

**TESTIMONY OF MICHAEL WILLIS, ATTORNEY,  
HOBBS, STRAUS, DEAN & WALKER  
ON BEHALF OF BRISTOL BAY AREA HEALTH CORPORATION  
SENATE COMMITTEE ON INDIAN AFFAIRS  
HEARING ON BIA AND GAO REPORTS ON  
TRIBAL RISK MANAGEMENT  
JULY 12, 2000**

Good afternoon, Mr. Chairman and members of the Committee. My name is Michael Willis. I am an attorney with Hobbs, Straus, Dean & Walker, representing the Bristol Bay Area Health Corporation (BBAHC). BBAHC is a tribal consortium which operates the Indian Health Service ("IHS") hospital in Kanakanak, Alaska, and provides health services to 33 Alaska Native Villages in the 45,000 square mile Bristol Bay region. As a result of the statutory extension of the Federal Tort Claims Act ("FTCA") coverage to tribes, tribal organizations and tribal consortia, BBAHC has been protected by the provisions of the FTCA against any claims resulting from the performance of functions under its health care contracts and compacts with IHS pursuant to the ISDEAA since October 23, 1989.

First, the BBAHC emphasizes that FTCA coverage for Indian Self-Determination and Education Assistance Act (ISDEAA) activities was and remains an important and positive policy decision because contractors and compactors would otherwise have to divert program funds to obtain medical malpractice insurance and general liability coverage. In BBAHC's case, since all of its health care activities are provided in accordance with its self-governance agreement with the Indian Health Service, BBAHC no longer carries medical malpractice insurance.

As for general liability, contractors and compactors must still obtain some type of private insurance because the FTCA does not cover all risks associated with all their activities. For this reason, BBAHC has continued to carry some private insurance. However, since the primary purpose of this insurance coverage is to apply in cases not covered by the FTCA, BBAHC does not use IHS contract funds to pay premiums for this coverage. Although BBAHC has been advised by its broker that its premium rate reflects FTCA coverage, BBAHC has been advised that rate reductions are

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generally not being passed on to tribes based on the extension of the FTCA.

BBAHC has also found that it remains difficult to define precisely what is and what is not covered by the FTCA, leaving gray areas of residual risk at the fringe. A conservative risk management approach (not ignorance or inertia as the GAO report suggests) provides incentives to ISDEAA contractors and compactors to obtain private insurance coverage for those gray areas as well as for those activities performed outside the ISDEAA agreement. The difficulty of assessing the level of residual risk may be one of the reasons why premium rates have not been significantly reduced for ISDEAA contractors and compactors purchasing insurance coverage to supplement FTCA protection.

While BBAHC believes that the extension of the FTCA to tribal contractors has been significantly supportive of the federal policy of tribal self-determination (recently reconfirmed by the Senate in Senate Resolution 277), it has requested us to bring your attention a recent development which has raised a question as to whether the Department of Justice is fully supportive of these laws.

The United States Attorney for the District of Anchorage has demanded that BBAHC indemnify the United States for all or part of a \$2.8 million settlement negotiated by the United States Attorney for a claim involving BBAHC filed in accordance with the FTCA. (A copy of the demand has been provided to this Committee). Recently, we learned that the United States Attorney has also urged the Indian Health Service to make a claim on this same basis against BBAHC under the Contract Disputes Act. We understand that to date IHS has declined to take such action.

The demand by the U.S. Attorney stems from an incident that occurred on November 27, 1993, which resulted in injuries to a child attending a social function at a BBAHC facility. The child's family filed a claim which DHHS and the United States Attorney agreed was covered by the FTCA. BBAHC cooperated with the United States Attorney in his investigation of the claim. In August 1997 the claim was settled by the United States Attorney for \$2,800,000.

At the time of the incident giving rise to the claim BBAHC maintained a policy of general liability insurance which the United States Attorney claims is duplicative of coverage afforded

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BBAHC by extension of the FTCA. (We understand that the insurance policy applicable in 1993 was obtained to protect BBAHC against claims falling outside the scope of the FTCA and that BBAHC's broker at that time has signed a declaration stating that the premium cost to BBAHC reflected the existence of FTCA coverage.)

The United States Attorney tendered defense of the tort claim to BBAHC's private insurance company, Continental Insurance Company. The insurance company refused. Following settlement of the claim with the injured child's family, the United States filed suit against the insurer (U.S. v. CNA Financial Corp., U.S.D.C. Alaska, CA No. A98-285CV) seeking recovery of the settlement amount, attorneys fees, interest and expenses. We understand that CNA/Continental denies that the United States has any rights under the policy applicable in 1993.

If the United States Attorney continues to pursue the theory that the United States is an implied insured party under any policy of insurance obtained by a self-governance tribe or Title I contractor, then:

(1) no benefit and considerable additional risk for tribes results from the extension of FTCA coverage (the tribe or their insurers may be liable to the United States when the government attorneys represent them and settle or lose a case without the tribe having any control over the litigation or input into the terms of the settlement); and

(2) a primary purpose of Congress in extending FTCA coverage to reduce insurance costs to tribes operating programs under the ISDEAA is defeated. Tribes should not be required either to use inadequate "contract support funds" or dip into program funds in order to pay excessive insurance premiums. If the government is an additional insured under insurance policies obtained by tribes, there obviously is no reason for the insurer to reduce the premium based on the FTCA coverage. See S. Rep. No. 274, 100th Cong., 1st Sess. 8-13, (1987) (identifying the failure of the federal agencies to provide funding for overhead costs, such as liability insurance, which tribal contractors incur over and above the agency program contract, as one of the primary obstacles to full implementation of the self-determination policy).

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It is our opinion that existing law does not permit such recovery against tribes by the United States.

In passing the 1988 amendments to the ISDEAA, Congress included a new statutory requirement in Section 106(a)(2) that funding for overhead costs "shall" be added to the program funding provided under the contract. One of the principal items of so-called "contract support costs" was, and is, the cost of liability insurance. Since the federal government self-insures, agency budgets do not include funding for insurance. Congress also sought to address the inadequacy of funding for "contract support" by shifting the requirement to obtain liability insurance from contractors under the ISDEAA to the Secretary of the Interior and the Secretary of Health and Human Services. Public Law 100-472 ("the 1988 Amendments") added the requirement that

Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost effective basis for Indian tribes, tribal organizations and tribal contractors carrying out contracts... [under the ISDEAA].

The statute required the Secretary, in obtaining such insurance, to "take into consideration the extent to which liability under such contracts or agreements is covered by the Federal Tort Claims Act." See 25 U.S.C.A. § 450f(c)(1) (West Supp. 1998).

Notwithstanding the direction to the Secretary of the Interior to provide for general liability insurance on a national basis, the Secretary failed to take action. In the FY 1989 appropriations legislation Public Law 101-121 for the Department of the Interior and Indian Health Service, Congress temporarily extended the FTCA coverage to all liability claims against self-determination contractors for one year. When the Departments failed to take further effective steps under Section 102(c) of the ISDEAA in FY 1989, the Congress acted to extend the FTCA permanently to such claims in Section 314 of Public Law 101-512. The House Committee explained that in the light of the Department's failure to carry out the instructions from the Committee ". . . the Committee has no choice but to provide the required liability coverage on a permanent basis by extending the [FTCA] coverage." H. Rep. No. 101-789, at 72 (1990). The Senate Report expressly stated that the permanent extension of the FTCA coverage to general liability claims against self-determination

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contractors was "to meet the liability insurance provisions of Public Law 93-638, as amended." (Section 102(c)). S. Rep. No. 101-534, at 153-154 (1990). The Conference Report confirmed that the congressional intent in extending the FTCA was to satisfy the obligation of the federal agencies to provide general liability insurance under the ISDEAA. 136 Cong. Rec. H. 1344 (October 27, 1990).

By maintaining the policy that any liability insurance acquired by a tribal contractor to protect itself from claims which may fall outside the scope of the FTCA must also insure the United States, the Department of Justice defeats the congressional purpose of extending FTCA coverage to tribal contractors under the ISDEAA. No reduction in premium cost could be expected in that case. We do not know whether the Department of Justice has taken this position with other tribes, but we do understand that it is DOJ policy to tender the defense of FTCA claims to insurance companies which have issued liability policies to tribal contractors under the ISDEAA.

The concern that the United States will demand indemnification from tribes (and/or their insurers) for claims settled under the FTCA is not limited to BBAHC. The issue has been discussed recently in self-governance compact negotiations with the IHS in Alaska. In order to preserve the intended FTCA protection for tribal organizations administering health programs under self-governance agreements with the Indian Health Service, tribal co-signers of the Alaska Tribal Health Compact have proposed that the FY 2001 Annual Funding Agreements ("AFA") under the Compact include a provision to address this problem. The provision states that:

Programs, functions, services, and activities provided under this AFA are covered under the Federal Tort Claims Act... and any insurance coverage obtained by the [tribal organization] does not insure by implication or otherwise the United States against any judgment or other cost incurred as the result of the defense of such claim, or entitle the United States to contribution or indemnity, unless expressly so provided in such insurance.

IHS has indicated that it cannot agree to this proposed clause without DOJ approval. We understand that IHS and the agency's Office of General Counsel are seeking such concurrence. If approved, this provision would protect the co-signers'

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insurers to the Compact from exposure to DOJ claims for reimbursement for adverse judgments and costs in FTCA cases when a tribe obtains private insurance which is allegedly duplicative of FTCA. It would not, however, protect other tribes and tribal organizations outside the Alaska Tribal Health Compact which could be affected if this misguided FTCA practice by DOJ recurs.

We respectfully ask that your Committee request that the Department of Justice put an end to this practice. Unless the Department of Justice modifies its position, a clarifying amendment may be needed to assure that tribal contractors are able to rely on FTCA protection with full confidence that the United States will not turn around and sue the private insurance carriers after defending an FTCA case ostensibly on their behalf.

In closing, BBAHC reaffirms that the FTCA provides an effective system of protecting tribal organizations fulfilling federal program obligations within reasonable cost limitations. BBAHC urges that the following steps be taken to assist in maintaining the effectiveness of FTCA protection:

1. That this Committee communicate that the Department of Justice and Indian Health Service should agree to the co-signers' proposed FTCA provision for the FY 2001 AFA to the Alaska Tribal Health Compact noted above. Such communication should serve as a clear policy statement that the United States is not an implied insured under an ISDEAA contractor's or compactor's private liability insurance policy which is purchased to supplement FTCA protection;

2. That the Department of Health and Human Services and the Department of the Interior, in consultation with the Department of Justice, provide an authoritative definition of the scope of FTCA coverage which can be used to assist ISDEAA contractors and compactors in obtaining adequate supplemental, but not duplicative, insurance coverage from the industry;

3. That Interior and HHS consult with the insurance industry on rating residual risks and pricing of coverage accordingly.

Bristol Bay Area Health Corporation thanks you for your attention to these concerns.