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A BILL TO DEEM THE SUBMISSION OF CERTAIN CLAIMS TO AN INDIAN HEALTH SERVICE CONTRACTING OFFI- CER AS TIMELY

SEPTEMBER 20, 2012.—Ordered to be printed

Mr. AKAKA, from the Committee on Indian Affairs,
submitted the following

R E P O R T

[To accompany S. 2389]

The Committee on Indian Affairs, to which was referred the bill (S. 2389) to deem the submission of certain claims to an Indian Health Service contracting officer as timely, having considered the same, reports favorably without amendment and recommends that the bill do pass.

PURPOSE

The purpose of S. 2389 is to deem claims submitted to an Indian Health Service contracting officer pursuant to the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) on or before October 31, 2005, involving a claim that accrued after October 1, 1995, and on or before September 30, 1999, to have been timely submitted.

BACKGROUND

S. 2389 deems timely approximately two dozen contract claims that were presented to the Indian Health Service in 2005 over alleged contract underpayments which occurred in fiscal years 1996–1999. These claims were not filed earlier because tribal contactors reasonably believed that class action litigation filed in 2001 would protect their interests by tolling the applicable statute of limitations.

The Indian Self Determination and Education Assistance Act provides a process whereby Indian tribes or tribal organizations can assume operation of Federal Indian programs administered by

the Department of the Interior and the Indian Health Service within the Department of Health and Human Services. Tribal contractors administer these programs through contracts or compacts. In addition, this Act also authorizes the payment of contract support costs to these tribal contractors. These contract support costs are reasonable costs for activities which must be carried on by a contractor to ensure compliance with the terms of the contract and prudent management. 25 U.S.C. 450j-1(a)(2).

However, contending that these costs were not fully funded, Indian tribes filed suit against the Indian Health Service seeking full support costs. See *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 and *Pueblo of Zuni v. U.S.*, 243 F.R.D. 436 (D.N.M. 2007). These suits, filed March 5, 1999 and September 10, 2001, respectively, also sought class certification comprised of Indian tribes and tribal organizations operating Indian programs through these contracts and not fully paid the contract support costs.¹

In the *Cherokee Nation* case, the District Court denied class certification on February 9, 2001 and subsequently ruled on the merits of the case, which the Cherokee Nation appealed. The court stayed the action in the *Zuni* case pending the outcome of the appeal in the *Cherokee Nation* case. After the Supreme Court issued its ruling in the *Cherokee Nation* case, the *Zuni* District Court lifted the stay and denied class certification in 2007 for failing to comply with the mandatory administrative exhaustion scheme under the Contract Disputes Act which governs these types of disputes for tribal contracts and compacts.

Several tribal contractors filed individual claims with the agency contracting officer, which were all denied as untimely. On appeal of the denials, tribal contractors argued that the statute of limitations, for filing these claims was tolled until class certification was denied. The Civilian Board of Contract Appeals held that the statute of limitations for filing these claims was not subject to tolling.² On appeal, the Federal Circuit Court of Appeals held that the statute of limitation for these claims was not tolled under the general class action tolling doctrine, but it was subject to equitable tolling. The court remanded to the “for a determination as to whether, under the circumstances of these cases, the limitation period should be tolled.”³

However, this ruling does not settle whether any claims were timely nor does it settle the validity of any claim. Rather, each claim will need to be reviewed through the administrative process under the equitable tolling doctrine before any determination of the validity of any claim may be conducted.

NEED FOR LEGISLATION

Generally, for class action lawsuits, the statute of limitations for individual class members to pursue their own claims is suspended while a class action case is pending in the courts. In 2009 the U.S. Court of Appeals for the Federal Circuit ruled that this normal rule

¹In *Cherokee Nation*, the plaintiff sought class certification for tribal contractors with claims arising from 1988 to “the present”. In *Zuni*, the plaintiff sought class certification for tribal contractors with claims arising from 1993 to “the present.”

²*Arctic Slope Native Ass'n v. Sebelius*, 585 F.3d 784, 790 (Fed. Cir. 2009).

³*Id.* at 800.

does not apply in government contract litigation.⁴ Over the past 8 years, the entire litigation for these claims has focused on whether they were timely filed, not whether the government is actually responsible for having underpaid the contracts. This bill would contribute to judicial efficiency, but would not predetermine the outcome or validity of the litigation nor invite more litigation.

LEGISLATIVE HISTORY

On April 26, 2012, Senator Begich, for himself, Senator Crapo, Senator Murkowski, and Senator Tester, introduced S. 2389, which was referred to the Committee on Indian Affairs.

SECTION-BY-SECTION ANALYSIS

Section 1. Timely submission of certain claims

This section deems the submission of certain claims to an Indian Health Service contracting officer as timely.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business meeting on June 28, 2012, the Committee on Indian Affairs, by voice vote, adopted S. 2389 and ordered the bill reported to the Senate, with the recommendation that the Senate do pass S. 2389 as reported.

COST AND BUDGETARY CONSIDERATIONS

The following cost estimate, as provided by the Congressional Budget Office, dated August 6, 2012, was prepared for S. 2389:

S. 2389—A bill to deem the submission of certain claims to an Indian Health Service contracting officer as timely

Summary: S. 2389 would amend federal law regarding certain health care claims submitted to the Indian Health Service (IHS). Specifically, the bill would deem certain claims submitted to an IHS contracting officer on or before October 31, 2005, involving a claim that accrued between October 1, 1995, and September 30, 1999, to have been submitted within the period specified by the statute of limitations.

CBO estimates that enacting S. 2389 would increase direct spending from the Judgment Fund of the U.S. Treasury by \$12 million over the 2013–2022 period. Because the legislation would affect direct spending, pay-as-you-go procedures apply. Enacting S. 2389 would not affect revenues.

CBO also estimates that implementing S. 2389 would have an insignificant effect on spending subject to appropriation.

S. 2389 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).

Estimated cost to the Federal Government: The estimated budgetary impact of S. 2389 is shown in the following table. The costs of this legislation fall within budget function 800 (general government).

⁴*Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009).

	By fiscal year, in millions of dollars—											
	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2013– 2017	2013– 2022
	CHANGES IN DIRECT SPENDING											
Estimated Budget Authority	0	0	0	0	2	2	2	2	2	2	2	12
Estimated Outlays	0	0	0	0	2	2	2	2	2	2	2	12

Basis of estimate: The Indian Health Service (IHS) operates a network of health care clinics and hospitals in tribal areas. Because there are situations in which IHS patients require additional health care services that are not available at local IHS service sites, the agency contracts with private health care practitioners and facilities to supplement the care available to those patients. Certain private contract health care providers have contended that the reimbursement they received from IHS in the mid-to-late 1990s was insufficient to cover the full cost of providing care to IHS patients under the Indian Self-Determination and Education Assistance Act, and they resubmitted some of those claims from the 1990s in 2005. However, IHS determined that the providers had submitted those claims after the time allowed for claims submission had expired, removing them from consideration.

S. 2389 would allow the claims specified above to be resubmitted for payment by the government because these claims now would be considered “submitted timely.” According to legal representatives involved in the matter, the total value of the claims affected by this bill is about \$25 million.

The outcome of the claims against the government that would result from enacting S. 2389 is uncertain, both with respect to the amount of any damages that might be awarded to the health care providers and the timing of any resolution. Assuming enactment around the end of fiscal year 2012, CBO believes there is some probability that litigation brought based on these claims would result in a settlement payable within the 2013–2022 period from the Treasury’s Judgment Fund (a permanent, indefinite appropriation for claims and judgments against the United States). In a recent Supreme Court decision (in the case *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012)), the Court removed one of the government’s defenses against such claims.

Taking into account the uncertainty of the outcome, CBO assumes that about half of the resubmitted claims would be paid under S. 2389. Therefore, CBO estimates that enacting this bill would increase direct spending by \$12 million over the 2013–2022 period. Those payments would be made from the Judgment Fund. Given the extended length of time required to settle similar litigation, CBO expects that outlays would probably not begin until 2017 or later.

Pay-as-you-go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net changes in outlays and revenues that are subject to those pay-as-you-go procedures are shown in the following table.

CBO ESTIMATE OF PAY-AS-YOU-GO EFFECTS FOR S. 2389, AS ORDERED REPORTED BY THE
SENATE COMMITTEE ON INDIAN AFFAIRS ON JUNE 28, 2012

	By fiscal year, in millions of dollars—												
	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2012– 2017	2012– 2022
NET INCREASE IN THE DEFICIT													
Statutory Pay-As- You-Go Impact ...	0	0	0	0	0	2	2	2	2	2	2	2	12

Intergovernmental and private-sector impact: S. 2389 contains no intergovernmental or private-sector mandates as defined in UMRA.

Estimate prepared by: Federal Costs: Robert Stewart; Impact on State, Local, and Tribal Governments: Lisa Ramirez-Branum; Impact on the Private Sector: Marin Randall.

Estimate approved by: Holly Harvey, Deputy Assistant Director for Budget Analysis.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that the regulatory impact of S. 2389 will be minimal.

EXECUTIVE COMMUNICATIONS

The Committee has received no communications from the Executive Branch regarding S. 2389.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that the enactment of S. 2389 will not effect any changes in existing law.