No. 07-2274

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SOUTHERN UTE INDIAN TRIBE

Plaintiff-Appellant,

v.

MICHAEL O. LEAVITT, Secretary of the United States Department of Health and Human Services,

Defendants-Appellees.

Appeal from the United States District Court
for the District of New Mexico
The Honorable Judge William P. Johnson
D.C. No. 1:05-cv-00988-WJ-LAM

BRIEF *AMICUS CURIAE* OF THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF APPELLANT AND REVERSAL OF THE DISTRICT COURT

Lloyd B. Miller
Hilary V. Martin
Sonosky, Chambers, Sachse,
Miller & Munson, LLP
900 W. 5th Avenue, Suite 700
Anchorage, AK 99501
Telephone: (907) 258-6377
Facsimile: (907) 272-8332
E-mail address: lloyd@sonosky.net

SCANNED PDF FORMAT ATTACHMENTS ARE INCLUDED
WITH DIGITAL SUBMISSION SENT VIA E-MAIL

RULE 26.1(a) CORPORATE DISCLOSURE STATEMENT

Amicus National Congress of American Indians (NCAI) is a non-profit organization. NCAI has no parent corporation and, as it has no stock, no publicly held company owns 10 percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ADMINISTRATIVE DECISIONS

STATUTES

LEGISLATIVE HISTORY

OTHER AUTHORITIES

STATEMENT OF AMICUS CURIAE INTEREST

The National Congress of American Indians (NCAI) was founded in 1944 and is the largest tribal government organization in the United States. NCAI serves as a forum for consensus-based policy development among its over 250 member tribal governments from every region of the country. NCAI's mission is to inform the public and all branches of the federal government about tribal self-government, treaty rights and a broad range of federal policy issues affecting tribal governments, including contracting and compacting activities under the Indian Self-Determination and Education Assistance Act of 1975 (ISDA), 25 U.S.C. §§ 450 - 450aaa-18. Toward that end, NCAI submitted an *amicus* brief in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), and now submits this brief to assist the Court in addressing the closely related issues presented here.[1]

INTRODUCTION

IHS declined to award the Southern Ute Indian Tribe an ISDA contract to operate the IHS Southern Ute Health Clinic, because the Tribe would not agree to IHS's demand that the Tribe first waive in the contract the Tribe's right to have the contract state the full amount of the Tribe's "contract support cost" requirement to administer the Clinic.

---

[1] All parties have consented to the filing of this brief. NCAI Att. 1a-2a.

In its First Order, the district court correctly reversed IHS's decision. The court reasoned that IHS could not deviate from the ISDA's contract funding mandates, including: (1) the mandate that the contract include all "required" contract support costs identified under 25 U.S.C. § 450j-1(a); (2) the Act's further mandate that a decision to decline a contract proposal for funding reasons can only be supported if the proposal seeks greater funding than the applicable amount determined under § 450j-1(a); and (3) the Act's mandate to IHS to award a verbatim model contract and funding agreement that requires a recitation of the Tribe's full applicable amount determined under § 450j-1(a).

But in its Second Order, the district court essentially reversed course, ordering that the contract documents shall instead state a "zero" amount for contract support costs. The court explained that such a provision reflected the court's conclusion that appropriations were not available to pay any such costs to the Tribe. The Tribe has appealed this Second Order, seeking to enforce its statutory right to a contract that recites the amounts dictated by the ISDA, with payment of those sums then subject only to the "availability of appropriations," all as specified in the Act.

The question presented is whether IHS may lawfully require that the contract amount recite zero dollars, when the ISDA actually commands that: (1) the "applicable funding level for the contract" is to be "determined under section

450j-1(a);" (2) an approved contract must include "the full amount of funds to which the contractor is entitled" under § 450j-1(a), including contract support costs; and (3) the verbatim mandatory contract commands in sec. 1(b)(4) that the attached annual funding agreement is to specify, not "zero," but rather "no[ ] ... less than the applicable amount determined pursuant to [§ 450j-1(a)] of the [ISDA]."

SUMMARY OF ARGUMENT

I. Congress in the Indian Self-Determination Act required the Secretary to award a contract at a specified price, with payment of that price subject only to the "availability of appropriations." Congress required that this price include certain "contract support costs." Congress crafted this scheme in direct response to the failure over many years of the Secretary, including IHS, to pay in full tribal contract support costs (CSCs). *Infra* at 5-7.

IHS's insistence upon a contract that specifies "zero" in CSCs, subject to the possible addition of such costs sometime later, turns the Congressional scheme on its head, returning to IHS the very discretion over contract funding matters that Congress assiduously sought to eliminate. *Infra* at 7-9.

II. Whether IHS's fiscal year 2008 appropriation for CSCs will prove to be legally available to pay this contract in full, and thus what the consequence will be if it is not paid in full, cannot be known at this time. The contract has not yet been

awarded, it has not yet been performed, and it has not yet been paid. No claim for non-payment has been presented. Nor is there any evidence in the record that IHS's CSC appropriation has been fully obligated, or that Congress may not supplement that appropriation at a future time. Such currently speculative issues thus can only be assessed, if at all, at the time a contractor presents a claim under the ISDA and the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-612, as anticipated in 25 U.S.C. §§ 450m-1(a), (c). *Infra* at 10-12.

Even if the appropriations law issue IHS pressed below were ripe for decision, the Supreme Court in *Cherokee* made plain that IHS is legally obligated to pay an ISDA contract in full, including CSCs, where, as here, IHS has sufficient appropriations that are legally available to pay the contract—even if IHS chooses to spend that appropriation otherwise, and "even if [the] agency's total lump sum appropriation [available for CSCs] is insufficient to pay *all* the contracts the agency has made." 543 U.S. at 637-638. If, in such circumstances, the agency spends its money elsewhere, Congress has provided a remedy in "money damages" for the resulting non-payment. 25 U.S.C. § 450m-1(a). Under the ISDA, it is up to Congress, alone—not IHS—to limit the "availability of [IHS's] appropriations" to pay a given contract. *Infra* at 12-29.

ARGUMENT

I. IHS'S INSISTENCE ON A CONTRACT AWARDING "ZERO" IN CSCs IS CONTRARY TO THE ISDA.

In order to foster greater tribal self-determination and autonomy, and to free tribes from excessive federal control (25 U.S.C. §§ 450, 450a), Congress in the ISDA authorized an Indian Tribe to secure a contract, upon demand, for the operation of any IHS programs serving the Tribe. 25 U.S.C. § 450f(a)(1). Congress's actions here marked a radical but necessary departure from previous policies of federal paternalism and from the control of dominating federal agencies that fostered tribal dependency over tribal self-sufficiency. Congress in § 450j-1(g) further directed that, upon approval of a contract, "the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under [§ 450j-1(a)]," a sum which must include both: (1) the program amounts which the Secretary would have otherwise provided to operate the contracted program, § 450j-1(a)(1); and (2) the "contract support costs" which the tribal contractor must incur to administer the program, §§ 450j-1(a)(2), (3) & (5). Congress developed these measures to overcome federal agencies that historically resisted the ISDA's mandate in order to protect their own bureaucracies and budgets. The history of the ISDA from its enactment in 1975 through substantial amendments in 1988 and 1994 shows the unusual evolution of a

statute under which Congress has repeatedly stripped IHS and other agencies of their discretion, largely because of Congress's conclusion that the agencies were protecting their own bureaucracies at the expense of tribal self-determination. As a result, Congress placed the Secretary under the strongest possible obligation to fully fund CSCs, without measurable discretion, and (as *Cherokee* reflects) even at the expense of the agency's own internal operations.

It is for this reason that Congress was so insistent that the sum of the program amounts and the CSC amounts shall be "add[ed] to the contract" in full upon approval. § 450j-1(g). Indeed, in the model verbatim contract which Congress mandated IHS must use, Congress repeated that the amount to be specified each year in the accompanying annual funding agreement "shall not be less than the applicable amount determined pursuant to [§ 450j-1(a)] of the [ISDA]," a sum which includes both program and CSC amounts. 25 U.S.C. § 450*l*(c), sec. 1(b)(4).

Under the Act, a tribal contractor's right to these combined sums is subject to just one qualification: actual payment of a self-determination contract is, at all times, subject to the "availability of appropriations." § 450j-1(b); § 450*l*(c), sec. 1(b)(4). Thus, the Secretary never breaches his duty under a contract if the Secretary's failure to pay the full amount that Congress required be stated in the contract is due to the absence of legally available appropriations.

This is the contracting scheme that Congress carefully delineated in the Act through a succession of amendments.[2] Those amendments followed years of entrenched agency resistance to carrying out Congress's intent in earlier, more general versions, of these same provisions.[3] In direct response to that misconduct, Congress directed that the full amount of funding a Tribe requires to carry out a contract is to be calculated under the ISDA, with that same amount to be repeated in all the contract documents, while the actual payment of that amount ultimately depends upon the "availability of appropriations" that Congress provides to IHS to make the payment. Congress thus left it to itself, alone—and not IHS—to decide whether the agency would be excused from fully paying the contract requirement.

IHS has asserted in this case (and the district court in its Second Order agreed) that the ISDA actually permits a very different scheme, one in which the agency makes the initial judgment, before entering into any contract, about the "availability

---

[2] *See, e.g.*, the Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285; the Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, tit. I, 108 Stat. 4250.

[3] *See generally Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1457-1458 (10th Cir. 1997); *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1344-1345 (D.C. Cir. 1996) ("*RNSB*"); S. Rep. No. 100-274, at 7-10, 12-13, 33, 37 (1987); S. Rep. No. 103-374 (1994) (all discussing the IHS's and the Bureau of Indian Affairs' failings under prior versions of the Act, particularly in funding ISDA contracts).

of [its] appropriations" to pay a particular sum, and in which the agency then specifies in the contract documents only the lesser amount that the agency has decided it can pay. Thus, instead of having the full amount "added" to the contract under § 450j-1(g) and "specified" in the annual funding agreement under sec. 1(b)(4) of the model contract, with payment of that amount then "subject to the availability of appropriations" (sec. 1(b)(4); § 450j-1(b)), IHS asserts that the Act permits these steps to be reversed, so that the contract amount is whatever sum IHS initially believes will be available to pay the contract (in this case, "zero" for payment of contract support costs in fiscal year 2008).

IHS's approach turns Congress's scheme on its head and is patently at odds with the plain language of the Act. As other courts have observed, if Congress intended to accomplish anything through its various ISDA amendments, it was to eliminate entirely any agency discretion over all contract funding matters—especially those involving contract support costs. *RNSB*, 87 F.3d at 1344-1345; *supra* 7 n.3.

IHS's approach also permits the agency to make a self-serving judgment about its duty to pay some or all of a Tribe's statutory requirement—here, zero in IHS's estimation—and then to award a contract restating that self-serving sum, thereby avoiding any future contest about whether IHS's legal judgment is, in fact, correct. This, too, is contrary to Congress's scheme, in which Congress anticipated—and

expressly directed—that a contract would state the full amounts required by the Act (*supra* 4-5), so that any subsequent disagreement over the "availability of appropriations" to pay that contract would be resolved in a contested proceeding brought under the CDA, all as contemplated in the ISDA's remedial provisions, *see* 25 U.S.C. §§ 450m-1(a), (c).[4] That scheme is critical to the integrity of the ISDA, for, as the Supreme Court demonstrated in *Cherokee*, IHS's self-serving judgments about the "availability of [its] appropriations" to pay the amounts Congress instructed the agency to pay have to date been universally proven wrong. 543 U.S. at 643-645 (reversing IHS's conclusion that its appropriations over a four-year period were not legally available to pay two tribal contractors); *Shoshone-Bannock Tribes v. Leavitt*, 408 F. Supp. 2d 1073, 1081 (D. Or. 2005) (opinion subsequently withdrawn following settlement); *Application for Attorney Fees of Seldovia Village Tribe*, IBCA No. 3862F-97, 2005 WL 1805664 (I.B.C.A. July 26, 2005).

[4] IHS could not invoke the alternative of issuing a partial declination over the CSC funding issue, *see* 25 U.S.C. § 450f(a)(2)(D), because that provision expressly permits IHS to decline to award an amount only if the amount the Tribe seeks is in excess of the "applicable funding level for the contract, as determined under section 450j-1(a)." Here, the "zero" amount that IHS is advancing is obviously less than the "applicable funding level" for the Tribe's CSCs as determined under §§ 450j-1(a)(2), (3) & (5).

II. THE DISTRICT COURT'S CONCLUSION ABOUT THE "AVAILABILITY OF APPROPRIATIONS" TO PAY THE TRIBE WAS PREMATURE AND CONTRARY TO LAW.

A. Whether IHS's Appropriation is Legally Available to Pay the Tribe in Full Should Only be Resolved, if Ever, in a Breach of Contract Action.

Whether, as a matter of law, appropriations will be available for IHS fully to pay the Appellant Tribe the full CSC requirement that Congress commanded must be stated in the contract cannot be known at this time. The same is true about the government's potential liability in money damages under the CDA and the ISDA if IHS does not pay that full amount. These matters cannot be known for two reasons.

First, nothing has yet happened. The contract has not yet been awarded, it has not yet been performed, and it has not yet been paid. No claim for any non-payment has been made, and none may ever be made. IHS's assertion today that it will not pay any CSCs constitutes, at best, an anticipatory breach, but one for which no remedy is truly ripe.

Second, even under IHS's view of its appropriation—that an appropriation which is insufficient to pay all contractors legally excuses IHS from fully paying any contractors (a dubious proposition we address *infra* 12-29)—there is no evidence in the record that the current CSC appropriation has been fully obligated to other contractors. *See Menominee Indian Tribe v. United States*, __F. Supp. 2d__, 2008

WL 680379, *2 (D.D.C. 2008) (requiring such evidence before assessing IHS's "availability of appropriations" defense). Moreover, Congress may yet take action to supplement the fiscal year 2008 CSC appropriation, just as it did in fiscal year 2007. *See* U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110-28, §§ 6501-6502, 121 Stat. 112, 176-177 (2007) (increasing IHS's CSC earmark to $269,730,000) (NCAI Att. 17a-19a).

These points underscore the wisdom of Congress's statutory scheme, where all these issues are addressed through the ISDA's remedies after the standard contract containing the standard CSC amounts is awarded, after the contract is performed, after the fiscal year is over, after IHS (like the Tribe) is in a position to do an accounting, and after the contractor elects (if at all) to pursue a claim.

B. Ripeness Issues Aside, IHS's Appropriation is Legally Available to Pay the Tribe's CSCs in Full.

It appears that the underlying theoretical appropriations law issue was not litigated in this case: Whether, as a matter of law, appropriations are legally available to pay this contractor (that is, assuming IHS's entire CSC appropriation is not augmented by Congress, is spent by IHS, and proves insufficient for IHS to pay all tribal contractors). The district court did not offer any analysis on this score, instead

simply observing that a breach of contract action over the CSC payment issue would be "an exercise in futility" and "perhaps frivolous." Second Order at 9.

Indeed, the court offered only two points here. First, the court asserted that the Tribe had conceded the point, although the quotation from the Tribe's brief did not so state. (In any event, a concession on a point of law is neither binding nor an excuse for not assessing the merits of IHS's assertion, even a stipulation by the parties on a question of law cannot bind the court. *Koch v. United States, Dep't of Interior*, 47 F.3d 1015, 1018 (10th Cir. 1995).)

Second, the court in footnote cited back to its First Order. Second Order at 8 n.7. But the quoted passage is highly equivocal, stating merely that:

> The United States Supreme Court's decision in [*Cherokee Nation*] suggests, as this Court has noted, that "the Government's obligation to pay CSC may be different where there are no unrestricted funds available to pay them." Doc. 50 Mem.Op. & Order.

Id. (emphasis added). Since this Court does not have the benefit of any analysis on this issue, *amicus* NCAI offers the following.

1. Basic appropriations law and the *Cherokee-Ferris* Lump-Sum Rule.

Fundamental to government contracting law is a longstanding distinction between: (1) lump-sum appropriations available for several objects, projects or contracts, *see Int'l Union v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) ("the lump-

sum appropriation has a well understood meaning"); *Thompson v. Cherokee Nation*, 334 F.3d 1075, 1085-86 (Fed. Cir. 2003), *aff'd sub nom. Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005); and (2) specific line-item appropriations that recite (or 'cap') the amount available for a particular purpose (applicable to a single project or contract). *See Sutton v. United States*, 256 U.S. 575 (1921).

The Lump-Sum Appropriation. In the case of a "lump-sum" appropriation, "[a] contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects." *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892), *quoted approvingly in Cherokee*, 543 U.S. at 637-638.[5] In the lump-sum situation, an agency's exhaustion of an appropriation without fully paying the contract naturally prevents the agency from spending more, given the proscription of the Anti-

[5] *See also Dougherty v. United States*, 18 Ct. Cl. 496, 503 (1883) ("[W]e have never held that persons contracting with the Government for partial service under general appropriations are bound to know the condition of the appropriation account at the Treasury or on the contract book of the Department."); *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 552 (Ct. Cl. 1980) (holding the government liable for failing to make first settlement payment due from a lump-sum appropriation prior to enactment of a restricting amendment) (cited approvingly in *Thompson*, 334 F.3d at 1085-86. *See* 2 GEN. ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-22–6-23 (3d ed. 2006) ("GAO REDBOOK"), 2006 WL 2620931 (discussing the *Ferris* rule).

Deficiency Act, 31 U.S.C. § 1341(a)(1)(A). But, it does not bar a recovery of damages.[6]

This was the situation presented in *Cherokee*. In finding the government liable for failing to pay the Tribes' contracts in full, a unanimous Supreme Court stated twice that an agency is liable for nonpayment so long as its appropriation is sufficient to pay the particular contract at issue, even if the appropriation proves insufficient to pay "*all*" the contracts the agency has made:

> [A]s long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of "insufficient appropriations," even if the contract uses language such as "subject to the availability of appropriations," and even if an agency's total lump sum appropriation is insufficient to pay *all* the contracts the agency has made.

543 U.S. at 637-38 (citing *Ferris* and *Blackhawk*) (underscoring added; italics in original). In the second passage the Court observed:

> [W]e have found no indication that Congress believed or accepted the Government's current claim that, because of mutual self-awareness among tribal contractors, tribes, not the Government, should bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay *all* contractors.

Id. at 640.

---

[6] *N.Y. Cent. R.R. Co. v. United States*, 65 Ct. Cl. 115, 128 (1928), *aff'd* 279 U.S. 73 (1929); *see also Lee v. United States*, 129 F.3d 1482, 1483-84 (Fed. Cir. 1997); *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1583-84 (Fed. Cir. 1994); 2 GAO REDBOOK 6-20, 2006 WL 2620931.

The factual predicate for the precise 'insufficient lump-sum' situation the Court twice described in *Cherokee*—an appropriation that is large enough to pay some of the contracts the agency has made, but not large enough to pay all of the contracts the agency has made—was not actually presented in *Cherokee*. (This is because, under the four Appropriations Acts at issue there, each year IHS had a multi-billion dollar lump-sum appropriation that was legally available to pay several tens of millions of dollars in CSCs.) But, the situation the Court twice described—an "insufficient" lump-sum appropriation—is, according to IHS, now presented in fiscal year 2008: IHS asserts that its current CSC appropriation will be sufficient to pay a large number of contracts, but insufficient to pay all the contracts IHS has made. It is in that precise situation where the Supreme Court has now made perfectly clear the government "cannot back out of a promise to pay on grounds of 'insufficient appropriations,'" *i.e.*, on account of an "availability of appropriations" clause. Under standard appropriations and government contract law, it does not matter that the CSC appropriation "is insufficient to pay *all* the contracts the agency has made." *Id.*

In reiterating this understanding of the standard "availability of appropriations" clause, the Supreme Court invoked long-standing government contracting law because of the importance of "provid[ing] a uniform interpretation of similar language used in comparable statutes, lest legal uncertainty undermine contractors'

confidence that they will be paid, and in turn increase the cost to the Government of purchasing goods and services." 543 U.S. at 644; *see also Thompson*, 334 F.3d at 1084 (applying "fundamental principles of appropriations law, as enunciated by the Supreme Court, by this court, by our predecessor court, and by other circuits"). Strict adherence to that law here is thus particularly necessary.

The Specific Line-Item Appropriation. At the other end of the spectrum is where Congress designates a specifically-appropriated sum for a given undertaking. In such a situation a contractor may, in appropriate circumstances, be held to the limits of the specifically capped amount. *Sutton*, 256 U.S. at 579-580 (contractor held to notice of $20,000 statutory limit on agency authority to contract); *Bradley v. United States*, 98 U.S. 104 (1878). *Shipman v. United States*, 18 Ct. Cl. 138 (1883) ("[W]here an alleged liability [of the Government] rests wholly upon the authority of an appropriation, they must stand and fall together"). In such a situation, the limit in the appropriation to pay the contractor is plain on the face of the Appropriations Act, and there can generally be no liability for the government if the contractor's work exceeds the stated amount.

2. The *Cherokee-Ferris* Lump-Sum Rule applies here.

Amicus NCAI submits that the Lump-Sum Rule applies both to IHS's FY 2008 lump-sum appropriation of $271,636,000, available for "payments to tribes and tribal

organizations for contract or grant support costs" under the ISDA, and the smaller $5,000,000 available for CSCs under new or expanded ISDA contracts like Appellant's. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2135 (2007) (NCAI Att. 20a-23a). (The sums stated are without regard to any subsequent across-the-board rescissions. The legal availability of IHS's appropriation to pay all CSCs associated with the Appellant Tribe's contract is particularly underscored by the Act's express provision of $5,000,000 for this very purpose, a sum IHS cannot administratively abolish. *Id*. Since "Congress has appropriated sufficient legally unrestricted funds to pay the [Tribe's] contract[] at issue, the Government normally cannot back out of a promise to pay on grounds of 'insufficient appropriations,' . . . even if [IHS's] total lump-sum appropriation" of $5,000,000 "is insufficient to pay *all* the contracts the agency has made." 543 U.S. at 637. Unlike *Sutton*, here there is no statutory earmark limiting the amount available for this Tribe's contract. Thus, in the event payment is ultimately not made, the Appellant Tribe, like the two Tribes in *Cherokee*, may recover damages under the CDA.

This result obtains because the Court in *Cherokee* squarely rejected the argument that tribal contractors, any more than other government contractors, should bear the risk that a bulk lump-sum appropriation might prove "insufficient to pay *all*

the contracts the agency has made." As the Court made clear, there is no reason in the ISDA setting—and, we would add, particularly with IHS constantly changing its Circulars, its Manual and its other payment rules— that a tribal contractor should bear the risk that a lump-sum appropriation might prove insufficient to pay the contractor the full amount of CSCs required under the ISDA. The unfairness of the alternative—leaving tribal contractors at IHS's whim—is particularly brought into focus when one considers that during the three-year period at issue in this suit, when IHS should have awarded the Tribe a contract to operate the Clinic, IHS three times amended its CSC payment procedures, including a unilateral decision to redirect Congress's entire $5,000,000 CSC appropriation from new contractors to existing contractors.[7] As in *Ferris*, these facts only underscore the generally-applicable rule that a contractor cannot be "chargeable with knowledge of [an appropriation's] administration," particularly where the contractor "is one of several persons to be paid out of [that] appropriation." 27 Ct. Cl. at 546.

[7] In 2006, the IHS Director announced that IHS would not be paying any CSCs associated with new or expanded contracts (such as Southern Ute's), despite the availability of its appropriation to do so. NCAI Att. 27a. In 2005, IHS announced the policy prompting this lawsuit, that IHS would decline to award any new contract absent inclusion of CSC-specific waiver language. NCAI Att. 24a. And in September 2006, IHS changed its CSC payment rules to state that CSC funds for new or expanded contracts (such as Southern Ute's) would thereafter only be made at the national average level of CSC funding, rather than at the contractor's full CSC requirement. NCAI Att. 38a.

3. Adherence to the *Cherokee-Ferris* Rule is consistent with legislative intent.

This outcome is consistent with Congress's addition of the "availability" clause to § 450j-1(b) in 1988. As reflected in *Cherokee*, Congress in 1988 wrote against the backdrop of federal appropriations and contract law, and it is presumed to have understood that the "availability" clause, a well-known term of art, would not come into play unless the *Sutton* situation arose. *INS v. St. Cyr*, 533 U.S. 289, 312 n.35 (2001) (Congress is presumed to know the meaning of a term of art).

Congress also wrote in full awareness of the conduct of an agency that had historically failed to pay CSCs to such an extent that this one issue had become "the single most serious problem with implementation of the Indian self-determination policy." S. REP. NO. 100-274, at 8 (1987); *supra* at 7 n.3.

In this setting, it is completely understandable for Congress to have set up a regime where only the clearest *Sutton*-type language in an Appropriations Act could cut short the duty to pay an ISDA contract in full.

Such a reading of the CSC cap serves the critical function, expressly recognized in *Cherokee*, of fencing off the CSC appropriation from the remainder of IHS's appropriation. By partitioning the CSC-specific lump-sum appropriation and "asking Congress in advance to protect funds needed for more essential purposes"

(543 U.S. at 642), IHS's other operations remain protected. IHS cannot be compelled to invade its remaining general appropriation to make its contractors whole. But partitioning the one appropriation from the other, without doing more, does not relieve the Government from its promise to pay a Tribe's contract when there are legally available funds to do so.

4. IHS's 2008 appropriation is not "restricted" from paying the Tribe.

In describing the Lump-Sum Rule, the Supreme Court used the phrases "unrestricted funds" and "unrestricted lump-sum appropriation." These phrases are significant, for the Court's use of the informal word "unrestricted" distinguishes a contrary situation where the agency is restricted to spending its appropriation on one object only, as was the case in *Sutton* and *Shipman*, and thus cannot spend it on another contract. We say this because all appropriations are fundamentally "restricted" by time, purpose or amount (and typically by all three restrictions, as is the case with all of IHS's appropriations). 5 GAO REDBOOK pt. A, § 1, 2004 WL 3546089 (discussing restrictions). The informal terms "restricted" and "unrestricted" are therefore properly understood in their context, and the fact that an appropriation is a bulk "earmark" (the situation here) does not automatically convert the earmarked

funds to "restricted" funds. Context is critical.[8]

Thus, as employed in *Cherokee* an "unrestricted" appropriation is one where Congress has not so restricted the appropriation to the point that the agency has no choice over how to spend it except for a given contract or project. Restrictive single-purpose appropriations of that kind, though increasingly less common (given the growing federal budget), classically occur when Congress enacts a "line-item appropriation [that] is available only for the specific object described." 6 GAO REDBOOK pt. B, § 1, 2006 WL 2620931. *See also* 6 GAO REDBOOK pt. C, § 2.a, 2006 WL 2620934 (explaining "line-item appropriation" and discussing *Sutton* as an example); *Bradley*, 98 U.S. at 108 (discussing two restricted Appropriations Acts "[f]or rent of house numbered nine hundred and fifteen E Street northwest").

This is precisely the situation that was presented in *Sutton*, where the contractor was held to notice of a $20,000 statutory limit on the agency's authority to contract

---

[8] For instance, in *In re Availability of Funds for Payment of Intervenor Attorney Fees-Nuclear Regulatory Comm'n*, 62 Comp. Gen. 692, 695-696 (1983) (discussed with other authorities at 5 GAO REDBOOK pt. A, § 2.c, 2004 WL 3546090), the Comptroller General distinguished between a 1982 appropriation that was "restricted" by an appropriations rider from being used to pay attorneys' fees, and an "earlier unlimited appropriation " that was "unrestricted" in this respect by the rider, and so could be used for attorneys' fees. Similarly, if "not to exceed" $100,000 is earmarked from a larger $1,000,000 appropriation for "renovation of office space," any portion of the earmark that is not used for that object can "be applied to other unrestricted objects of the appropriation." 6 GAO REDBOOK pt. B, § 2, 2006 WL 2620932.

for a specific project that the contractor was undertaking. It is also the very situation that was presented in the oft-cited *Shipman* case, where an 1878 Act of Congress appropriated $7,000 "for the purpose of constructing a macadamized road from the City of Vicksburg, Mississippi, to the national cemetery near that city," and where a contract to construct that road, being "restricted to the amount allowed by Congress for this purpose," was accordingly held to limit the government's liability to the sum specified in the Act. 18 Ct. Cl. at 145-146. Here, of course, Congress made no such line-item appropriation for the Tribe, nor for the Tribe's Clinic. Indeed, unlike *Sutton* or *Shipman*, Congress said nothing at all about the Tribe or its Clinic.

Since the $5,000,000 appropriation here is "unrestricted" insofar as payments to Appellant Tribe are concerned, and since that appropriation is legally available and more than sufficient to pay the Tribe, the Supreme Court's statement in *Cherokee* applies fully here, and the reasoning reflected in *Sutton* and *Shipman* does not.

5. Comptroller General Opinions confirm application of the Lump-Sum Rule in an earmark.

This result is fully in accord with general appropriations law. For instance, in *In re Newport News Shipbuilding and Dry Dock Co.*, 55 Comp. Gen. 812 (1976), an issue arose over a statutory earmark of $244,300,000 which, according to relevant committee reports, was to be spent in certain amounts for the construction of two

nuclear powered frigates. *Id*. at 818-819.[9] Although the Appropriations Act mentioned both frigates, it did not specify amounts for each (although committee reports did). Consistent with general appropriations law applicable to lump-sum appropriations (as well as the rule that committee language instructing how an appropriation is to be spent is not legally binding), the Comptroller General held that the earmarked appropriation was "legally available" in full for one of the two ships: "we conclude that the entire $244.3 million was legally available for the DLGN 41." *Id*. at 822. In reaching this conclusion, the Comptroller General relied heavily on the Lump-Sum Rule discussed in *In re LTV Aerospace Corp*., 55 Comp. Gen. 307 (1975), an opinion later quoted approvingly by Justice Scalia in *Int'l Union*, 746 F.2d at 861-862 and the very same Rule the Supreme Court applied in *Cherokee*, 543 U.S. at 637 (citing *Int'l Union*). In so doing, the Comptroller General reasoned that the Rule that an entire appropriation is "legally available" to cover any one object within it, applies whether the appropriation is a large sum available for a broad range of objects, or (as in *Newport*) an earmark only available for two objects:

[9] The Appropriations Act (Pub. L. No. 93-437, 88 Stat. 1212, 1220 (1974)) provided in part: "for the DLGN nuclear powered guided missile frigate program, $244,300,000, which shall be available only for construction of DLGN 41 and for advance procurement funding for DLGN 42, both ships to be constructed as follow ships of the DLGN 38 class."

> Contractor urges that LTV is inapplicable here since LTV involved a lump-sum appropriation whereas the DLGN appropriation is a more specific 'line item' appropriation. While we recognize the factual distinction drawn by contractor, we nevertheless believe that the principles set forth in LTV are equally applicable and controlling here. To be sure, any appropriation which is intended to be available for more than one item and which contains no further subdivision may be said to contain an element of 'ambiguity' since it is impossible to tell from the face of the statute how the appropriation is to be allocated among the items for which it is available. However, implicit in our holding in LTV and in the other authorities cited is the view that dollar amounts in appropriation acts are to be interpreted differently from statutory words in general. This view, in our Order, pertains whether the dollar amount is a lump-sum appropriation available for a large number of items, as in LTV, or, as here, a more specific appropriation available for only two items.
>
> For the reasons discussed above and in the cited authorities, we conclude that the entire $244.3 million was legally available for the DLGN 41 . . . .

Newport, 55 Comp. Gen. at 821-822. Importantly, the Comptroller General's decisions are binding on the Executive Branch, 31 U.S.C. § 3526(d), and highly persuasive with the courts. *Ass'n of Civilian Technicians v. FLRA*, 269 F.3d 1112, 1116 (D.C. Cir. 2001).

In short, if an earmarked lump-sum appropriation that is unrestricted as between two permitted items is therefore "legally available" in its entirety for one of those items (as *Newport* instructs), then necessarily an earmarked lump-sum appropriation that is unrestricted as among over 300 contracts (including Appellant Tribe's) is "legally available" insofar as necessary to pay the Tribe's contract. The

government thus has no appropriations law defense in fiscal year 2008.

6. The Lump-Sum Rule is critical to maintaining stability in government contracting.

As the foregoing authorities reflect, this result is not unprecedented. To the contrary, the *Cherokee-Ferris* Lump-Sum Rule of federal appropriations law is critical to the stability of government contracting. No one ever would seriously argue that if Congress capped at several billion dollars the total amount of payments the Defense Department could make to reconstruction contractors in Iraq, then individual contractors would have no right to be paid their particular contracts in full, and would instead be left to the whim of the Secretary—and without legal recourse—as he developed whatever new 'circular' or manual (or, as occurred here, series of letters) that he might devise to allocate an anticipated total shortfall, with some contractors paid nothing. There is no reason in law, logic or justice why a different outcome should control here. Indeed, the Court in *Cherokee* cautioned that self-determination contractors are entitled to *at least* the same benefits as other government contractors, 543 U.S. at 632-633 (although they actually enjoy more, given the ISDA's verbatim model contract and other mandatory provisions).

7. If, as IHS may contend, the result here produces an unintended result, Congress alone may change it.

The law here is clear, and the Courts must take Congress's enactments as it

finds them. Borrowing from *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989), "'the sole function of the courts is to enforce [the availability clause] according to its terms.'" (Citation omitted.) Thus, if there is to be a change, it is for Congress to make it.

For instance, Congress can elect the *Sutton* approach and limit payments for a particular contractor or for the particular project to be contracted. Or, Congress can say that in a given year no ISDA contractor shall receive more than 90% of its CSC requirement. Or, Congress can altogether eliminate CSC funding for new and expanded contracts (as Congress once did, *see* Pub. L. No. 105-277, § 328, 112 Stat. 2681, 2681-291 (1998)). These and like provisions would put all contractors on clear notice from the face of the Appropriations Act about the precise amount of the appropriation that Congress intends will be legally available to pay each. *See Blackhawk*, 622 F.2d at 552 (enactment addressing a class of contracts by limiting agency's authority to pay any individual construction contract settlement over $1,000,000 without an independent audit). But absent such actions, the Lump-Sum Rule controls, and that Rule is the natural consequence of the term of art "availability of appropriation" that Congress in the ISDA has chosen to employ.

If (as IHS surely will argue) the resulting consequence proves unintended, it is a consequence that Congress can readily change. But it is not a consequence the

agency can change, any more than may the Courts. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) ("[C]onsiderations of *stare decisis* weigh heavily on the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."); *United States v. Thompson,* 941 F.2d 1074, 1080 (10th Cir. 1991) ("When the scheme established by Congress is clear from the statute's language and legislative history, the courts cannot intervene to remedy unintended consequences.").[10]

8. *Cherokee* has overtaken *Oglala* and its progeny.

The Supreme Court's statement of the law regarding the legal availability of a limited appropriation renders obsolete other decisions that have found that the ISDA does not confer upon the Secretary the authority to contract in excess of appropriations. For instance, in *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1378 (Fed. Cir. 1999), the Federal Circuit held that the government's

[10] As an aside, even if additional funds were not legally available from the regular appropriation for the Appellant Tribe's contract—and as discussed herein NCAI believes that they are—additional funds to pay the contracts are legally available from the Secretary's collections from Medicare, Medicaid and private health insurance. Nothing in the 2008 Appropriations Act forecloses the use of these collections to pay IHS's CSC obligations, and payments for such costs certainly are "for facilities, and to carry out the programs . . . to provide health care services to Indians," 25 U.S.C. § 1621f(a), and "necessary [for the Southern Ute Clinic] to achieve compliance" with applicable accreditation requirements. 42 U.S.C. § 1395qq(c) (Medicare); 25 U.S.C. § 1642(a) (Medicaid).

contract obligation under the ISDA (and not just the agency's duty to pay) was limited by the "availability of appropriations." Oglala urged that the government had committed itself to a fixed contract amount without regard to actual agency appropriations. The Federal Circuit disagreed.[11]

Apparently the parties in *Oglala* believed that the BIA's capped CSC appropriation at issue there was not legally available to pay the plaintiff in full. Thus, Oglala pressed an alternate argument that was rejected. But now the Supreme Court in *Cherokee* has examined the precise meaning of the ISDA's routine "availability" clause and instructed that in the *Oglala*-type situation, involving an unrestricted but limited lump-sum amount made available for CSC payments, the appropriation is legally available after all to fully pay each contract that the agency has made. Thus, *Oglala* and its progeny have been overtaken by subsequent controlling precedent.[12]

---

[11] *See also Cherokee Nation v. Thompson*, 311 F.3d 1054, 1060 (10th Cir. 2002) (following *Oglala*), *rev'd sub nom. Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005).

[12] *Amicus* NCAI does not agree with the Federal Circuit's resolution of the matter, *see Train v. City of New York*, 420 U.S. 35, 39 n.2 (1975) (explaining a "contract-authority scheme"); *Nat'l Ass'n of Reg'l Councils v. Costle*, 564 F.2d 583, 586 (D.C. Cir. 1977) ("legislative authorization . . . to create obligations in advance of an appropriation" creates "contract authority"); *Gibney v. United States*, 114 Ct. Cl. 38, 53 (1949) ("[w]e know of no case in which any of the courts have held that a simple limitation on an appropriation bill of the use of funds has been held to suspend a statutory obligation"). Instead, NCAI believes that 25 U.S.C. § 450j-1(b) expressly limits only "the provision of funds" by the Secretary (*i.e.*, the Secretary's

CONCLUSION

For the foregoing reasons and those set forth in Appellant's brief, the decision below should be reversed.

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON, LLP

s/ Lloyd B. Miller

Lloyd B. Miller
Hilary V. Martin
900 W. 5th Avenue, Suite 700
Anchorage, AK 99501
Telephone: (907) 258-6377
Facsimile: (907) 272-8332
E-mail address: lloyd@sonosky.net

authority to pay), and not the amount of the government's full contractual undertaking (*compare e.g.* 25 U.S.C. § 1658 ("[t]he authority of the Secretary to enter into contracts under this title shall be to the extent, and in an amount, provided for in appropriation Acts")). However, *Cherokee* renders this debate academic.

Certificate of Compliance With Fed. R. App. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because this brief contains 6999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and has been prepared in a proportionally spaced typeface using WordPerfect Office 12 in Times New Roman 14.

Dated this 12th day of May 2008.

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON, LLP

s/ Lloyd B. Miller

_____

Lloyd B. Miller
900 W. 5th Avenue, Suite 700
Anchorage, AK 99501
Telephone: (907) 258-6377
Facsimile: (907) 272-8332
E-mail address: lloyd@sonosky.net

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **BRIEF *AMICUS CURIAE* OF THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF APPELLANT AND REVERSAL OF THE DISTRICT COURT** was served on the following attorneys or parties of record this 12th day of May 2008, via U.S. mail and electronic mail:

Jeffrica Jenkins Lee, Esq.
jeffrica.lee@usdoj.gov
Barbara Biddle, Esq.
barbara.biddle@usdoj.gov
U.S. Department of Justice
950 Pennsylvania Avenue, Room 7537
Washington, D.C. 20530-0001

Steven Boos, Esq.
sboos@mbssllp.com
Maynes, Bradford, Shipps & Sheftel, LLP
P.O. Box 2717
Durango, CO 81302-2717

Monte Mills, Esq.
mmills@southern-ute.nsn.us
Southern Ute Indian Tribe
Legal Department
P.O. Box 737
Ignacio, CO 81337

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON, LLP

s/ Lloyd B. Miller

_____

Lloyd B. Miller
900 W. 5th Avenue, Suite 700
Anchorage, AK 99501
Telephone: (907) 258-6377
Facsimile: (907) 272-8332
E-mail address: lloyd@sonosky.net

CERTIFICATE OF DIGITAL SUBMISSION

The undersigned hereby certifies as follows:

1. All required privacy redactions have been made, and with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and

2. The digital submissions have been scanned for viruses with the most recent version of a commercial virus-scanning program, E-trust Antivirus, version 7.1.192, a program which is automatically updated when new releases are made, and according to the program, the digital submissions are free from viruses.

Dated this 12th day of May 2008.

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON, LLP

s/ Lloyd B. Miller

_____

Lloyd B. Miller
900 W. 5th Avenue, Suite 700
Anchorage, AK 99501
Telephone: (907) 258-6377
Facsimile: (907) 272-8332
E-mail address: lloyd@sonosky.net