No. 2010-1013

United States Court of Appeals for the Federal Circuit

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,

Appellant,

v.

Kathleen Sebelius, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellee.

Appeal from the Civilian Board of Contract Appeals in case nos. 294-ISDA, 295-ISDA, 296-ISDA, and 297-ISDA, Administrative Judges Candida S. Steel and Jeri Kaylene Somers.

APPELLANT'S COMBINED PETITION FOR REHEARING AND REHEARING EN BANC

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CERTIFICATE OF INTEREST

Counsel for the Appellant Arctic Slope Native Association, Ltd. certifies the following:

1. The full name of every party or amicus represented by me is:

   Arctic Slope Native Association, Ltd.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by me are:

   N/A

4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or agency or are expected to appear in this court are:

   Sonosky, Chambers, Sachse, Miller & Munson, LLP: Lloyd B. Miller; Donald J. Simon; Arthur Lazarus, Jr., of counsel; Peter G. Ashman, of counsel; Melanie B. Osborne; Vanessa L. Ray-Hodge; Hilary V. Martin; Peng Wu. Sidley Austin, LLP: Carter G. Phillips, Jonathan F. Cohn.

Date: March 1, 2011

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STATEMENT OF RELATED CASES

1. There are two actions pending before the Court of Federal Claims that in part involve claims similar to those at issue in this appeal.

   (a) *Bristol Bay Area Health Corp. v. United States*, No. 07-725 (appeal docketed Oct. 12, 2007); and

   (b) *Nez Perce Tribe v. United States*, No. 09-231 (appeal docketed Apr. 15, 2009).

2. There are approximately 22 appeals pending before the Civilian Board of Contract Appeals that involve breach of contract claims against the Secretary over contract underpayments, several of which arise in the same years at issue in this appeal.

STATEMENT OF COUNSEL

A. Based upon my professional judgment, I believe the Panel's determination—that an agency contractor, not the agency, bears the risk that a bulk appropriation will be insufficient to pay all of the contracts the agency has made—directly conflicts with this Circuit's settled foundational principles of government contract law established in *Ferris* v. *United States*, 27 Ct. Cl. 542 (1892) and *Dougherty* v. *United States*, 18 Ct. Cl. 496, 503 (1883), and affirmed in *Cherokee Nation* v. *Leavitt*, 543 U.S. 631, 640, 643 (2005) (citing *Ferris* and *Dougherty*).[1]

B. Based upon my professional judgment, I believe this appeal requires an answer to the following precedent-setting question of exceptional importance:

> Can the Government escape liability for contract damages when, without any advance notice and only after the Government receives the full benefit of the contract, the Government fails to pay the contract price simply on the ground that a multi-hundred million dollar appropriation which is amply sufficient to pay the contract in full turns out to be insufficient to pay all of the contracts the Government made?

C. The Panel erred in determining that, even though the decision below "appears to conflict" with Circuit precedent on one point, Appellants had not

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[1] *See South Corp.* v. *United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982) (adopting Court of Claims' precedent as the law of this Circuit).

properly raised the argument, because the argument was in fact properly raised on pages 26 and 35 of Appellant's Opening Brief.

Lloyd B. Miller, Counsel for Appellant

INTRODUCTION

In a decision that creates unprecedented instability in government contract law, a panel of this Circuit has declared that a contractor has no right to be paid for services rendered to the Government (and therefore no right to contract damages) so long as the Government concludes, after performance is complete, that a multi-hundred million dollar appropriation that was more than sufficient to pay the contractor in full turns out to be insufficient to pay all of the Government's contracts for similar projects. In so doing, the Panel relied on *Babbitt* v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999), to reject the settled law of this Circuit—which the Supreme Court *reaffirmed* only five years ago—that under *Ferris* v. *United States*, 27 Ct. Cl. 542 (1892), a routine "availability of appropriations" clause places on the Government, not the contractor, the risk that an appropriation sufficient to pay the contractor may ultimately prove insufficient to pay all of the Government's contractors. *Cherokee Nation* v. *Leavitt*, 543 U.S. 631, 640, 643-44 (2005) (citing *Ferris*). En banc review is necessary to correct the Panel's error, and to reaffirm the foundational *Ferris* Rule embedded in this Circuit's long-settled law.

BACKGROUND AND PROCEEDINGS BELOW

1. In 1999 and 2000 the Arctic Slope Native Association (ASNA) fully performed two successive one-year contracts with the Government to operate the U.S. Indian Health Service's (IHS) Samuel Simmonds Hospital in Barrow, Alaska.

The contracts were awarded under the Indian Self-Determination Act (ISDA), 25 U.S.C. §§ 450-458bbb-2, which mandated that the agency award ASNA a contract for both its direct costs incurred in operating the Hospital and its associated indirect (or administrative) contract support costs.[2] The one-year contracts were awarded in advance of each fiscal year, with all contract payments made "subject to the availability of appropriations." § 450j-1(b). Congress each year then made available to the agency approximately $2 billion out of which the agency was authorized to pay ASNA's direct costs, and "not to exceed" $203,781,000 (in FY1999) and $228,781,000 (in FY2000) out of which the agency was authorized to pay ASNA's contract support costs.[3] In FY1999 ASNA's direct costs and contract support costs were, respectively, $5,789,000 and $3,306,506, and in FY2000 ASNA's direct costs and contract support costs were, respectively,

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[2] Slip op. 3 (distinguishing the "secretarial amount" for direct costs from contract "administrative costs"); §§ 450j-1(a)(2), (3) (defining "contract support costs" that "shall be added" to each contract); § 450j-1(g) ("the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a)," inclusive of contract support costs).

[3] Pub. L. No. 105-277, 112 Stat. 2681, 2681-278 to 279 (1998); Pub. L. No. 106-113, 113 Stat. 1501, 1501A-181 to 182 (1999).

$6,639,460 and $3,667,284, so both appropriations were clearly sufficient to pay ASNA in full.

The Government fully paid ASNA its direct costs in operating the Hospital, but it paid only a portion of ASNA's contract support costs. For FY1999 the Government failed to pay $1,912,941 that ASNA was entitled to in contract support costs, and then failed to pay another $489,182 in FY2000. J.A.253-54 (IHS data). The Government never alerted ASNA prior to the completion of contract performance that it was going to pay ASNA less than the full contract amount. To the contrary, the Government repeatedly notified ASNA in advance of performance that it would *fully* pay ASNA these costs, posting ASNA at the very top of the agency's payment priority lists published for FY1999. J.A.161 n.5, 740.

ASNA thus had no notice that it was going to be paid less than its full contract amount until after it fully performed each contract. Nor did it know that the Government would *overpay* many other contractors out of the same appropriation. ASNA Opening Br. 15 (citing IHS 1999 Report). In the wake of the Supreme Court's 2005 *Cherokee* decision involving materially identical contracts awarded by the same agency, ASNA filed timely contract damage claims under the Contract Disputes Act, 41 U.S.C. §§ 601-613, *see* J.A.37, 42, followed by timely appeals to the Civilian Board of Contract Appeals and this Circuit. Slip op. at 8.

2. The Panel affirmed the Board's dismissal of the claims, holding that this Circuit had already resolved the controlling issue in *Oglala*—a decision that *predates* the Supreme Court's decision in *Cherokee*.[4] *Id.* at 9-10. The Panel tried to distinguish *Cherokee* by saying that here "[t]he availability of funds provision coupled with the 'not to exceed' language limits the Secretary's obligation to the tribes to the *appropriated amount*." *Id.* at 14-15 (emphasis added). Although each year's "*appropriated amount*" was many orders of magnitude larger than the amount due ASNA—and despite contrary authority from *Cherokee*—the Panel reasoned that under *C.H. Leavell & Co.* v. *United States*, 530 F.2d 878 (Ct. Cl. 1976), an "availability" clause in this setting always trumps the *Ferris* Rule and limits the Government's liability to the "appropriated amounts" actually paid by the contracting officer. *Id.* at 11-12. The Panel also distinguished *Ferris* by asserting (incorrectly) that the contractor there had no notice of a limited appropriation, while ASNA here supposedly did. *Id.* And the Panel supported its conclusion by asserting (again, incorrectly) that a recovery of contract damages by ASNA would either "defeat the statutory cap" or require an impermissible "reallocation" of payments among hundreds of contractors, *id.* at 13-14, even though an award of damages for the Government's breach would do neither and

[4] If the Court concludes that, despite *Cherokee* and *Ferris*, *Oglala* is still controlling, then the Court should also grant en banc review to overturn *Oglala* as conflicting with *Cherokee* and *Ferris*.

would actually come out of the Judgment Fund, 31 U.S.C. § 1304.

ARGUMENT

I. THE PANEL'S DECISION IS CONTRARY TO *FERRIS* AND *DOUGHERTY* AND VIOLATES TIME-HONORED PRINCIPLES OF GOVERNMENT CONTRACT LAW REAFFIRMED IN *CHEROKEE*.

It is difficult to overstate how destabilizing the Panel's decision is for government contractors. For well over a century it has been settled law that the Government is liable for any damages caused by an agency underpayment when a capped appropriation is sufficient on its face to pay the contract in full, irrespective of the government's obligations to other contractors. *Ferris*, 27 Ct. Cl. at 546. For even longer it has been settled law that a contractor has *no* duty to monitor the condition of an appropriation on the books of the Government, *Dougherty* v. *United States*, 18 Ct. Cl. 496, 503 (1883), much less to monitor the agency's award or payments of other contracts. In reaffirming these bedrock principles just five years ago, the Supreme Court in *Cherokee* squarely *rejected* the notion that the Government can shift the risk of non-payment to a contractor either by invoking a "normal[]" "availability of appropriations" clause, 543 U.S. at 643, or by claiming "mutual self-awareness" among hundreds of contractors that a limited appropriation might prove insufficient to pay them all. *Id.* at 640.

By rejecting these foundational principles, and instead holding that a contractor does bear the risk of underpayment, the Panel decision injects "legal

uncertainty [that will] undermine contractors' confidence that they will be paid, and in turn increase the cost to the Government of purchasing goods and services." *Id.* at 644. Indeed, if the Panel were correct, it would be "'madness'" to contract with the Government, *United States* v. *Winstar Corp.*, 518 U.S. 839, 864 (1996) (plurality opinion) (quoting *The Binghamton Bridge*, 3 Wall. 51, 78 (1866)), for *every* appropriation is at some level capped, *every* contractor faces the risk that the agency it deals with may somehow over-commit itself, and thus *every* agency will have impunity in retroactively and unilaterally underpaying its contract obligations. "A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." *Murray* v. *Charleston*, 96 U.S. 432, 445 (1877).

A. This Case Cannot Be Distinguished From *Cherokee*.

The Supreme Court in *Cherokee* has already construed the very *same* six-word clause at issue here: "subject to the availability of appropriations." 543 U.S. at 643. It is a fundamental principle of federal appropriations law that, under this "normal[]" term of art, *id.*, an "appropriation" is "legally available" for a "legal expenditure" if it is designated for the purpose of the contract and it is sufficient to pay the particular contract, irrespective of whether it is sufficient to pay *all* the Government's contracts. *See also* ASNA Opening Br. 30-33 (discussing U.S. Gov't Accountability Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 4-6 (3d ed. 2006) ("GAO REDBOOK")). This is why the Supreme Court in *Cherokee*

relied on *Ferris* when discussing the ISDA's "availability of appropriations" clause (even though Ferris's contract contained no such clause). The Court in *Cherokee* made plain that the clause means that if sufficient funds were "legally available" to pay a specific contractor in full, then the government is liable in damages for failing to pay the contractor in full, precisely as *Ferris* holds. 543 U.S. at 643. Simply put, it is the Government, not the contractor, that "bear[s] the risk" that the Government will overcommit itself to too many contracts, *id.* at 640; the contractor is "'not chargeable with knowledge'" of such shortfalls. *Id.* at 638-39 (quoting *Ferris*).

The Panel decision disregards all this, holding that when an "availability of appropriations" clause is combined with an appropriation that is capped at "not to exceed" $200 million, suddenly the law changes and all risk of loss shifts to the contractor. That was error. If an overall appropriation is capped at an amount amply sufficient by many multiples to pay an individual contractor's contract amount, the contractor has no way of knowing that the capped appropriation will actually prove insufficient to cover all of the Government's other contracts. The "not to exceed" cap at issue here thus provides a contractor with no more notice of a later agency shortfall than does a normal "availability of appropriations" clause.

The Supreme Court squarely endorsed this Circuit's *Ferris* Rule that a contractor who provides the Government with the full benefit of the contractual

bargain is entitled to be paid in full whenever the appropriation is legally sufficient to pay that contractor, even if the appropriation is insufficient to pay all other contractors. There is no question that the "not to exceed" appropriation at issue here was sufficient to pay ASNA in full. The panel's failure to correctly apply the *Ferris* Rule cannot be reconciled with *Cherokee* or *Ferris* and gravely undermines the stability of the government contracting regime.

B. The Panel Erred in Relying on *Leavell* and *Winston*.

The Panel avoided the *Ferris* Rule and resisted *Cherokee* by insisting that an "availability" clause *does* make a difference, centrally relying on *Leavell*. But the Panel's reliance on *Leavell* only shows the error of the Panel's way. Unlike the normal six-word "availability" clause in a single-year contract at issue in *Cherokee* and here, *Leavell* involved a nine-part 1,162-word "Funds Available for Payments" clause. The clause reiterated *at least six times* that the contractor, awarded a multi-year contract, was not to proceed with work in later years unless and until he was *notified in advance*, and in writing, that the contracting officer had a stated amount of funds on hand to pay him, and that absent advance notification the Government would have no liability to pay anything. 530 F.2d at 894-896. The *Leavell* court explained that this type of clause was purposely developed in the 1920s so that the Corps of Engineers could award multi-year "continuing contracts" for construction projects to be funded out of successive appropriations, without binding the

Government in the first year to amounts payable in later years. *Id.* at 892. Precisely as contemplated by the clause, in a subsequent year Leavell received written notice from the contracting officer, in *advance* of any performance, that appropriations were less than anticipated, together with a statement setting forth precisely how much less he should work and how much less he would be paid. *Id.* at 881-83.

Words are important, particularly in contract law. All "availability" clauses are not alike. A 1,162-word clause, specifically conditioning work in future years upon advance funding notification from a contracting officer, is vastly different than a "normal[]" six-word "availability" clause in a one-year contract that does not condition work on advance notice of anything. *Cherokee*, 543 U.S. at 643. The contractor in *Leavell* got advance notice of underfunding, and the clause expressly shifted the risk of underfunding to him. That is miles apart from the contract clause and the facts here, where there was no advance notice and no shifting of the risk.

Moreover, in *Leavell* the contractor ultimately got paid anyway. Thus, the case *cannot* stand for the proposition that the Government can receive the full benefit of a bargain and then refuse to pay. And if *Leavell* ever could have supported that result, it no longer can after *Cherokee*, which squarely holds that the

contractor is entitled to payment when an appropriation is sufficient to pay him.[5]

C. The Panel Misapplied This Circuit's *Ferris* Rule.

The Panel tried to distinguish *Ferris* by asserting that "[i]n *Ferris* the appropriations act did not contain a statutory cap with respect to the project in question"—there, a Delaware River channel improvement project at Mifflin Bar, Pennsylvania. 27 Ct. Cl. at 542. But that is a false distinction, because the same is true here: the FY1999 appropriation used to pay for the operation of the Barrow Hospital likewise "did not contain a statutory cap with respect to the project in question." Rather, just as the 1879 appropriations act in *Ferris* contained a capped amount that covered multiple projects "for improving Delaware River ... forty-five thousand dollars," Act of March 3, 1879, 20 Stat. 363, 364,[6] here the FY1999 Act

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[5] Much the same is true of *Winston Bros. Co.* v. *United States*, 130 F. Supp. 374 (Ct. Cl. 1955). *See* slip op. at 15 n.8 (discussing *Winston*). There, several contractors had three-year continuing contracts for construction projects. When the funds on hand for the second year proved less than originally "estimated," the contracting officer made an "allocation" among the contractors *before* any work began. 130 F. Supp. at 378. The contracts had a lengthy "*Failure of Congress to appropriate funds*" clause that expressly made the contracts contingent in later years "upon Congress making the necessary appropriation for expenditures thereunder," and including a "release[] [of] the Government from all liability due to the failure of Congress to make such appropriation." *Id.* at 376. With no firm contract rights for these future years, the court ruled that the contracting officer's allocation among the contracts, *prior to the commencement of performance* was valid so long as it was done "on a rational and non-discriminatory basis." *Id.* at 380. That is not the case here.

[6] *See* GAO REDBOOK 6-29 (the term "for _____, $___" "establishes a maximum that may not be exceeded" and is equivalent to "'not to exceed'").

similarly contained a capped sum of $200 million for contract support costs available for multiple (actually *hundreds* of) different contracted projects, one of which was the Barrow Hospital. Thus, while it is true that "[i]n *Ferris*, the contractor had no notice of the limited nature of the appropriation" to pay it (slip op. at 11), so too, here, ASNA "had no notice of the limited nature of the appropriation" to pay it.

The root flaw in the Panel's analysis is that, while it correctly reads the 1879 appropriations act at issue in *Ferris* as capping the appropriations available to pay for multiple projects "for improving Delaware River," it then incorrectly reads the comparable "not to exceed" cap here, applicable to hundreds of separate ISDA contracted projects, as really a cap on a single "project"—which, of course, it is not.[7]

D. The Panel's Decision Disregarded the ISDA's Command, Its Mandatory Rule of Statutory Construction and the Overall Statutory Scheme.

[7] The Panel's discussion of reallocation issues is particularly difficult to comprehend. Slip op. at 13-14. Just as "reallocation" from other contractors to Ferris was not the basis for the outcome in *Ferris*, so, too, reallocation from other tribal contractors to ASNA is not the basis for recovery here. The premise of a recovery under the *Ferris* Rule is not that funds should have been taken from another contractor to pay the plaintiff; it is that funds which were legally available to pay the plaintiff went to pay others, and the plaintiff does not bear the risk that the funds would be insufficient to pay everyone. This is not just a matter of the Supreme Court parroting a litigant's position, slip op. at 12-13 n.6 (characterizing the *Cherokee* Court's discussion at 543 U.S. at 637), but an actual *holding* of the Court, *see* 543 U.S. at 640. The funds to pay ASNA's damages would not come from other contractors, but instead from the Judgment Fund, 31 U.S.C. § 1304.

At a minimum, the ISDA's six-word "subject to the availability of appropriations" clause is ambiguous, given its radical difference from *Leavell*'s 1,162-word "Funds Available for Payments" clause and *Winston*'s comprehensive "Failure of Congress to appropriate funds" clause. The ambiguity is compounded by the ISDA's mandate to the agency to add the "full amount" of contract support costs to every contract, 25 U.S.C. § 450j-1(g), together with the Act's repeated statements about the contractor's entitlement to receive full payment for contract support costs. §§ 450j-1(a)(2), (3), (5); § 450j-1(b)(1); § 450j-1(d)(2); § 450*l*(c), sec. 1(b)(4). Notwithstanding this ambiguity, the Panel failed to heed Congress's directive that "[e]ach provision of the [ISDA] and each provision of this Contract *shall be liberally construed for the benefit of the Contractor*." § 450*l*(c), sec. 1(a)(2) (emphasis added).

The Panel also disregarded congressional intent in the ISDA's statutory scheme to leave the Secretary with as little discretion as possible in contract funding allocation matters. 25 U.S.C. §§ 450j-1(b)(1), (2), (3), (4); § 450k(a)(1); *Ramah Navajo Sch. Bd.* v. *Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996) ("*RNSB*") ("The statute itself reveals that not only did Congress *not* intend to commit allocation decisions to agency discretion, it intended quite the opposite; Congress left the Secretary with as little discretion as feasible in the allocation of [contract support]."). The very *last* thing Congress intended was to grant the Secretary

broad—and, as the Panel saw it, possibly *unreviewable* discretion, *see* slip op. at 15 n.8—to underfund or overfund contracts at will. It is precisely because the Secretary, prior to the ISDA's 1988 amendments, asserted such unreviewable authority to unilaterally set the price of ISDA contracts that Congress *twice* rewrote the Act, purposefully to constrain the Secretary's discretion in this regard. Congress's intent in § 450m-1(a) was to counter the "'argu[ment] that such contractors have *no legal remedies at all* by which to redress the Bureau's failure to fund their contracts with indirect costs at the level mandated by law and by their contract terms.'" *RNSB*, 87 F.3d at 1344 (quoting S. Rep. No. 100-274, at 37).

The Panel disregarded all this, together with the Supreme Court's admonition that the ISDA's "availability" clause is decidedly *not* "'an affirmative *grant* of authority to the Secretary to adjust funding levels based on appropriations.'" *Cherokee*, 543 U.S. at 643-44 (rejecting government's position).

II. THE PANEL OVERLOOKED AN ALTERNATIVE ARGUMENT THAT ASNA ADVANCED WHICH WOULD PERMIT RECOVERY OF A SMALL AMOUNT OF ITS DAMAGES.

The Panel indicated that it would overrule the Board's rejection of ASNA's alternative claim that it should at least be awarded damages arising out of the agency's failure to spend a small portion of the contract support appropriation on *any* contractor. Slip op. at 17 n.11. But the Panel denied relief on this claim because it mistakenly believed ASNA did not raise this point in its Argument. *Id.*

The Panel erred, for the argument was in fact addressed at pages 26 and 35 of ASNA's Opening Brief. That said, a correction of this error does not lessen the imperative for en banc review to correct the Panel's departure from settled law.

CONCLUSION

Due to the potential for severe disruption across the entire government contracting regime "and [the] perceived conflict in precedent" between the Panel decision and this Circuit's *Ferris* Rule, as affirmed in *Cherokee*, the Circuit should rehear this case en banc. *Slattery* v. *United States*, No. 2007-5063, 2011 WL 257841 at *1, __ F.3d __, __ (Fed. Cir. 2011).

Respectfully submitted this 1st day of March 2011.

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ADDENDUM

United States Court of Appeals for the Federal Circuit

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
Appellant,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellee.

2010-1013

Appeal from the Civilian Board of Contract Appeals in case nos. 294-ISDA, 295-ISDA, 296-ISDA, and 297-ISDA, Administrative Judges Candida S. Steel and Jeri Kaylene Somers.

Decided: December 15, 2010

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Justice, of Washington, DC, argued for appellee. On the brief were TONY WEST, Assistant Attorney General, JEANNE E. DAVIDSON, Director, DONALD E. KINNER, Assistant Director, and SAMEER YERAWADEKAS, Attorney. Of counsel on the brief was SEAN DOOLEY, Senior Attorney, Office of the General Counsel, Public Health Division, United States Department of Health and Human Services, of Washington, DC.

Before LOURIE, BRYSON, and DYK, *Circuit Judges*.

DYK, *Circuit Judge*.

Arctic Slope Native Association ("ASNA") filed suit against the Secretary of Health and Human Services ("Secretary") for breach of contract, alleging that the government failed to pay ASNA's so-called contract support costs shortfall for fiscal years 1999 and 2000. The Secretary argued that the obligation to pay, under the contract and the statute, was subject to the availability of appropriations and that there were no available appropriations because Congress had provided that the appropriations available for the funding of contract support costs were "not to exceed" specified amounts. The Civilian Board of Contract Appeals ("the Board") granted summary judgment for the Secretary. *Arctic Slope Native Ass'n, Ltd. v. Dep't of Health & Human Servs.*, CBCA 294-ISDA, et al., 09-2 BCA ¶ 34,281 (C.B.C.A. Oct. 1, 2009). We affirm.

BACKGROUND

I

This case is the latest in a long-running dispute between the various Indian tribes and the Secretary concerning the Secretary's obligation to pay contract support

costs. This dispute has led to decisions by the Supreme Court and this court. *See, e.g.*, *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 549 (2005) [hereinafter *Cherokee II*], *aff'g sub nom*, *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003) [hereinafter *Cherokee I*]; *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000).

Briefly, the Indian Self-Determination Act ("ISDA"), Pub. L. No. 103-413, 108 Stat. 4250 (codified at 25 U.S.C. §§450–450n), as amended in 1994, authorizes the Secretary to enter into contracts with tribes, under which the tribes supply health services that a government agency would otherwise provide, *id.* § 450f(a)(1). This case concerns indirect costs under the contracts for fiscal years 1999 and 2000. Indirect costs are "administrative or other expense[s] related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program . . . ." *Id.* § 450j-1(a)(3)(A)(ii). The Act and the contract entered into pursuant to the Act require that the Secretary pay the tribal contractors' indirect costs. *Id.* § 450j-1(a). These indirect costs include the secretarial amount, *id.* § 450j-1(a)(1), and contract support costs, *id.* § 450j-1(a)(2). *See also Cherokee II*, 534 U.S. at 634–35. The secretarial amount is the amount the Secretary would have expended had the government itself run the program. The secretarial amount does not include the additional indirect costs that the tribes incur in their operation of the programs, which the Secretary would not have directly incurred (i.e., the cost of administrative resources that the Secretary could draw from other government agencies). These additional indirect costs, which are not included in the secretarial amount, are referred to as contract support costs. *See* 25 U.S.C. § 450j-1(a)(2); *Cherokee II*, 534 U.S. at 635.

Both under the ISDA and the contracts, the government's obligation to pay contract support costs is "subject to the availability of appropriations." 25 U.S.C. § 450j-1(b); Joint App. 133 (incorporating § 450j-1(b) into the contract). Additionally, "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization . . . ." 25 U.S.C. § 450j-1(b). Congress has been reluctant to appropriate the amount necessary to pay the full amount of contract support costs, and the Secretary has accordingly declined to pay contract support costs not funded by appropriations. The Secretary has urged that the "availability of appropriations" clause justified the failure to pay.

A similar dispute arose previously for fiscal years 1994 through 1997. *See Cherokee II*, 543 U.S. at 634–35; *Cherokee I*, 334 F.3d at 1079. The Secretary did not deny the promise to pay, nor the failure to pay, but argued that the legal obligation to pay arose "if, and only if, Congress appropriated sufficient funds, and that, in this instance, Congress failed to do so." *Cherokee II*, 543 U.S. at 636. The Secretary admitted that the relevant appropriations acts did not include an explicit cap on appropriations, but nonetheless argued that "specific recommendations of funding amounts for contract support costs in the appropriations committee reports" were sufficient to impose a cap. *Cherokee I*, 334 F.3d at 1083. Both the Supreme Court and this court rejected the argument that committee report language is sufficient to impose a cap, holding specifically that "restrictive language contained in Committee Reports is not legally binding." *Cherokee II*, 543 U.S. at 646; *see Cherokee I*, 334 F.3d at 1085. "[I]n order for a statutory cap to be binding on an agency, it must be carried into the legislation itself; such a cap cannot be

imposed by statements in committee reports or other legislative history." *Cherokee I*, 334 F.3d at 1085.

This court held, and the Supreme Court affirmed, that where there are "no statutory caps on available appropriations, the Secretary [is] not excused from meeting his contractual obligations by the availability clause of section 450j-1(b)."[1] *Cherokee I*, 334 F.3d at 1093; *see Cherokee II*, 543 U.S. at 641. "[I]f the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment *even if the agency has allocated the funds to another purpose* or assumes other obligations that exhaust the funds." *Cherokee II*, 543 U.S. at 641. Absent explicit restriction, an agency is generally permitted to reprogram funds within a lump-sum appropriation. U.S. Gov't Accountability Office, Principles of Federal Appropriations Law 2-25 (3d ed. 2006) [hereinafter GAO Redbook]. Thus, where there is no "statutory cap or other explicit statutory restriction," the Secretary is required to reprogram funds if doing so is necessary to fund the contract. *Cherokee I*, 334 F.3d at 1086.

The Secretary further argued that under § 450j-1(b) there was no obligation to reprogram funds to pay the claims at issue because "doing so would require a reduction of funds for programs serving other tribes." *Id.* at 1083. This court and the Supreme Court found this

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[1] Section 450j-1(b) provides in relevant part that:

> Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

25 U.S.C. § 450j-1(b).

argument unpersuasive because "the relevant congressional appropriations contained *other* unrestricted funds . . . sufficient to pay the claims at issue" that would not require a reduction in funding for programs serving other tribes. *Cherokee II*, 543 U.S. at 641 (emphasis added); *see Cherokee I*, 334 F.3d at 1093.

II

After the dispute arose with respect to fiscal years 1994 through 1997, Congress acted to impose a statutory cap on funding for contract support costs in fiscal years 1999 and 2000. The appropriations act for fiscal year 1999 provided that "notwithstanding any other provision of law, of the amounts provided herein, *not to exceed* $203,781,000 shall be for payments . . . for contract or grant support costs."[2] Omnibus Consolidated & Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-279 (1998) (emphasis added) [hereinafter 1999 Appropriations Act]. Similarly, the appropriations act for fiscal year 2000 provided that "notwithstanding any other provision of law, of the amounts provided herein, *not to exceed* $228,781,000 shall be for payments . . . for contract or grant support costs." Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-182 (1999) (emphasis added) [hereinafter 2000 Appropriations Act]. The Conference Report viewed this language as imposing a statutory cap, specifically approving our earlier decision in *Oglala Sioux*. H.R. Conf. Rep. No. 106-479, 494–95 (1999). There, as discussed below, we explicitly held that "not to exceed"

[2] Congress also imposed a statutory cap phrased in "not to exceed" language for fiscal year 1998, but claims for contract support costs in fiscal year 1998 are not involved in this litigation. *See* Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1583 (1997).

language was sufficient to impose a statutory cap. *Oglala Sioux*, 194 F.3d at 1376, 1379–80.

III

Beginning in fiscal year 1999, ASNA entered into a self-governance contract with the Secretary, which remained in effect during fiscal years 1999 and 2000. The contract does not specify funding amounts for contract support costs, but instead refers to separate Annual Funding Agreements. For each fiscal year, the contract requires the Secretary to pay the full amount of contract support costs specified in the Annual Funding Agreement, "[s]ubject only to the appropriation of funds by [Congress] and to adjustments pursuant to [25 U.S.C. § 450j-1(b)]." Joint App. at 133–34. ASNA does not claim that the Secretary failed to pay the secretarial amount, or the contract support costs specified in the Annual Funding Agreements—approximately $1.29 million for fiscal year 1999[3] and approximately $3 million for fiscal year 2000.[4]

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[3] The annual funding agreement for fiscal year 1999 initially identified zero funding for contract support costs, but was later amended to add $297,059 in direct and $902,263 in indirect, non-recurring contract support costs. The agreement was amended again to add $72,662 in direct and $21,697 in indirect, non-recurring contract support costs. *Arctic Slope*, 09-2 BCA ¶ 34,281, slip op. at 4a.

[4] The annual funding agreement for fiscal year 2000 initially identified $5,254,412 in recurring base funds (including recurring contract support costs) and $902,263 in non-recurring contract support costs. The agreement was amended several times to add additional contract support costs, resulting in a total of $896,483 in direct contract support costs and $2,162,108 in indirect contract support costs. *Arctic Slope*, 09-2 BCA ¶ 34,281, slip op. at 4a–5a.

ASNA claims instead that the Secretary has failed to pay ASNA's contract support cost shortfall—the difference between the amount of support costs specified in the Annual Funding Agreement and ASNA's actual expenditures.

ASNA submitted claims for its contract support cost shortfall—$2,028,723 for fiscal year 1999 and $621,530 for fiscal year 2000. The contracting officer did not issue a decision on these claims. Thus, they were deemed denied under 41 U.S.C. § 605(c)(5). On appeal, the Board concluded that ASNA "is entitled to be paid its full [contract support costs] requirement only as long as appropriations are legally available to do so," and found that "funds were no longer available with which to pay claims" because of the statutory cap imposed by the "not to exceed" language. *Arctic Slope*, 09-2 BCA ¶ 34,281, slip op. at 10a. Accordingly, the Board granted the Secretary's motion for summary judgment. ASNA timely appealed and this court has jurisdiction pursuant to 41 U.S.C. § 607(g)(1)(A) and 28 U.S.C. § 1295(a)(10).

DISCUSSION

This court reviews the Board's legal determinations *de novo*. *See Lear v. Siegler Servs., Inc., v. Rumsfeld*, 457 F.3d 1262, 1265–66 (Fed. Cir. 2006). The question of whether the ISDA and the contracts entered into pursuant to that Act require payment of ASNA's contract support costs shortfall is a question of law. *See id.* at 1266.

I

Like the contract at issue in *Cherokee*, the contract here contains an availability clause (i.e., the contract is subject to the appropriation of funds by Congress). *See Cherokee I*, 334 F.3d at 1082. In stark contrast to *Chero-*

kee, however, where the Secretary unsuccessfully relied on committee report language to impose a cap, here there is a statutory cap on funding for contract support costs phrased in traditional not to exceed language. As the Government Accountability Office has noted, the phrase "not to exceed" is a standard phrase used to express Congress's intent to designate a given amount as the maximum available amount for a particular purpose. *See* GAO Redbook 6-32. The opinions of the Government Accountability Office, as expressed in the GAO Redbook, note that "the most effective way to establish a maximum (but not minimum) earmark is by the words 'not to exceed' or 'not more than.'" Additionally, the Comptroller General has recognized that "not to exceed" language "is susceptible of but one meaning"—it restricts agency spending by establishing the maximum amount that an agency may spend. 64 Comp. Gen. 263, 264 (1985). The opinions of the Government Accountability Office and the Comptroller General, while not binding, are "expert opinion[s], which we should prudently consider." *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 201 (D.C. Cir. 1984); *see also Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (relying on GAO Redbook at 6-159).

Our court (explicitly) and the Supreme Court (implicitly) have recognized that "not to exceed" language imposes a binding statutory cap. In *Oglala Sioux*, the appropriations act contained traditional "not to exceed" language. 194 F.3d at 1376. This court explicitly held that "not to exceed" language was sufficient to impose a statutory cap. *Id.* at 1380. The tribe argued that, despite the statutory cap, it was entitled to full funding of its contract support costs. *Id.* at 1378. We rejected that argument, holding that the availability clause in § 450j-1(b) limits the Secretary's ability to bind the government

beyond the statutory cap; thus, the Secretary may not reallocate funding beyond that limit. *Id.* at 1379–80.

Subsequently, in *Cherokee I* we also noted that "Congress generally uses standard phrases to impose a statutory cap," the most common of which is the phrase "not to exceed." 334 F.3d at 1084. We characterized the "not to exceed" language in *Oglala Sioux* as "a statutory cap on appropriations that excused the agency from paying full contract support costs," *id.* at 1083, and concluded that in *Cherokee* there was no statutory cap because "[t]he appropriations acts at issue . . . do not include 'not to exceed language,'" *id.* at 1089. Further, we stated that "if there is a statutory restriction on available appropriations for a program, either in the relevant appropriations act or in a separate statute, the agency is not free to increase funding for that program beyond that limit." *Id.* at 1084. The Supreme Court decision in *Cherokee* did not disagree, assuming that "not to exceed" statutory language was sufficient to impose a statutory cap even though committee reports were not. *See Cherokee II*, 543 U.S. at 642. The Court made clear that reallocation of funds may be prohibited where Congress protects the funds using "statutory earmarks." *Id.* Thus, we conclude that the "not to exceed" language in the appropriations acts for fiscal years 1999 and 2000 imposes a statutory cap on funding for contract support costs, such that the Secretary is not permitted to make payments beyond the maximum specified in the appropriations acts.

II

ASNA appears not to dispute the fact that the "not to exceed" language imposes a statutory cap. However, ASNA argues that "not to exceed" language, in essence, limits recovery only in cases involving a line-item appro-

priation for a single contract.[5] ASNA contends that the "not to exceed" language imposes no limit on the Secretary's contractual liability in this case because the total appropriation is sufficient to satisfy the obligation to the ASNA, even though insufficient to satisfy the combined obligations to all the tribes. Under ASNA's theory, each tribe could sue separately, and the aggregate recovery would exceed the statutory cap. ASNA contends that the decision of our predecessor court in *Ferris v. United States*, 27 Ct. Cl. 542 (1892), supports its position. It does not.

In *Ferris*, the court held that where the appropriation covers multiple contracts, the contractor may sue for breach if the appropriation is sufficient to cover the contract at issue, even if not sufficient for all purposes. *Id.* at 546. The court stated specifically that "[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." *Id.* (emphasis added). Thus, the insufficiency of an appropriation does not "cancel [the government's] obligations, nor defeat the rights of other parties" unless the contractor has notice of a limitation on appropriations. *Id.*

There are important differences between this case and *Ferris*. In *Ferris*, the contractor had no notice of the limited nature of the appropriation, and the court declined to charge "[a] contractor who is one of several

[5] *See Sutton v. United States*, 256 U.S. 575, 581 (1921). In *Sutton*, the Supreme Court held that where the appropriation is for a specific project, the contractor is deemed to have notice of the limitation on appropriations and has no right to recover for work done in excess of the appropriation.

persons to be paid out of an appropriation . . . with knowledge of its administration." 27 Ct. Cl. at 546. The GAO Redbook notes that in situations like *Ferris*, where the contractor is "one party out of several to be paid from a general appropriation," the contractor is not deemed to have notice because "the contractor is under no obligation to know the status or condition of the appropriation account." *GAO Redbook* at 6-44. As we have noted, subsequent to *Ferris*, "subject to the availability of appropriations" language was adopted to change the *Ferris* rule by providing the required notice to the contractor. For example, our predecessor court noted in *C. H. Leavell & Co. v. United States*, 530 F.2d 878, 892 (Ct. Cl. 1976) (citing *Ferris*, 27 Ct. Cl. at 542), that before the incorporation of "subject to the availability of appropriations" language into Army Corps of Engineers contracts, "a failure on the part of Congress for any reason to fund an existing Government contract was held to be a breach of contract." The court further noted that "subject to the availability of appropriations" provisions were included in contracts to overcome the *Ferris* rule by providing notice to the contractor of the limitation on funding. *Id.* at 892. The present contract includes such an availability of funds provision; the contract explicitly states that CSC funding is subject to the availability of appropriations. Joint App. at 133.

ASNA, however, contends that both this court's decision in *Cherokee I* and the Supreme Court's decision in *Cherokee II* hold that the *Ferris* rule applies even where the contract and statute include subject-to-availability language.[6] This is partly correct in that subject-to-

[6] ASNA seeks to read *Ferris* more broadly based on the Supreme Court's description of the tribes' argument in *Cherokee*, but the tribes' argument is not adopted by the

availability language does not excuse the failure to pay in the absence of a statutory cap and where the Secretary has the ability to reallocate funds from non-contract uses. *Cherokee II*, 543 U.S. 641; *Cherokee I*, 334 F.3d at 1093–94. But here there is a statutory cap and no ability to reallocate funds from non-contract uses. In *Ferris* the appropriations act did not contain a statutory cap with respect to the project in question and there was no finding that funds could not be reallocated from discretionary spending to satisfy contractual obligations. *See Ferris*, 27 Ct. Cl. at 546; An Act Making Appropriations for the Construction, Repair, Preservation, and Completion of Certain Works on Rivers and Harbors, and for Other Purposes, ch. 181, 20 Stat. 363, 364, 370, 372 (1879). But a statutory cap bars such reallocation. Adopting ASNA's approach would effectively defeat the statutory cap because the Secretary would be obligated to pay a total amount of tribal obligations exceeding the cap.[7]

Court. *See Cherokee II*, 543 U.S. at 549. There the Court stated:

> The Tribes and their amici add . . . that as 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 the 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. *See Ferris v. United States*, 27 Ct.Cl. 542, 546 (1892).

Cherokee II, 543 U.S. at 637.

[7] *In re Newport News Shipbuilding & Dry Dock Co.*, 55 Comp. Gen. 812 (1976), is not to the contrary. In *Newport News*, the government argued that the total

Moreover, such reallocation from one tribe to another would be particularly inappropriate here in light of the statutory language specifically providing that the Secretary need not reallocate funds from one tribe to another, a provision that did not appear in *Ferris* (where there was no language dealing with reallocation among contracts). *See* 25 U.S.C. § 450j-1(b). Here § 450j-1(b) provides that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization." 25 U.S.C. § 450j-1(b). In *Cherokee*, both the Supreme Court and this court were careful to point out that such reallocation from one tribe to another was not required because there were *other* unrestricted funds available that would not require the Secretary to utilize funds devoted to another tribe. *Cherokee II*, 543 U.S. at 641; *Cherokee I*, 334 F.3d at 1093. This court, for example, declined to decide "how much money was obligated to [funding another tribe] and, therefore, unavailable" because the relevant congressional appropriations contained *other* funds not subject to the restriction of § 450j-1(b) which were sufficient to pay full contract support costs to the tribe. *Cherokee I*, 334 F.3d at 1093. Here there are no such unrestricted funds.

In view of the statutory cap, we hold that the *Ferris* approach is inapplicable. The availability of funds provi-

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appropriation was not available for the contract at issue because language in the committee report divided the total appropriation among several contracts. *Id.* at 818–19. As in *Cherokee*, this argument was rejected. The Comptroller General stated that "subdivisions of an appropriation contained in the agency's budget request or in committee reports are not legally binding . . . unless they are specified in the appropriation act itself." *Id.* at 819–20. Thus, the entire appropriation was available to fund the contract at issue. *Id.* at 822.

sion coupled with the "not to exceed" language limits the Secretary's obligation to the tribes to the appropriated amount. The Secretary is obligated to pay no more than the statute appropriates. *See Oglala Sioux*, 194 F.3d at 1378; *Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1345 (D.C. Cir. 1996). Here the appropriated amount has been paid to the tribes. The method of allocating funds among the various tribes is not at issue.[8]

III

Alternatively ASNA argues that the Secretary breached the contract by not requesting sufficient appropriations. ASNA asserts that "[t]he law does not permit an agency to enter into contracts limited to available appropriations, secure the benefits of the contractor's services, but fail even *to seek* appropriations sufficient to pay the contracts in full." Appellant's Br. 51. Even if this issue had been properly raised below, which we doubt, it is without merit.

The case on which ASNA relies, *S.A. Healy Co. v. United States*, 576 F.2d 299, 300 (Ct. Cl. 1978), involved a situation in which the "plaintiff was awarded a fixed price [construction] contract," which included an availability

[8] Even though the Secretary is under no obligation to reallocate funds from one tribe to benefit another, the Secretary may have a duty to allocate funds among the tribes in a rational, non-discriminatory way. *See Winston Bros. Co. v. United States*, 130 F. Supp. 374, 380 (Ct. Cl. 1955) (holding that where the agency "allocates the funds on a rational and non-discriminatory basis and they prove insufficient, the Government is not liable for harm resulting from the shortage"); *but see Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) ("As long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives . . . the decision to allocate funds is committed to agency discretion by law."). We need not decide that issue in this case.

clause. The plaintiff sought a monetary award for losses incurred due to a shutdown of work allegedly "caused by [the government's] failure to request and secure sufficient funds from Congress." *Id.* However, in holding that the contractor should not bear the risk of loss, the court relied on the fact that "the contractor was not warned of the lack of funding." *Id.* at 306.

In this case, it is not clear that the Secretary failed to request adequate funding. The Secretary requested a given amount for contract support costs in both fiscal year 1999 and fiscal year 2000. *See* President's Budget for Fiscal Year 1999 (1998), Budget App. 403; President's Budget for Fiscal Year 2000 (1999), Budget App. 434. As it turns out, additional funds were required in both years. As required by statute, the Secretary "prepare[d] and submit[ted] to Congress an annual report . . . includ[ing] . . . an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted."[9] 25 U.S.C. § 450j-1(c). Despite notice of the shortfall, Congress chose to impose a statutory cap on funding for contract support costs. *See* 1999 Appropriations Act, 112 Stat. 2681, 2681-279; 2000 Appropriations Act, 113 Stat. 1501, 1501A-182 (1999). In fact, the committee report for the original version of the 2000 Appropriations Act specifically acknowledged that because "contract support costs . . . have outpaced available funding . . . [w]e have reached a point at which we can no longer offset

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[9] *See* Office of Tribal Programs, Indian Health Service Contract Support Cost Data, at 5 (Aug. 27, 1999), *available at* http://www.ncai.org/fileadmin/contract_support/IHS_Contract_Support_Data_FY1999.pdf; Office of Tribal Programs, Indian Health Service Contract Support Costs Shortfall Report, at 1, *available at* http://www.ncai.org/fileadmin/contract_support/FY2000_CSC_Shortfall_Report.pdf.

these costs . . . by continuing to downsize the Federal bureaucracy in IHS." H.R. Rep. No. 106-222, 112–13 (1999).[10] The committee report further stated that Congress "cannot afford to appropriate 100% of contract support costs at the expense of basic program funding for tribes." *Id.*

But whether or not the Secretary could take further action to request additional funding, the contractor was expressly warned of the risk that funding would be inadequate. The contract explicitly specified that funding may be inadequate to fully fund the Secretary's obligations. *See* Joint App. at 150–51. Under such circumstances there can be no breach resulting from an alleged failure to request adequate funding.

Accordingly, we conclude that ASNA is not entitled to payment of its shortfall for fiscal years 1999 and 2000.[11]

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[10] Appropriations for Indian Health Services for fiscal year 2000 were initially proposed in H.R. 2466, 106th Cong. (1st Sess. 1999). The original bill provided that "notwithstanding any other provision of law, of the amounts provided herein, *not to exceed* $238,781,000 shall be for payments to tribes and tribal organizations for contract or grant support costs for fiscal year 2000." H.R. 2466 (emphasis added). The final bill, as enacted, reduced the amount appropriated for contract support costs by approximately $10 million, but the provisions relating to contract support costs remained virtually unchanged in all other respects. *See* 2000 Appropriations Act, 113 Stat. 1501, 1501A-182.

[11] Before the Board, ASNA argued that unexpended funds for each of the two years in question were available, and that these amounts were later returned to the Treasury. The amounts were $179,539 for fiscal year 1999 and $137,013.51 for fiscal year 2000. The Board held that these amounts were not available because they were returned to the Treasury. That holding appears to conflict with our holding in *Cherokee I* that the proper ques-

AFFIRMED

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tion is "whether funds *were* available for the Secretary to meet his contract obligations, not whether those funds *remain available* now." 334 F.3d at 1092. However, while mentioned in the Statement of the Case of ASNA's opening briefs, the availability of the lapsed funds was not argued and thus not properly raised. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006); *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990).

CERTIFICATE OF SERVICE

I, Lloyd B. Miller, hereby certify and attest that:

1. I am counsel of record for Appellant in the above-captioned matter.

2. That on the 2nd day of March 2011 I caused to be delivered by Federal Express the original and eighteen (18) true and correct copies of Appellant's Combined Petition For Rehearing and Rehearing En Banc to the following for filing:

Jan Horbaly, Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, NW
Washington, D.C. 20439

3. That on the 2nd day of March 2011 I caused to be served by Federal Express two (2) true and correct copies of Appellant's Combined Petition For Rehearing And Rehearing En Banc upon the following:

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Dated this 1st day of March 2011.

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