United States General Accounting Office

GAO

Testimony

Before the Committee on Indian Affairs,
U.S. Senate

For Release on Delivery
2:30 p.m. EDT
Wednesday
July 12, 2000

FEDERAL TORT CLAIMS ACT

Claims History and Issues Affecting Coverage for Tribal Self-Determination Contracts

Statement of Barry T. Hill, Associate Director,
Energy, Resources, and Science Issues,
Resources, Community, and Economic
Development Division

GAO/T-RCED-00-234

Mr. Chairman and Members of the Committee:

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 Originally enacted in 1946, FTCA established a process by which individuals injured by federal employees could seek compensation from the federal government.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 a better understanding of how this coverage works, you asked us to review and report on various aspects of it. We provided this Committee with our report on July 5, 2000.[2] Our testimony today will focus on the FTCA claims history for tribal self-determination contracts and FTCA coverage issues that are unique to tribal contractors.

In summary:

- 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 Interior's Bureau of Indian Affairs and Health and Human Services' Indian Health Service. Total damages claimed were about $700 million. About two-thirds of these claims involved Bureau programs, most notably law enforcement. The remaining one-third involved Health Service programs, of which about one-half involved patient care. At both agencies, these claims involved a small number of tribes. Although some of these claims remain open, about 70 percent (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 federal 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 that duplicates their FTCA coverage, it is possible that the federal government is paying twice—once

[2]Federal Tort Claims Act: Issues Affecting Coverage for Tribal Self-Determination Contracts (GAO/RCED-00-169, July 5, 2000).

for tribes' insurance premiums and once to settle tribes' 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 now 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 having the government pay more than necessary to resolve these claims, our July 2000 report recommended that the departments routinely check for duplicative liability insurance. The Department of Health and Human Services agreed with our recommendation and the Department of the Interior acknowledged that such duplication might occur.

- 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, 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. Therefore, 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 jurisdiction resides.

Background

The Federal Tort Claims Act was enacted in 1946 and provides a limited waiver of the federal 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 Department of Justice handles lawsuits arising from FTCA claims.

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 private liability insurance, which reduced the funds available to provide direct program services. Thus, the Congress amended the 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 federal government for injuries or losses resulting from the negligent actions of tribal employees.

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 exceeding $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.

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. Total damages claimed were $706 million (see table 1).

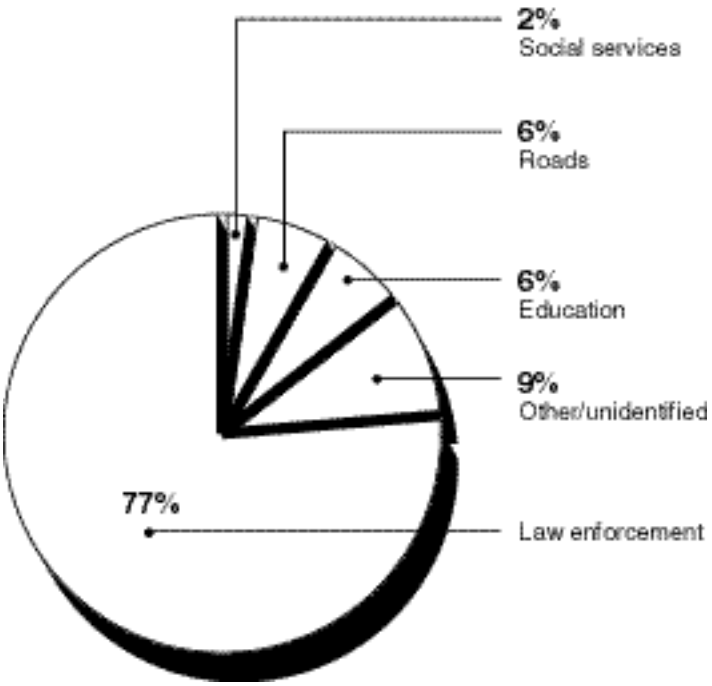
Table 1: Claims Arising From Tribally Contracted Programs From the Bureau of Indian Affairs and the Indian Health Service, Fiscal Years 1997-99

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**

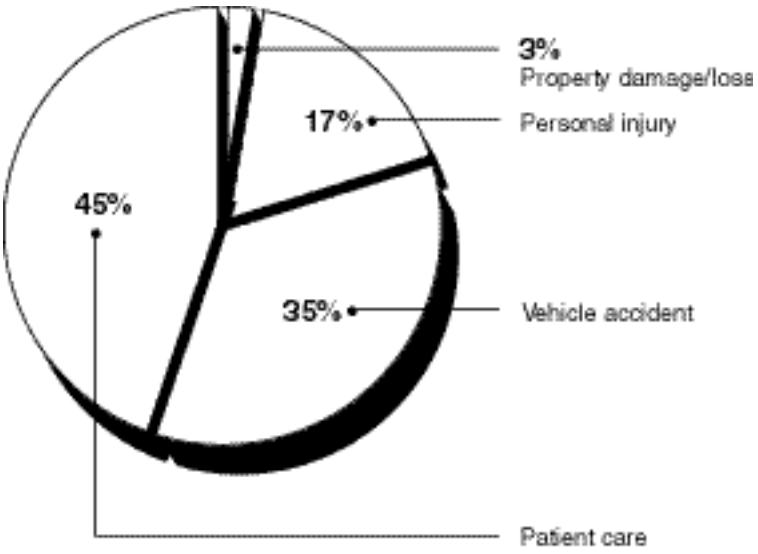
About two-thirds of the claims involved Bureau programs, most notably law enforcement (see fig. 1).

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



The remaining one-third of the claims involved Health Service programs, of which 45 percent involved patient care (see fig. 2).

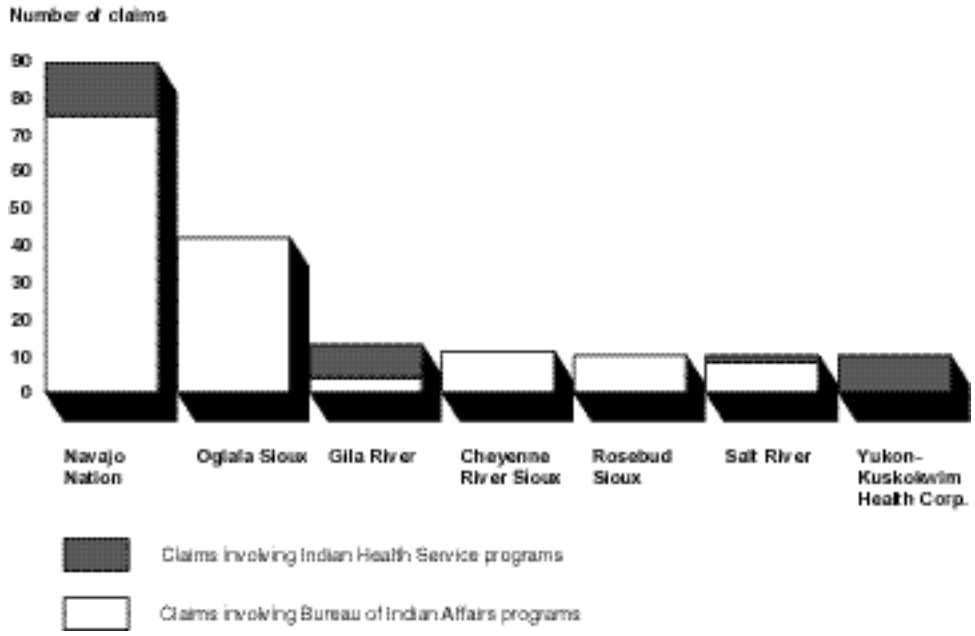
Figure 2: Claims Arising from Tribally Contracted Programs From the Indian Health Service, by Type of Claim, Fiscal Years 1997-99



Although two-thirds of the claims involved Bureau programs, they accounted for only about one-third of the total dollar amount claimed. The 228 claims involving Bureau programs ranged from a low of $39 to a high of $50 million, with a median claim amount of about $71,000. The 114 claims involving Health Service programs ranged from a low of $75 to a high of $100 million, with a median claim amount of $1 million.

The claims involved tribally contracted programs for 76 contractors (60 of the 556 federally recognized tribes and 16 organizations). The claims for the Bureau programs involved 46 contractors (45 tribes and 1 organization). The claims for the Health Service programs involved 40 contractors (25 tribes and 15 organizations), 10 of which also were involved in claims for Bureau programs. The Navajo Nation, the largest tribe, was the tribal contractor involved in the largest number of claims at 89—26 percent of the total number of claims. About two-thirds of the contractors were involved in only one or two claims. Seven contractors, each with 10 or more claims, accounted for over half the total number of claims (see fig. 3).

Figure 3: The Seven Contractors Involved in the Most Claims, Fiscal Years 1997-99



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 private liability insurance that duplicates their FTCA coverage, claimants may be referred to private insurers rather than to the federal government for compensation.

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—out of the $333 million claimed in these cases. Of the claims brought to closure, either administratively or through litigation, 127 resulted in settlement payments and 108 were denied. 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]

---

[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 tort claims disposition.

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 federal 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 private liability insurance that could cover these claims. Although this check is required by the Department of Justice for claims that are litigated, and in fact has been done for some claims at the administrative level, most claims have been resolved without a check for duplicative insurance. To protect against having the government pay more than necessary to resolve these claims, our July 2000 report recommended that the departments routinely check for duplicative liability insurance.

Several unique legal issues have also emerged from recent litigation. These issues 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 Federal Government May Be Paying More Than Necessary to Resolve Claims Involving Tribal Contractors

The federal 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 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 that duplicates their FTCA coverage, it is possible that the federal government is paying twice—once for tribes' insurance premiums and once to settle tribal FTCA claims.

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 to do so. 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

---

[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, violations of constitutional rights, subcontractor activities, breaches 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).

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 the 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. Similarly, at Health and Human Services, the Claims Branch and the Office of General Counsel do not routinely check for duplicative insurance.

The departments of the Interior and of Health and Human Services agreed that duplication might occur. We believe that as long as federal funds continue to be used by tribes to purchase private liability insurance that duplicates their FTCA coverage, the government should receive the benefits of those policies. As a result, we recommended 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 interest of the United States to do so.

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.

[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.

- FTCA does not provide statutory authority for the removal of 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 the removal of such cases filed in state courts, yet no similar removal authority exists for such cases filed 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.

- 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.

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

- 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. 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. This makes it difficult for them to fully utilize their FTCA coverage.

- - - -

Mr. Chairman, this concludes my statement. We would be pleased to respond to any questions that you or other Members of the Committee may have at this time.

Contacts and Acknowledgments

For information about this testimony, please contact Chet Janik or Jeff Malcolm at (202) 512-3841.

(141465)