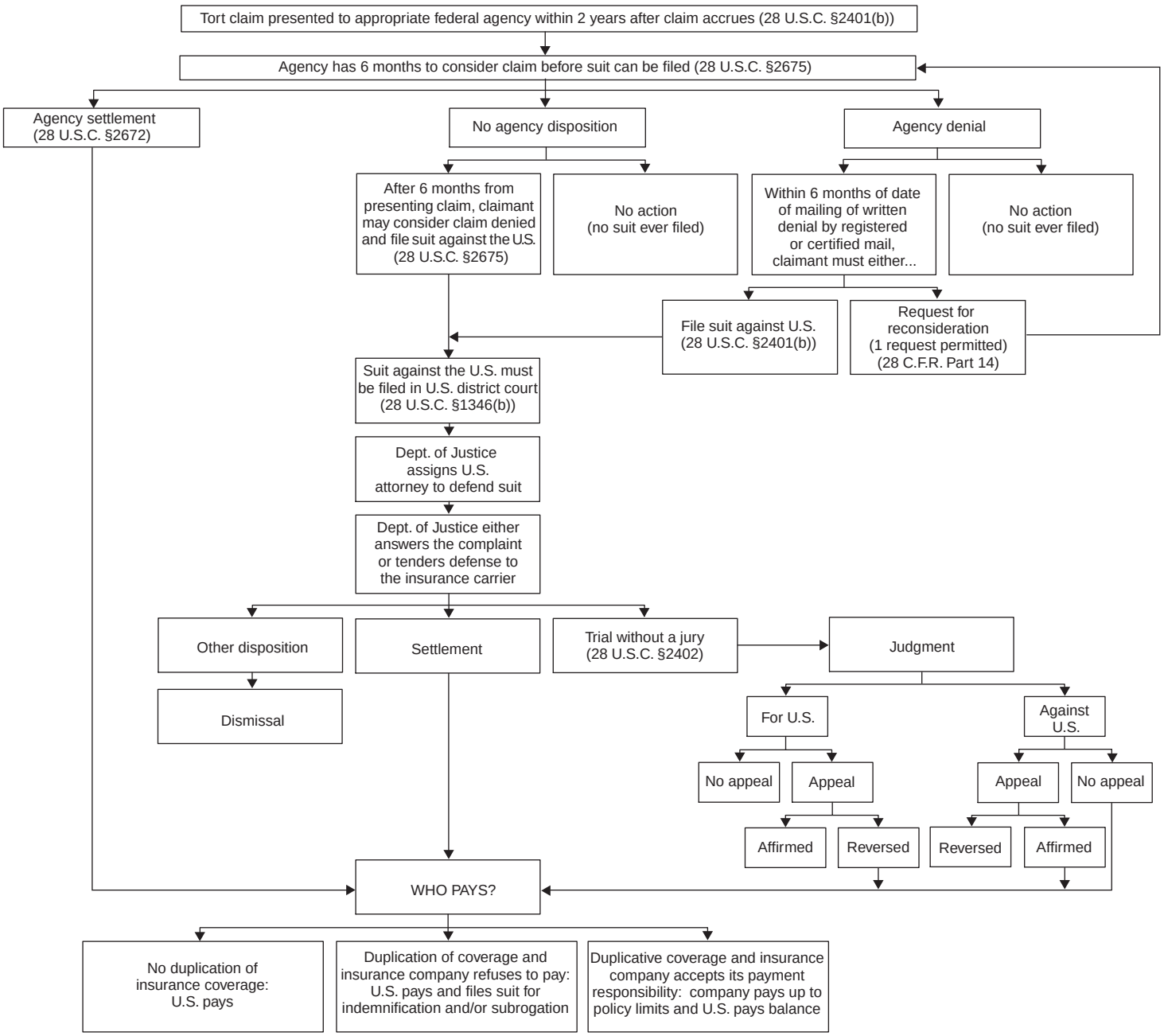
25 U.S.C. 2804(a) and (f)

(a) Agreement for use of personnel or facilities of Federal, tribal, State, or other government agency
The Secretary may enter into an agreement for the use (with or without reimbursement) of the personnel or facilities of a Federal, tribal, State, or other government agency to aid in the enforcement or carrying out in Indian country of a law of either the United States or an Indian tribe that has authorized the Secretary to enforce tribal laws. The Secretary may authorize a law enforcement officer of such an agency to perform any activity the Secretary may authorize under section 2803 of this title.

(f) Status of person as Federal employee
While acting under authority granted by the Secretary under subsection (a) of this section, a person who is not otherwise a Federal employee shall be considered to be—
(1) an employee of the Department of the Interior only for purposes of—
(A) the provisions of law described in section 3374(c)(2) of title 5, and
(B) sections 111 and 1114 of title 18, and
(2) an eligible officer under subchapter III of chapter 81 of title 5.

5 U.S.C. 3374(c)(2)
(c)(2) is deemed an employee of the agency for the purpose of chapter 73 of this title, section 203, 205, 207, 208, 209, 602, 603, 606, 607, 643, 654, 1905, and 1913 of title 18, sections 1343, 1344 and 1349(b) of title 31, and the Federal Tort Claims Act and any other Federal tort liability statute;

The FTCA Claims Process



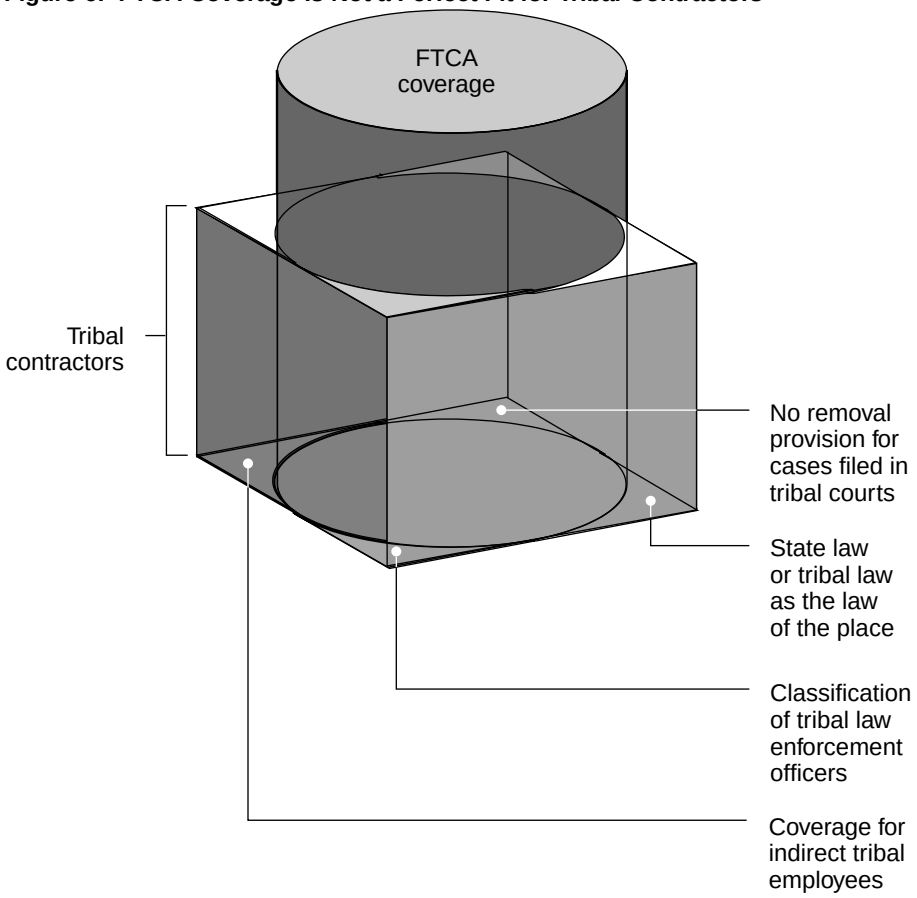
Source: The George Washington University Medical Center, Center for Health Services Research and Policy.

Legal Issues That Have Arisen With the Extension of FTCA Coverage to Tribal Contractors

Originally enacted in 1946, the Federal Tort Claims Act (FTCA) was not designed with the coverage of tribal contractors in mind. The act was designed to provide coverage for federal employees. The act itself and the provisions that extended the coverage to tribal contractors do not address a number of important legal issues specific to tribal contractors. For example, under FTCA, federal courts have exclusive jurisdiction to resolve claims brought under the act, and the act provides for removing such claims from state courts. However, there is no similar removal authority for such claims filed in tribal courts. In addition, other legal issues have arisen about whether state law or tribal law should be used as the "law of the place" to adjudicate claims, whether tribal law enforcement officers should be considered federal law enforcement officers, and whether FTCA coverage has been extended to senior tribal officials, such as tribal council members.

These four legal issues are areas for which FTCA coverage is not a perfect fit for tribal contractors (see fig. 6).

Figure 6: FTCA Coverage Is Not a Perfect Fit for Tribal Contractors



Two of the four issues—the state law versus tribal law and the classification of tribal law enforcement officers issues—are currently being litigated in federal courts around the country. The four legal issues are discussed in detail below.

No Removal Provision for Cases Filed in Tribal Courts

FTCA is the exclusive remedy for the public to pursue claims against the federal government for the negligent acts of its employees, and federal courts are the only courts with jurisdiction to hear cases on FTCA claims. Since federal courts have exclusive jurisdiction to hear FTCA claims involving federal employees, the act provides statutory authority for removing any such claims filed in state courts. However, no similar

statutory authority exists for FTCA cases filed in tribal courts. Federal employees and tribal contract employees have had FTCA cases brought against them in tribal courts. Cases filed in tribal court can be problematic because FTCA does not provide the necessary authority to remove such cases from tribal court to federal court, where they belong.

Officials from Interior's Office of the Solicitor and the Department of Justice stated that having statutory removal authority would make it easier to deal with these cases when they are filed in tribal courts. Currently, the federal government has three ways to try to deal with such cases if it chooses to do so. The first two options are available if the government learns of the case before a verdict has been entered. First, a letter can be written to the tribal court asking it to voluntarily dismiss the case. However, tribal courts are under no obligation to do so. Second, the government can file a motion in federal court seeking an injunction against the tribal court ordering it to stop hearing the case. Third, if the government chooses not to pursue the first two options, or it is unsuccessful, it may file a motion in federal court seeking to have the tribal court verdict set aside on the grounds that the tribal court lacked jurisdiction to hear the case.

State Law or Tribal Law as the Law of the Place

Under FTCA, the federal government is liable for the negligent acts of its employees to the extent that a private person would be liable "in accordance with the law of the place where the act or omission occurred."[1] Historically, the law of the place has been interpreted to mean the law of the state where the incident occurred. Legal questions are now being raised about whether the "law of the place" should be tribal law for incidents that occur on Indian land.

In June 1999, a judge for the federal district court in New Mexico ruled that the law of the Pueblo of Acoma should be the controlling "law of the place" and not New Mexico state law. This case involved a medical malpractice claim involving an Indian Health Service hospital located within the bounds of Acoma tribal land. At issue was the medical malpractice cap of $600,000 under New Mexico state law. In ruling that the law of the Pueblo of Acoma should be the controlling "law of the place," the judge ruled that the

[1]28 U.S.C. 1346(b) and 2672.

plaintiff was not bound by New Mexico's medical malpractice cap of $600,000.

The courts have been split on their interpretations of the law of the place. Other federal judges in New Mexico and Arizona have ruled that "law of the place" should continue to be interpreted to mean state law. The Department of Justice's position is that the law of the place should be state law. Agency officials are concerned that any movement towards using tribal law as the controlling law of the place could seriously complicate the resolution of these claims.

Classification of Tribal Law Enforcement Officers

Claims for intentional torts, such as assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution, are barred under FTCA, except for claims against "investigative or law enforcement officers of the United States Government." An investigative or law enforcement officer is defined in the statute as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."[2] Legal arguments have been made recently that tribal law enforcement officers enforcing tribal laws should not be considered federal law enforcement officers. If tribal law enforcement officers are not considered federal law enforcement officers, then claims for intentional torts involving those officers would be barred under FTCA.

In September 1998, a federal district judge for the Western District of Washington ruled that tribal police officers for the Suquamish Indian Tribe were not federal law enforcement officers and dismissed all of the intentional tort claims against the United States arising from the actions of those tribal police officers. A similar case is currently being litigated in Montana, and the Department of Justice is again arguing that the case should be dismissed because the tribal police officers are not federal law enforcement officers.

For fiscal years 1997 through 1999, over three-quarters of the FTCA claims for Bureau programs contracted by tribes were from the law enforcement program. At least 34 of those claims involved intentional torts. The remaining were primarily for vehicle accidents. If this interpretation that

[2] 28 U.S.C. 2680(h)

tribal police officers are not federal law enforcement officers becomes widely accepted, then a large number of claims against tribal police officers would be barred.

Coverage for Indirect Tribal Employees

The 1990 provision that permanently extended FTCA coverage to tribal contractors does not specifically mention the types of tribal employees covered by FTCA. For a tribal employee to be covered under FTCA, the federal government must make a determination that the employee was performing a function within the scope of his or her employment under a self-determination contract. Federal funding provided to tribes, and the tribal employees paid with those funds, can be divided into two categories—direct and indirect. Direct employees are those who directly perform a function under a contract, while indirect employees perform support functions, such as accounting and finance, for multiple programs. Each direct program pays for its share of administrative costs through an indirect cost rate. Questions have been raised about FTCA coverage for these indirect employees, specifically for tribal council members to the extent that they are sued for entering into a self-determination contract.

In 1999, the Department of Justice declined to provide FTCA coverage for seven current and former tribal council members of the Omaha Tribe of Nebraska who were named in two lawsuits for their approval of the tribe's law enforcement contract. The two lawsuits were filed in state court and named 17 different individuals. (One suit named 16, the other 14; they had 13 individuals in common.) Under FTCA, Justice represented 7 of the 16 defendants in the first case, and 5 of the 14 in the second case. In both cases, Justice represented only the Bureau employees and the tribal law enforcement employees. Justice declined to provide coverage for the seven current and former tribal council members and three other indirect tribal employees because they were not "carrying out" a self-determination contract.

Under the provision that extended general coverage, FTCA coverage has been extended to Indian tribes, tribal organizations, or Indian contractors while they are "carrying out" a self-determination contract. The Department of Justice has interpreted this language as making a distinction between carrying out a contract and entering into a contract. According to Justice, providing coverage for a tribal employee sued for carrying out a self-determination contract is consistent with the law, while it is not appropriate to provide coverage for tribal council members being sued for

deciding on behalf of a tribe to enter into a contract with the federal government (including negotiating the terms of a contract).

In at least one other case, a decision was made to authorize representation of tribal council members. In November 1997, Justice decided to represent three current and former tribal council members for the Suquamish Tribe who were named in litigation involving the tribe's law enforcement and tribal justice contracts. Since representation decisions are made by the Department of Justice on a case-by-case basis, tribes do not always know which tribal employees are covered and when and it makes it difficult for them to fully utilize their FTCA coverage.

Comments From the Department of the Interior

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

JUN 20 2000

Jim Wells
Director, Energy, Resources,
And Science Issues
United States General Accounting Office
Washington, DC 20548

Re: Written Comments on Draft General Accounting Office Report, (GAO)

Dear Mr. Wells:

Secretary Babbitt has asked me to provide written comments to you on GAO draft report entitled Federal Tort Claims Act: Issues Affecting Coverage for Tribal Self-Determination Contracts (GAO/RCED-00-169), dated May 30, 2000 (Report).

Before I relay specific comments on the Report I would first offer this general observation.

In 1975, when the Indian Self-Determination Act (ISDA) was first passed, tribal contractors under the ISDA (638 Contractors) were responsible for all costs associated with accidents or torts caused by their employees. Because the cost of liability insurance was becoming an impediment to tribal contracting, in 1990, Congress extended Federal Tort Claims Act (FTCA) coverage to 638 contractors and their employees. The FTCA, which was originally enacted in 1946, was designed to provide redress to third parties injured by the tortious conduct of federal employees.

The primary goal of the ISDA is to create an independent "government to government" relationship between the Federal Government and each of the 556 federally-recognized Indian Tribes. In furtherance and recognition of this relationship, Tribes run their own federally-supported programs, hire their own employees, and supervise and manage their employees consistent with tribal law and customs. The amount of, and opportunities, for federal oversight of how those programs are administered by Tribes is significantly restricted by statute.

In the normal course, a liable party, including the Federal Government, is able to manage its risk by putting into place loss reduction programs which may include operational procedures or training employees or otherwise managing them in a manner that reduces risk exposure. However, when a 638 contractor's employee causes an injury covered by the FTCA, the Federal Government, not the Tribe, is ultimately liable for the injury. This unusual statutory scheme creates two anomalies. First, because accountability for torts resides with the Federal Government and not the Tribe, the normal incentives to engage in loss reduction activities are not present in the 638 program. Second, from time to time, we have been unable to obtain support from the Tribe or its employees in our efforts to investigate the facts and circumstances which led to the tort claim.

Given the fundamental importance of the contracting program to the Administration's support for Indian self-determination, we are anxious to find a way to address this issue. One possibility might be for the Federal Government to retain authority to terminate a contract in those circumstances where a contractor has generated an unusual number of claims or where the Tribe has not cooperated in the defense of a claim. While more analysis should be given to this problem and possible solutions, we suggest that the issue be identified in your report to the Committee.

Comments on the Draft Report :

1. The description of the FTCA process was accurate, except that the last paragraph on page 6, continuing on page 7, needs to be clarified. Since people unfamiliar with the FTCA may read the report, I recommend that the following paragraph be substituted in its place:

> "The claimant must go through the administrative claims process before filing suit in federal court. Interior and Health and Human Services can approve settlements of $25,000 or less, whereas the Department of Justice must approve larger settlements. Settlements of $2,500 or less are paid directly from agency funds, with larger settlements being paid from the Judgment Fund in the U.S. Treasury. Ultimately, if the claimant is dissatisfied with the administrative determination, the claimant may file suit in federal court. The Department of Justice handles lawsuits arising from FTCA claims. FTCA claims involving tribal Contractors may be turned over, or "tendered," to private insurers when tribes have purchased liability insurance policies that provide coverage for the same incidents covered under FTCA."

2

The cost of insurance will likely go down if the insurance does not cover torts under 638. If the insurance does cover 638 torts, we will save money by not paying. GAO is correct, there is a potential that the U.S. is paying for both the claims and the liability insurance to cover it.

2. In addition, I have a few technical comments as follows:

Page 1, ¶ 1, the final sentence should be revised to read:

"For the Bureau, the programs that can be contracted by tribes include**, but are not limited to,** law enforcement, education . . . ."

Page 3, ¶ 2, 2nd sentence: "then" should be "than."

If you wish to discuss this further, please feel free to contact Karen Sprecher Keating, Timothy S. Elliott or Alton E. Woods at 202-208-4722.

Sincerely,

Edward B. Cohen
Acting Solicitor

3

Comments From the Department of Health and Human Services

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Inspector General

Washington, D.C. 20201

JUN 16 2000

Mr. Jim Wells
Director, Energy, Resources,
and Science Issues
United States General
Accounting Office
Washington, D.C. 20548

Dear Mr. Wells:

Enclosed are the Department's comments on your draft report entitled, "Federal Tort Claims Act: Issues Affecting Coverage for Tribal Self-Determination Contracts." The comments represent the tentative position of the Department and are subject to reevaluation when the final version of this report is received.

The Department appreciates the opportunity to comment on this draft report before its publication.

Sincerely,

Michael Mangano
for June Gibbs Brown
Inspector General

Enclosure

The Office of Inspector General (OIG) is transmitting the Department's response to this draft report in our capacity as the Department's designated focal point and coordinator for General Accounting Office reports. The OIG has not conducted an independent assessment of these comments and therefore expresses no opinion on them.

Comments of the Department of Health and Human Services on the General Accounting Office Draft Report, "Federal Tort Claims Act: Issues Affecting Coverage for Tribal Self-Determination Contracts," GAO/RCED-00-169

General Comments

The Department of Health and Human Services (Department) thanks the General Accounting Office (GAO) for the opportunity to provide comments on GAO's draft report. The Department agrees with the overall report and provides the following comments on three issues outlined in the report that will make these issues more specific to the Department's Indian Health Service (IHS).

1. Describe the process for implementing Federal Tort Claims Act (FTCA) coverage for tribal self-determination contracts.

   The process for IHS is contained in Chapter 12 of the IHS "Internal Agency Procedures Handbook" and 25 C.F.R. Part 900, Sections 180-210. Each IHS area office is required to designate an "FTCA liaison" to assist tribes and tribal organizations in processing FTCA claims that may arise as a result of self-determination contracting. The IHS FTCA liaison is the IHS contact point for tribes. This person is responsible for: referring coverage questions to the appropriate IHS legal counsel; providing appropriate claims forms to the tribes; coordinating FTCA training for tribes; receiving and forwarding FTCA claims to the appropriate IHS office; and providing information relating to the status of claims filed by tribes. Appendix L of the "Internal Agency Procedures Handbook" contains a brief narrative description and a flow chart for the processing of FTCA claims. The flow chart has also been incorporated into GAO's report as Appendix II, "Flow Chart of FTCA Claims Process."

2. Determine the FTCA claims history for tribal self-determination contracts for Fiscal Years 1997 through 1999.

   Pursuant to IHS' "Internal Agency Procedures Handbook," the Chief, Claims Branch, of the Department's Program Support Center (PSC), is to be notified of all FTCA claims filed with IHS. (The Claims Branch has records pertaining to the actual claims history for the fiscal years in question.)

3. Discuss FTCA coverage issues that are unique to tribal contracts.

   The primary issue that is unique to tribal contractors involves the fact that they are put in a position of "standing in the shoes" of the Federal Government when providing services under self-determination contracts. Yet, neither the Department of Justice nor the Department's IHS is able to provide contractors with absolute certainty that all torts arising as a result of their carrying out a self-determination contract will be covered. Without this absolute certainty, most tribes continue to carry certain types of liability

insurance coverage to address those instances where the Federal Government (the Department of Justice) determines if a tribe is not covered by FTCA. When claims do arise, there are often questions as to whether the insurance provider or the Federal Government should defend the claim. As a spinoff to this issue, occasionally a tribe is denied the authority to purchase this kind of "umbrella" liability coverage under its contract by certain Federal officials. (This should not be the case, and when the Department hears about those situations we try to remedy them in favor of the tribe.)

Another issue that the tribes face when contracting under the Indian Self-Determination Act is knowing that their tribal administrators and councilmen will also be covered when sued in connection with an FTCA claim. In some cases the Department of Justice has defended program personnel involved in a tort yet left the councilmen who are responsible for the administration of the program unrepresented. This is why many councilmen purchase private insurance in addition to relying on the FTCA coverage they are statutorily provided.

GAO Recommendation

To ensure that the federal government is not paying more than is necessary to resolve FTCA claims involving tribal contractors, we recommend that the Secretaries of the Interior and of Health and Human Services direct their claims processing personnel to determine if duplicative private liability insurance exists and tender the claims to the private insurers when it is in the best interests of the United States.

Department Comment

The Department concurs. The appropriate IHS management official will meet with PSC claims processing staff to plan and implement a procedure for providing necessary information maintained by IHS (such as updated listings of tribes and tribal organizations with self-determination contracts and compacts with IHS, and a roster of all IHS area office FTCA liaisons) to enable PSC staff to identify which claims arising from IHS programs involve tribal contractors or compactors, rather than Federal employees. The PSC claims staff will develop procedures to contact the specific tribe or tribal organization involved (either directly or through the IHS' FTCA liaison) to determine if duplicative private liability insurance exists, and to transmit such claims to the Department's claims officer for possible tender to a private insurer, when it is in the best interest of the United States.

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