No. 08-2262

ORAL ARGUMENT IS REQUESTED

In The United States Court of Appeals for the Tenth Circuit

RAMAH NAVAJO CHAPTER, *et al.*,

Plaintiffs-Appellants,

v.

KENNETH L. SALAZAR, Secretary of the Interior, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
The Honorable C. LeRoy Hansen, Judge

BRIEF FOR THE APPELLEES

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JURISDICTIONAL STATEMENT

Plaintiffs-appellants Ramah Navajo Chapter, *et al.*, brought this class action invoking the jurisdiction of the district court pursuant to the Indian Self-Determination and Education Assistance Act of 1975 (ISDA or Act), as amended, 25 U.S.C. § 450m-1(a), and seeking to resolve a dispute concerning the payment of "contract support costs" under ISDA. The district court certified a class, and the action proceeded. Most of the case has been settled, except for the issue presented on this appeal: whether, in view of the statutory cap on contract support costs for specific fiscal years, defendants lawfully refused to provide full payment to plaintiffs of their contract support costs for those years, but instead made partial payment to contracting tribes on a pro rata basis. In a Memorandum Opinion and Order entered on August 31, 2006 (Mem. Op. and Order), the district court upheld Interior's position. Doc. No. 1042, App. Vol. VII 1718.

The latter interlocutory ruling became appealable when the district court entered its final judgment on August 27, 2008. Doc. No. 1162, App. Vol. VII 1743. Plaintiffs filed a notice of appeal on or about October 24, 2008. Doc. No. 1176, App. Vol. VII 1746. The jurisdiction of this Court is invoked under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

ISDA, 25 U.S.C. §§ 450-450n, authorizes the Secretary of the Interior to enter into contracts with Indian tribes for the administration of programs that the Secretary would otherwise operate. The Act also provides that contract support costs, which are reasonable and necessary direct and indirect costs related to the administration of a contract, shall be added to the contract. The provision authorizing such contracts, however, makes all contract payments "subject to the availability of appropriations." 25 U.S.C. § 450j-1(b).

The issue presented is:

Whether annual statutory appropriations caps on contract support costs preclude holding the government liable to plaintiffs for additional contract support costs above and beyond the capped amounts for fiscal years 1994 to the present.

STATEMENT OF THE CASE

This case involves a recurring issue between tribal contractors and the federal government with respect to the government's obligation to fully fund self-determination contracts in the face of insufficient congressional appropriations. The dispute at issue on this appeal arose in the aftermath of *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005), where the Supreme Court held that the government is bound by its promise to pay contract support costs (CSC) when it has entered into an

ISDA contract with a tribe, and there are sufficient *unrestricted* appropriated funds available to make the payments. The Supreme Court, however, did not address the question of the liability of the government when there is a "capped" CSC appropriation for the total amount of funds that can be spent on all ISDA contracts. The district court in the instant case granted summary judgment in favor of the government, holding that plaintiffs are not entitled to recover their full CSC in fiscal years in which Congress has imposed such a statutory cap.

STATEMENT OF FACTS

A. Statutory And Regulatory Scheme.

Interior's Bureau of Indian Affairs (BIA) finances its ISDA self-determination contracts, as well as all of its directly operated programs, through funds derived from its annual lump-sum appropriation and other statutory funds appropriated by Congress. Prior to fiscal year 1994 (the year when Congress began setting statutory caps limiting the amount of funds to be allocated to CSC), conference committee reports accompanying Interior's appropriations bills recommended that a certain limited amount of BIA's lump-sum appropriation be set aside each year specifically for CSC payments. BIA paid CSC to tribal contractors in amounts corresponding to the recommendations set forth in congressional committee reports. No such limitation was included, however, in the text of the appropriations acts themselves.

By contrast, in the 1994 Appropriations Act, and in every subsequent fiscal year's appropriation, Congress placed a statutory cap in the appropriations act itself, specifically limiting the amount of CSC that BIA could pay to tribal contractors under their ISDA contracts. *See*, *e.g.*, Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2499, 2511 (1994) (setting aside "not to exceed $95,823,000 . . . for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts . . . authorized by the [ISDA]"); *see also* Doc. No. 971, Exh. A, App. Vol. VI 1434-80, for the appropriations acts for the all of the years in question (1994 to 2005).

Congress recognized that its finite appropriations would not always be sufficient to allow BIA to pay every tribal contractor the full amount of funding requested by a tribe to operate its programs -- just as BIA could face limited appropriations and funding shortfalls in connection with its own direct operation of programs and provision of services. Therefore, ISDA provides that BIA's funding of self-determination contracts is conditional: "Notwithstanding any other provision in this subchapter [Indian Self-Determination Assistance], the provision of funds under this subchapter is *subject to the availability of appropriations* . . . ." 25 U.S.C. § 450j-1(b) (emphasis added). Similarly, in connection with another statutory provision setting the term of self-determination contracts, which terms could be

indefinite, the Act reiterates that "[t]he *amounts* of such [self-determination] contracts shall be *subject to the availability of appropriations*." *Id.* § 450j(c)(1) (emphasis added).[1]

This limitation on the funds available to the tribes for self-determination contracts is not only mandated by statute, but is also required to be included in the language of each self-determination contract. *Id.* § 450l(a)(1). Section 450l of the ISDA provides a Model Contract setting forth the terms and provisions that each self-determination contract must contain. Pursuant to the model contract, self-determination contracts must contain language limiting BIA's funding of those contracts to available appropriations. The Model Contract states as follows: "*Funding Amount. -- Subject to the availability of appropriations*, the Secretary shall make available to the Contractor the *total* amount specified in the annual funding agreement . . . ." *Id.* § 450l(c) at Sec. 1(b)(4) (emphasis added). The statutory model contract also limits the obligation of the tribes to perform under the contract to the amount of funds awarded. *Id.* § 450l(c) at Sec. 1(b)(5).

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[1] In addition, Congress anticipated that there might be shortfalls in appropriations for contract support costs, and it provided for consideration of the shortfalls within the appropriations process. In particular, Section 450j-1(c) of ISDA requires the Secretary to provide an annual report to Congress, including "an accounting of any deficiency in funds" for payment of contract support costs. *Id.* § 450j-1(c)(2).

These contractual limitations are contained in plaintiffs' individual ISDA contracts. *See*, *e.g.*, Annual Funding Agreements for plaintiffs Ramah Navajo School Board and The Pueblo of Zuni (containing provisions expressly limiting the Government's liability), Doc. No. 971, Exh. B, App. Vol. VI 1481-89.

The amounts requested by BIA tribal contractors for CSC each year have exceeded the amount of appropriated funds that Congress has set aside for that purpose. *See*, *e.g.*, The Report on Tribal Contracts and Grants, FY 1998, Department of Interior, Bureau of Indian Affairs (1998 Shortfall Report), Doc. No. 971, Exh. C, App. Vol. VII 1490-1544 (showing CSC shortfall totals by area and contractor). Because of these funding shortfalls each year, BIA distributes CSC on a pro rata basis to all tribal contractors who incurred such costs. *See Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1348-1349 (D.C. Cir. 1996) (explaining how pro rata reduction scheme would effectuate original statutory scheme of ISDA and comply with congressional intent to limit appropriations for CSC).

B. Facts of the Case.

1. History of the Litigation.

This case arose from a dispute between the tribes and Interior over the formula that Interior used to calculate indirect contract support costs.[2] The district court upheld the validity of Interior's indirect cost formula, but this Court reversed that judgment. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). However, this Court's opinion did not address the impact of the "subject to the availability of appropriations" language in 25 U.S.C. § 450j-1(b). As the Federal Circuit noted in *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1380 (Fed. Cir. 1999), *cert. denied* 530 U.S. 1203 (2000), this Court's "holding [in *Ramah*] only specifically prohibits adverse adjustments to the calculation of ISDA indirect costs stemming from non-funding of indirect costs by other state or federal agencies and does not address the problem in this case -- congressional under-appropriation of funds."

This Court remanded the case to the district court. In 1998, the parties entered a partial settlement through mediation relating to claims arising out of BIA's use of

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[2] Pursuant to 25 U.S.C. § 450b(f), indirect costs are those "costs incurred for a common or joint purpose benefitting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefitted without effort disproportionate to the results achieved."

this indirect contract support cost formula prior to 1994, but reserved for further litigation claims from FY 1994 forward arising out of BIA's calculation of indirect CSC. After remand, plaintiffs moved to amend their complaint to include a new class representative, Oglala Sioux, and a new claim that the BIA has failed to fully fund indirect costs on BIA's own contracted programs due to insufficiency of appropriations since FY 1992 under a theory that the failure to do so violated ISDA and breached the duty of good faith and fair dealing on the contracts.[3] In other words, plaintiffs claimed that even under BIA's former indirect cost formula, it failed to fully fund indirect CSC on its own contracted programs.

2. Most Recent District Proceedings and Decision.

In 2002, the parties filed cross-motions for partial summary judgment on the issue that is before the Court on this appeal. Mem. Op. and Order 4, App. Vol. VII 1721. The cross-motions were stayed in 2002, pending final disposition of *Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054 (10th Cir. 2002), *rev'd sub nom. Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005).

Thereafter, the parties filed supplemental memoranda, and the district court adjudicated the dispute. In its ruling of August 31, 2006, the court granted

[3] Plaintiffs' appeal only concerns claims from 1994 forward. The claims remaining for 1992 and 1993 were settled.

defendants' motion and denied plaintiffs' motion. Mem. Op. and Order 3, 15, App. Vol. VII 1720, 1732.

The court began by reciting the language of ISDA and the relevant BIA appropriations acts, *id.* at 4–7, App. Vol. VII 1721-24, and identifying the material undisputed facts. *Id.* at 7-8, App. Vol. VII 1724-25. It then discussed relevant legal decisions, emphasizing that "[b]oth the Federal and D.C. Circuits have addressed the issue in this case, ruling that caps on appropriations in conjunction with the 'availability of appropriations' language in the ISDA, limit the liability of the government to pay additional amounts of contract support costs, even if this means that the amount provided is less than the amount negotiated in the self-determination contracts." *Id.* at 8, App. Vol. VII 1725; *see generally id.* at 8-10, App. Vol. VII 1725-27 (analyzing *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999), and *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). The court further stressed that "[t]hese cases have concluded that the ISDA and its model contracts do not create enforceable obligations of the United States for payment of contract support costs ('CSC') in amounts in excess of 'capped' CSC appropriations." Mem. Op. and Order 8, App. Vol. VII 1725. The court found the Federal Circuit and D.C. Circuit rulings persuasive. *See id.* at 14, App. Vol. VII 1731.

Next, the court agreed with the government that the Supreme Court's *Cherokee* decision is distinguishable and not controlling here. *See id.* at 11-14, App. Vol. VII 1728-31. The court stressed that plaintiffs themselves recognized that *Cherokee* "did not reach pivotal issues that remain to be decided by this Court" *(id.* at 11, App. Vol. VII 1728) -- most importantly, the significance of a statutory cap on CSC payments, which did not exist in *Cherokee*. The court stated that "[a]s acknowledged by Plaintiffs, the Supreme Court did not directly address the liability of the Government when there is a capped appropriation that bulks together funds owed to hundreds of contracts, as in the immediate case." *Id.* at 13, App. Vol. VII 1730. In the court's view, "[t]his is a very different statutory scheme from that considered" by the Supreme Court in *Cherokee*, and the "obvious implication" from *Cherokee* is that "where there are legal restrictions in the agency's appropriations, the 'subject to the availability of appropriations' language serves to limit governmental liability under the contracts to the amount of those restricted funds." *Id.* Quoting the Supreme Court, the district court further held that the latter language "'normally makes clear that an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become *binding* unless and until Congress appropriates funds for that year,'" and "'also makes clear that a Government contracting officer lacks any special statutory authority needed to bind the

Government without regard to the availability of appropriations.'" *Id.* at 14, App. Vol. VII 1731, quoting *Cherokee*, 543 U.S. at 643.

The court therefore concluded that "the United States is not liable for shortfalls in contract payments when Congress has specified an insufficient 'not to exceed' lump sum appropriation," and that "ISDA and its model contracts do not create enforceable obligations of the United States for payment of contract support costs in amounts in excess of capped contract support cost appropriations." Mem. Op. and Order 14, App. Vol. VII 1731.

STANDARD OF REVIEW

An order granting summary judgment is reviewable *de novo*. *Ripley v. Wyoming Med. Ctr., Inc.*, 559 F.3d 1119, 1121 (10th Cir. 2009) (citation omitted). Furthermore, statutory construction is a purely legal question, *see United States v. Diaz*, 989 F.2d 391, 392 (10th Cir. 1993); for this additional reason, the district court's construction of ISDA is subject to *de novo* review, *Haynes v. Williams*, 88 F.3d 898, 899 (10th Cir. 1996).

SUMMARY OF ARGUMENT

The plaintiff class has no "entitlement" to payment of additional funds for contract support costs in excess of a capped appropriation that Congress has imposed. With its exclusive power over the federal purse, Congress alone has the power to

determine the amount of the payment obligation that the federal government is authorized to incur under contracts entered into pursuant to ISDA, 25 U.S.C. § 450 *et seq*.

Under the unambiguous provisions of ISDA, the funding of ISDA contracts between the government and Indian tribes has always been legally restricted to the "availability of appropriations." This restriction has been further mirrored in the tribes' ISDA contracts. Prior to 1994, this statutory and contractual limitation did little to diminish the government's legal obligation to pay all of the tribes' CSC because Congress did not specifically limit the amount of "available appropriations" from the BIA's annual appropriations that could be used for that purpose. Rather, based on the teachings of the Supreme Court in *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005), the agency's entire annual lump-sum appropriation was "legally available" for the payment of valid contractual obligations for CSC. However, the government's ISDA obligations were considerably altered in fiscal year 1994 and every year thereafter. Congress, cognizant of the tribes' escalating demand for CSC, placed statutory caps on the amount of agency funding that could be used to pay CSC. These funding restrictions, set forth in every one of the BIA's annual appropriations statutes since 1994, unambiguously limit the liability of the federal government to pay for CSC in excess of the capped amounts.

Plaintiffs provide no workable theory enabling the Court to ignore the unambiguous limits Congress has placed on ISDA CSC payments, and to award the plaintiff class members additional funding to which they are not entitled by statute or contract. Even as plaintiffs admit that those statutory limitations prohibit the *Secretary of the Interior* from paying additional amounts for CSC, they suggest that the *United States* is not so limited. Under plaintiffs' theory, the "subject to the availability of appropriations" language set forth in their contracts and in ISDA only affects the Secretary's provision of funds, not the liability of the United States to pay all of plaintiffs' CSC.

Plaintiffs' strained interpretation of the "subject to the availability of appropriations" language conflicts with the ordinary meaning that the Supreme Court ascribed to this language in *Cherokee*, a case that turned on the fact that the Indian Health Service's unrestricted lump-sum appropriation was "legally available" to pay the full amount of the tribes' CSC. As discussed below, *Cherokee* makes clear that the "subject to the availability of appropriations" language makes the binding nature of ISDA contracts wholly dependent on Congress appropriating sufficient amounts of legally unrestricted funds to pay those contracts. Where, as here, Congress has explicitly instructed the government that the Secretary's expenditures "not exceed" a set amount for payment of CSC, the United States' liability to pay those costs is

limited by express terms of the ISDA contracts to funds that are legally available for that purpose.

Plaintiffs attempt to fit this case within the mold of *Cherokee* by arguing that, because the capped appropriations at issue here are not legally restricted to a specific amount *for each tribal contractor*, the appropriations caps are equivalent to the lump-sum appropriations at issue in *Cherokee*. Plaintiffs suggest that, if the capped appropriations are "legally available" to pay the full amount of contract support costs of even one contractor, the mere fact that the capped appropriation cannot cover all of the tribes' costs does not relieve the government of liability. However, plaintiffs misunderstand the distinction between "legally unrestricted" lump-sum appropriations, and the capped appropriations at issue here which are legally restricted to a specific amount for a specific purpose (payment of all of the tribes' CSC).

Plaintiffs further argue that the United States is liable for additional amounts of CSC because the Secretary did not request adequate funds from Congress during the appropriations process. There is no such obligation in ISDA contracts. Moreover, by statute, Congress has obligated the Secretary to present to Congress an annual accounting of any deficiency in CSC funding for the fiscal year. 25 U.S.C. § 450j-1(c)(2). The Secretary has satisfied this obligation, making Congress fully

aware of the full amount of CSC need every year. For these reasons, plaintiffs' argument that the government bears the contractual risk of insufficient appropriations and remains fully liable due to its inadequate funding requests fails as a matter of law.

The federal government has wholly satisfied the contractual bargain it made with plaintiffs. Tribes entered those contracts fully apprised that payment under their contracts was limited to the amounts of legally available appropriations provided by Congress. Since 1994, the government paid the tribal contractors all of the CSC that it was authorized to pay from its legally available, albeit restricted, capped appropriations. Thus, the district court correctly held that, having fully met their statutory and contractual obligations, defendants are entitled to judgment as a matter of law on plaintiffs' claims for additional CSC funding for years 1994 forward.

Finally, plaintiffs' assertion that the government has made "admissions" in another case that undermine its position here is utterly fanciful. This argument has no basis in this Court s case law concerning the "judicial admission" doctrine.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT INTERIOR HAS NOT VIOLATED ISDA.

A. Relevant Statutory Construction Principles.

Statutory construction begins with the plain language of the statute under scrutiny. *Ardestani v. INS*, 502 U.S. 129, 135 (1991); *Cannon v. University of Chicago*, 441 U.S. 677, 689 (1979); *Colorado High Sch. Activities Ass'n v. National Football League*, 711 F.2d 943, 945 (10th Cir. 1983). "In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'" *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) (citation omitted); *see NISH v. Rumsfeld*, 348 F.3d 1263, 1268 (10th Cir. 2003). Moreover, if the intent of Congress is clear and unambiguous, a court 's analysis begins and ends with the plain statutory language. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *Russell v. United States*, 551 F.3d 1174, 1178 (10th Cir. 2008), *pet. for cert. pending*, No. 08-1437 (U.S.); *United States v. Brown*, 529 F.3d 1260, 1264 (10th Cir. 2008).

B. ISDA States In Clear, Unambiguous Language That Interior's Obligation To Fund Contract Support Costs Is "Subject To The Availability of Appropriations."

In providing funds for a self-determination contract, ISDA requires the Secretary to provide direct program funds in an amount not less than he would have otherwise provided if BIA directly operated the contracted program (the Secretarial amount), as well as funds for the reasonable costs for certain administrative expenses associated with operation of the program -- *i.e.*, CSC. 25 U.S.C. § 450j-1(a)(1) & (2). However, ISDA restricts the applicable funding level for a self-determination contract, including funding for CSC. The Act expressly states: "Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter *is subject to the availability of appropriations* . . . ." *Id.* § 450j-1(b); *see also id.* § 450j(c) ("The amounts of [self-determination] contracts shall be *subject to the availability of appropriations*.") (emphasis added); *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1378 (Fed. Cir. 1999) (finding the phrase "subject to the availability of appropriations" to be unambiguous), *cert. denied*, 530 U.S. 1203 (2000); *Ramah Navajo Sch. Bd. v. Babbitt* 87 F.3d 1338, 1345 (D. C. Cir. 1996) (same). Further, absent certain circumstances, ISDA prohibits Interior from reducing the amount of funds provided to tribal contractors with existing contracts. *Id.* § 450j-

1(b)(2) ("The amount of funds required [under ongoing self-determination contracts] shall not be reduced by the Secretary in subsequent years . . .").

During the fiscal years at issue, beginning in 1994, congressional appropriations earmarked for CSC payments were insufficient to fully fund all ISDA contracts. Thus, Interior could spend only as much money annually as Congress specifically appropriated for that purpose. *See Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) ("[A]n agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes . . . ."); *Oglala*, 194 F.3d at 1378 ("[I]n the face of congressional under-funding [of CSC], . . . [the] agency can only spend as much money as has been appropriated for a particular program."); *Ramah Navajo Sch. Bd.*, 87 F.3d at 1345 (Congress "clearly" included the "subject to availability of appropriations" proviso of § 450j-1(b) "to make evident that the Secretary is not required to distribute money if Congress does not allocate that money to him under the Act."); *see also Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 643 (2005) (The phrase "'subject to the availability of appropriations' . . . makes clear that a Government contracting officer lacks any special statutory authority needed to bind the Government without regard to the availability of appropriations.").

As the district court correctly determined, in the face of a congressionally-capped appropriation, the agency simply could not lawfully pay plaintiffs the full amount of their CSC. *Cf. Star-Glo Assocs. LP v. United States*, 59 Fed. Cl. 724 (2004) (citrus growers' claims were barred where federal funding to compensate owners of groves destroyed by citrus canker was subject to statutory cap and available funds were exhausted before suit was commenced), *aff'd on other grounds*, 414 F.3d 1349 (Fed. Cir. 2005), *cert. denied* 547 U.S. 1147 (2006); *accord, Greenlee County v. United States*, 487 F.3d 871, 878-79 (Fed. Cir. 2007), *cert. denied*, 128 S. Ct. 1082 (2008); *see also Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1171 (Fed. Cir.), *cert. denied*, 516 U.S. 820 (1995) (if a statute imposes a funding cap, payments in excess of the cap would violate the Anti-Deficiency Act, 31 U.S.C.§ 1341(a)(1)(A)).

In *Cherokee*, the Supreme Court addressed the question of the government's obligation to pay under a self-determination contract and annual funding agreement containing the government's promise to pay CSC. The Court characterized the government's argument to be that "it is legally bound by its promises if, and only if, Congress appropriated sufficient funds, and that, in this instance, Congress failed to do so." 543 U.S. at 636. In rejecting the government's arguments, the Court observed

that Congress had appropriated "far more" than the amounts at issue and that "[t]hese appropriations . . . contained no relevant statutory restriction." *Id*. at 637.

Importantly, the *Cherokee* Court also explained that the subject-to-the-availability-of-appropriations proviso "is often used with respect to Government contracts . . . normally [to] make[] clear that an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become binding unless and until Congress appropriates funds for that year." *Id*. at 643. "It also makes clear," the Court explained, "that a Government contracting officer lacks any special statutory authority needed to bind the Government without regard to the availability of appropriations." *Id*. The Court concluded that the proviso did not support the government's position in *Cherokee* because Congress had in fact appropriated unrestricted funds that were adequate to pay the tribe the amount promised in its contract. In contrast, in the instant case CSC funding is subject to an express statutory cap, and the funding is inadequate to pay all tribal CSC. That is essentially dispositive here. *See Southern Ute Indian Tribe v. Leavitt*, 497 F. Supp.2d 1245, 1256 (D.N.M. 2007).[4]

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[4] As the *Southern Ute* court acknowledged, "the Supreme Court [in *Cherokee*] did not decide what the Government's obligations to pay CSC would be if Congress explicitly prohibited the use of unrestricted funds to meet these obligations. Furthermore, the Supreme Court hinted that the Government's obligations to pay CSC (continued...)

II. BECAUSE BIA HAS FULLY DISBURSED TO THE TRIBES ALL OF ITS LEGALLY AVAILABLE APPROPRIATIONS FOR CONTRACT SUPPORT COSTS, PLAINTIFFS HAVE NO ENTITLEMENT TO ADDITIONAL FUNDING.

Plaintiffs' claims for money damages for years 1994 to the present rely on the acceptance of the erroneous proposition that, as tribes contracting under ISDA, they are absolutely entitled to payment of all of their CSC regardless of the fact that Congress has placed unambiguous restrictions on the amount of BIA's annual appropriation that can be used for that purpose. What plaintiffs fail to comprehend is that Congress has the final word as to how much money the United States, through its agencies, can obligate on given programs or contracts. The Appropriations Clause of the Constitution commands that "no money can be paid out of the Treasury unless

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[4](...continued)
might be different if Congress did not appropriate adequate unrestricted funds." *Southern Ute*, 497 F. Supp.2d at 1256. The court also observed that the Supreme Court's statement that the agency could seek protection of funds by requesting statutory earmarks "appears to be another suggestion that the Government's obligation to pay CSC may be different when there are no unrestricted funds available to pay them." *Id.*; *see also Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1103 (D. N.M. 2006) ("[I]t is doubtful that the [Supreme Court's] holding in *Cherokee Nation* would have an effect on ISDA contract disputes for contracts during statutory cap years . . . .").

We note that the plaintiffs in *Southern Ute* attempted to appeal a subsequent interlocutory order in that case concerning a related issue, but this Court dismissed that appeal for lack of jurisdiction, *Southern Ute Indian Tribe v. Leavitt*, 564 F.3d 1198 (10th Cir. 2009), and the case remains pending in district court. For further discussion of *Southern Ute*, *see* section III. D, *infra*, at 49-55.

it has been appropriated by an act of Congress." *Office of Personnel Management v. Richmond*, 496 U.S. 414, 424 (1990) (citation omitted).

The extent of plaintiffs' alleged "entitlement" to CSC is clearly defined by their own contracts, which state that the amount to be paid under the contract is "subject to the availability of appropriations." In other words, like most contracts, the terms of ISDA agreements are subject to certain conditions -- conditions of which the tribes were on notice when the contracts were signed. Furthermore, the provisions of ISDA, which set forth the terms and parameters of those contracts, specifically state that the "provision of funds" under ISDA contracts "is subject to the availability of appropriations," 25 U.S.C. § 450j-1(b), and that the "*amounts* of such [self-determination] contracts shall be subject to the availability of appropriations." *Id.* § 450j(c)(1)(B) (emphasis added).

In *Cherokee*, *supra*, the Supreme Court clarified that the government could not defend against a claim for breach of an ISDA contract for failure to pay all CSC on the basis of a lack of sufficient appropriations in those years in which Congress placed no statutory restrictions on how much of the agency's annual lump-sum appropriations could be used for that purpose:

> The Government argues that these other funds, *though legally unrestricted (as far as the appropriations statutes' language is concerned)*, were nonetheless unavailable to pay 'contract support costs' because the Government had to use

> those funds to satisfy a critically important need, namely to pay the costs of 'inherent federal functions,' such as the cost of running the Indian Health Service's central Washington office. . . . This argument cannot help the Government, however, for it amounts to no more than a claim that the agency has allocated the funds to another purpose, albeit potentially a very important purpose.

543 U.S. at 641-42 (emphasis added). In that case, tribal contractors sued the Indian Health Service (IHS) for failing to fully pay contract support costs in fiscal years 1996 and 1997. *Id.* at 634-35. The Court concluded that the "subject to the availability of appropriations" language in ISDA and in the contracts was not sufficient to relieve IHS from liability under the contracts because Congress had in fact "appropriated adequate unrestricted funds." *Id.* at 643. The Supreme Court found that IHS's appropriations statutes for the years in question "unambiguously provided unrestricted lump-sum appropriations" from which CSC could be paid. *Id.* at 647.[5]

Prior to 1994, BIA, like IHS, funded the tribes' CSC from its annual "unrestricted" lump-sum appropriation. But for the fact that the parties to this case have settled all monetary claims for fiscal years prior to 1994, the *Cherokee* decision

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[5] Congress did not begin imposing statutory appropriations caps on IHS's payment of CSC until 1998. *See* Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1582-83 (1997), Doc. No. 971, Exh. D, App. Vol VII 1545.

would have directly affected resolution of the *pre*-1994 claims in this case.[6] The same cannot be said, however, for plaintiffs' monetary claims for 1994 forward (the claims relevant here). In 1994 Congress, obviously concerned about the escalating tribal demand for CSC, began restricting the amount of funding that is legally available for payment of tribes' CSC. As observed *supra*, in fiscal year 1994 and in every year thereafter, Congress has placed a cap, in the appropriations acts themselves, on the amount of funding that was available to tribes for CSC incurred under their ISDA contracts.

These appropriations caps signal the death knell for plaintiffs' monetary claims for years 1994 forward. The Appropriations Clause bars the payment and obligation of any funds for contract support costs to plaintiffs beyond those amounts made legally available for that purpose by Congress.[7] As plaintiffs have admitted, officers

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[6] The fact that BIA had no legal restrictions on the amount of appropriated funds it could expend for contract support costs in fiscal years prior to 1994 provided a legal basis for the agency's settlement in this case of all of plaintiffs' class claims for CSC for those pre-1994 years. *See Ramah Navajo Chapter v. Babbitt*, 50 F. Supp.2d 1091 (D. N.M. 1999) (Approving First Partial Settlement Agreement for $76.2 million); *Ramah Navajo Chapter v. Norton*, 250 F. Supp.2d 1303 (D. N.M. 2002) (Approving Second Partial Settlement Agreement for $29 million).

[7] The Appropriations Clause of the Constitution, art. I, § 9, cl. 7, provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The Clause "vests Congress with exclusive power over the federal purse," assuring that "Congress has absolute control of the moneys of the United (continued...)

of the United States are prohibited from making or authorizing an expenditure or obligation that exceeds amounts available in appropriations for that obligation. *See* 31 U.S.C. § 1341(a)(1)(A); *Highland Falls-Fort Montgomery Cent. Sch. Dist.*, 48 F.3d at 1171 (Anti-Deficiency Act "makes clear that an agency may not spend more money for a program than has been appropriated for that program"); *see also* Plfs' Supp. Mem. in Support of Amended Motion for Partial Summ. Judg. 3, Doc. No. 962, App. Vol. VI 1316 ("[I]f Congress does not provide sufficient funds the Secretary cannot write checks to cover all ISDA contract support cost obligations.").

It is undisputed that Interior, through BIA, has paid to the tribes all of the funding that Congress made legally available under the appropriations caps for CSC payments. *See* Mem. Op. And Order 7, App. Vol. VII 1724. Consequently, the district court correctly granted defendants judgment as a matter of law on plaintiffs' claims for monetary damages for fiscal years 1994 forward.

III. PLAINTIFFS PROVIDE NO WORKABLE THEORY THAT WOULD ALLOW THE COURT TO IGNORE CONGRESS' UNAMBIGUOUS LIMITS ON ISDA CONTRACT SUPPORT COST PAYMENTS.

To circumvent the binding legal restrictions in BIA's appropriations statutes and in ISDA, plaintiffs argue that those statutory restrictions limit only the

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[7](...continued)
States." *Rochester Pure Waters Dist. v. EPA*, 960 F.2d 180, 185 (D.C. Cir. 1992) (citation and internal quotation marks omitted).

Secretary's "expenditure authority," not the *United States'* "contract authority" and liability. *See, e.g.,* Pl. Br. 37, 42. Plaintiffs also attempt to characterize the CSC appropriations caps as "lump-sum appropriations" to bring this case within the purview of *Cherokee*. *See id.* at 26, 28 (characterizing the appropriations caps as a "lump sum appropriation"). Finally, plaintiffs suggest that the United States is fully liable for the additional amounts of CSC -- above the legal limits imposed by Congress -- because the Secretary did not ask for full funding during the appropriations process. *See* Pl. Br. 34. Plaintiffs provide no support for these theories.

A. The "Subject To The Availability Of Appropriations" Language Contained In ISDA And In Plaintiffs' Contracts Limits The Government's Liability To Available Appropriations.

The "subject to the availability of appropriations" language contained in both the authorizing statute (ISDA) and the self-determination contracts means that the government's financial obligation does not become binding until appropriations are made by Congress. Moreover, the language limits the contracting officer's authority to bind the government in excess of appropriations. Accordingly, the restrictions (or lack thereof) in appropriations statutes establish the full scope of the government's liability for those contracts.

Plaintiffs make two principal arguments to support their position that the "subject to the availability of appropriations" language does not limit the government's liability to fully pay contract support costs. First, plaintiffs argue that the phrase "subject to the availability of appropriations" in the contracts does not limit the total amount of the contracts to the total amount of funding appropriated by Congress for that purpose. *See* Pl. Br. 22-36. Second, plaintiffs assert that the phrase "subject to the availability of appropriations" language in the ISDA only restricts the "expenditure authority" of the Secretary of the Interior, not the "contract authority" and liability of the United States to pay the full amount of contract support costs. *Id.* at 37-52. Both of these arguments fail.

1. The "Subject To The Availability of Appropriations" Clause Limits The Government's Liability For Contract Support Costs To The Specific Amounts Appropriated For That Purpose.

Plaintiffs would have this Court construe the phrase "subject to the availability of appropriations" in ISDA contracts in such a way as to lend it ambiguity, where no ambiguities actually exist. Specifically, plaintiffs embark on a dissection of the contract text surrounding that phrase in the following ISDA Model Contract provision:

> *Funding amount. Subject to the availability of appropriations*, the Secretary shall make available to the Contractor *the total amount* specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such

> amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act.

Section 1(b)(4) of the Model Contract, 25 U.S.C. § 450l(c) (emphasis added). Plaintiffs assert that "subject to the availability of appropriations" modifies "shall make available," rather than "the total amount." *See* Pl. Br. 46-48.

Plaintiffs' analysis of the contract term "subject to the availability of appropriations" ignores one of the most important sources of its meaning -- the authorizing statute, ISDA. The terms set forth in the Model Contract provision that plaintiffs attempt to interpret, Section 1(b)(4) of 25 U.S.C. § 450l(c), are those that ISDA *mandates* be included in all ISDA contracts. *See* 25 U.S.C. §450l(a)(1). As such, the provisions of the Model Contract cannot be read in such a way as to render nugatory the other statutory provisions of ISDA. ISDA provides that "[n]otwithstanding any other provision . . . the provision of funds under this subchapter is subject to the availability of appropriations." 25 U.S.C. § 450j–1(b)(5). Moreover, ISDA Section 450j(c) specifically provides that "[t]he amounts of such [self-determination] contracts shall be subject to the availability of appropriations." *Id.* § 450j(c)(1)(B). Congress clearly anticipated fluctuations in the amount of appropriations for ISDA self-determination contracts and intended that the Secretary's contract authority be conditioned on the amount of legally available

appropriations. *See Oglala*, 194 F.3d at 1379 (BIA was not liable for additional amounts of CSC where the ability of BIA "to bind the Government contractually was expressly conditioned on the availability of appropriations" and Congress capped the appropriations for CSC); *Ramah*, 87 F.3d at 1345 (same); *see also Cherokee*, 543 U.S. at 643 ("[This language] makes clear that a Government contracting officer lacks any special statutory contracting authority needed to bind the Government without regard to the availability of appropriations.").

If, as plaintiffs admit, the BIA appropriation is not legally available for payment of the additional amounts of CSC requested, the question remains: which appropriation is "legally available" for payment of those additional costs? The only answer plaintiffs give is the Permanent Judgment Fund, 31 U.S.C. § 1304. *See* Pl. Br. 43. Plaintiffs' interpretation of the "subject to the availability of appropriations" language as not limiting the United States' ultimate liability for the full amount of CSC necessarily anticipates annual lawsuits by tribes against the United States to obtain CSC above the capped amount.

Congress could not possibly have intended such a costly, inefficient and cumbersome system. Logic dictates that if Congress intended to fully fund the tribes' CSC, it would have done so with sufficient legally available appropriations to BIA for that purpose. Had full funding been Congress' intent for fiscal years 1994

forward, it would not have capped appropriations for BIA and required tribes to sue and obtain a judgment against the United States to collect the remainder of their alleged "entitlement" to CSC funding, as plaintiffs contend.

In any event, by statute, BIA must reimburse the Judgment Fund for judgments paid pursuant to the Contract Disputes Act (CDA). ISDA expressly provides that the CDA shall apply to self-determination contracts with tribes. *See* 25 U.S.C. § 450m-1(a). The CDA in turn provides that a judgment payable under it shall be paid out of the Judgment Fund, 31 U.S.C. § 1304, and that the Judgment Fund shall then be reimbursed by the agency whose appropriations funded the contract. 41 U.S.C. § 612(c). The upshot, therefore, is that CSC would still have to be paid out of money appropriated to the Secretary, which plaintiffs concede Congress did not intend.

2. The "Subject To The Availability Of Appropriations" Clause Limits The United States' Liability, Not Just The Secretary's Provision Of Funds.

Plaintiffs also argue that the "subject to the availability of appropriations" clause in ISDA and in the tribes' self-determination contracts only limits the Secretary's expenditure authority, not the United States' liability to pay CSC. Pl. Br. 37-52. They maintain that "[u]nder ISDA contracts, the United States is the obligor while the Secretary is the payor," and that "[o]nly the Secretary's duty as paymaster to pay these contract obligations was conditioned on the 'availability of

appropriations,' not the United States' duty as obligor." *Id.* at 24 (citation omitted). But there is no reason to believe that Congress sought to protect one part of the federal fisc while exposing another, or that it was only concerned with which taxpayer pocket payment would come from. Plaintiffs' analysis exalts form over substance.

Pursuant to plaintiffs' reasoning, Congress intended to create an "entitlement" by tribes to full payment of CSC when it authorized the Secretary to enter ISDA contracts with the tribes, but at the same time intended to limit the Secretary's expenditure authority to pay those contract support costs to available appropriations. Again, plaintiffs' interpretation of the statute flies in the face of logic. Whether full payment will come from the agency's appropriation or from money damages payable from the judgment fund (another congressional appropriation), the result is the same: the funds will come from the United States Treasury. It makes little sense that Congress intended to create an entitlement to full payment of CSC when in ISDA itself it explicitly limited the Secretary's ability to pay those costs.

Plaintiffs' position also finds no support in *Cherokee*. The Supreme Court construed the phrase "subject to the availability of appropriations" as a limitation of government liability, not just the Secretary's expenditure power. *Cherokee*, 543 U.S. at 643. The Court stated that the phrase "makes clear that an agency and contracting

party can negotiate a contract prior to the beginning of a fiscal year but that the contract *will not become binding unless and until Congress appropriates funds* for that year." *Id.* (emphasis added).[8] The Court went so far as to call this construction "its ordinary contract-related interpretation." *Id.* at 644. In *Cherokee*, the Court concluded that the government's liability for contract support costs was created when Congress appropriated "adequate unrestricted funds" for IHS that could have covered the full amount of tribes' CSC. *Id*. at 643.

In contrast to IHS's legally unrestricted lump-sum appropriation at issue in *Cherokee*, BIA's appropriation for CSC *was* legally restricted -- by the "not to exceed" language contained in every BIA appropriations statute starting with fiscal

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[8] Interpreting the "subject to the availability of appropriations" language in the context of unrestricted, lump-sum (as opposed to capped) appropriations, the Supreme Court stated:

> This kind of language normally makes clear that an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become binding unless and until Congress appropriates funds for that year. . . . It also makes clear that a Government contracting officer lacks any special statutory contracting authority needed to bind the Government without regard to the availability of appropriations. . . .Since Congress appropriated adequate *unrestricted funds* here, [the subject to the availability of appropriations language], if interpreted as ordinarily understood, would not help the Government."

Cherokee, 543 U.S. at 643 (emphasis added) (citations omitted).

year 1994.[9] This is just the type of legal restriction the Supreme Court in *Cherokee* anticipated could prevent a court from finding a binding government obligation. *See id.* at 643-44 (observing that IHS' funds were "unrestricted" and Congress did not allocate a restricted appropriation "too small to pay for all the contracts").

Two appellate courts have directly addressed the issue of what impact BIA's statutory appropriations caps have on the liability of the federal government to pay additional amounts of CSC under ISDA contracts. Both of those courts concluded that Congress meant to limit the United States' liability to pay contract support costs under ISDA. *Oglala*, 194 F.3d 1374; *Ramah*, 87 F.3d 1338. The Federal Circuit in *Oglala* unequivocally stated:

> The language of § 450j-1(b) is clear and unambiguous; any funds provided under an ISDA contract are "subject to the availability of appropriations." The clause preceding this limitation, "[n]otwithstanding any other provision in this subchapter," further clarifies that other statutory language in the ISDA relied upon by Oglala, see e.g., § 450j-1(f) ("Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection(a)."), cannot trump this express restriction on ISDA funding.

194 F.3d at 1378. The Federal Circuit went on to note that the ability of the agency "to bind the Government contractually was expressly conditioned on the availability

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[9] For the same reason, this case is distinguishable from *Newport News Shipbuilding & Dry Dock Co.*, 55 Comp. Gen. 812, 818-22 (1976), which did not involve a "not to exceed" statutory cap, but only legislative history of the kind deemed inadequate to establish a cap in *Cherokee*.

of appropriations," *id.* at 1379, and further stated that "[i]t would exceed our judicial function to repeal the unambiguous language of [ISDA]" by holding that the tribe "is entitled to full funding of contract support costs regardless of any congressional appropriation caps." *See id.* at 1378-79.

The D.C. Circuit has also addressed the "subject to availability of appropriations" language in ISDA in the context of capped appropriations. *Ramah*, 87 F.3d 1338, involved a challenge to the Secretary's allocation of less than full funding for contract support costs in a year in which Congress had capped BIA appropriations for CSC. The court held that a pro rata allocation of funds for CSC (which it referred to as "CSF" for "contract support funding") "effectuate[s] the original statutory scheme of the ISDA" and complies with congressional intent behind the BIA's 1995 Appropriation Act -- an act capping appropriations for contract support costs. *Id.* at 1348-49 (internal quotation marks omitted). As the D.C. Circuit recognized, the statutory language making funding of contract support costs "subject to the availability of appropriations" means that "the Secretary need only distribute the amount of money appropriated by Congress under the Act, and need not take money intended to serve non-CSF purposes under the ISDA in order to meet his responsibility to allocate CSF." *Id.* at 1345. Considering the ISDA

provision requiring that contract support costs "be added" to the amount of direct costs, the court held that:

> Congress clearly included the proviso not to excuse the Secretary's obligation to follow the mandates of the statute, but rather to make evident that the Secretary is not required to distribute money if Congress does not allocate that money to him under the Act. The first part of the provision says just that. . . . Thus, if the money is not available, it need not be provided, despite a Tribe's claim that the ISDA "entitles" it to the funds.

Id.

Plaintiffs argue that *Oglala* and *Ramah* "are not good authority" in the wake of *Cherokee*. *See* Pl. Br. 51-52. As is evident, however, the Federal Circuit, the D.C. Circuit and the Supreme Court agree on the "ordinary" meaning of the phrase "subject to the availability of appropriations." The phrase "subject to the availability of appropriations," in conjunction with restricted capped appropriations, limits the government's liability under the contracts -- both as "obligor" and as "payor" -- to those capped amounts.

Plaintiffs attempt to circumvent the Supreme Court, several circuits and ISDA itself by relying on *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966) -- a case that did not involve the same "subject to the availability of appropriations" language present in the instant case. *See* Pl. Br. 40-41. In *New York Airways*, the court found that the authorizing statute (the Federal Aviation Act) that provided for the determination of fair and reasonable rates of compensation to air

mail carriers by the Civil Aeronautics Board did not make the Board's duty to determine rates "affirmatively conditioned upon the existence or adequacy of appropriations by Congress to pay the moneys which may fall due as the result of the Board's exercise of rate-making power." *New York Airways*, 369 F.2d at 746. The court concluded that, in order to restrict the payment to air carriers,

> Congress in this instance would have been required to incorporate into [the authorizing statute], either directly or by affirmative amendment in the appropriation act, suitable terminology restricting the Board's authority to set rates under [the authorizing statute] *beyond available appropriations*.

Id. at 749 (emphasis added). Unlike *New York Airways*, the payment amounts at issue in this case are "subject to the availability of appropriations," *see* 25 U.S.C. § 450j(c)(1), and the amount of appropriations for payment of the contracts was legally restricted in the appropriations statute.[10] Accordingly, *New York Airways* does not help plaintiffs.[11]

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[10] Nor are plaintiffs correct that Section 450j(c)(1) "deals only with the 'out' years of multi-year contracts." *See* Pl. Br. 48-49. Section 450j(c)(1), by its plain language, refers to a "self-determination contract" with a term "not to exceed three years" or mature contracts with "a definite or an indefinite term." 25 U.S.C. § 450j(c)(1). The section further provides that the "amounts" of self-determination contracts are "subject to the availability of appropriations." *Id.* Nothing in the statutory language suggests that a contracting tribe is entitled to full payment of CSC in the first year of their contract or that the appropriations cap applies only to "out years" of the contract.

[11] As the Federal Circuit observed in *Oglala*:

> *New York Airways* involved a situation in which the Government, as a

(continued...)

Plaintiffs and their amicus National Congress of American Indians (NCAI) also offer the Health and Human Services' Departmental Appeals Board's ruling for the St. Regis Mohawk Tribe as evidence that agencies have the power to bind the federal government financially under ISDA, even in the absence of available appropriations. *In re St. Regis Mohawk Tribe*, Dept. of Health and Human Services, Departmental Appeal Board (DAB), No. A-02-12, Decision No. 1808 (Jan. 17, 2002) (Exh. A to NCAI Brief). However, the issue in that case related to IHS' payment of the tribe's total contract funding (both base funding and contract support cost funding) over a period of two fiscal years, which effectively denied the tribe interest it could earn on its annual funding. The Appeals Board affirmed the decision of the Administrative Law Judge (ALJ), who concluded that the agency could not require a tribe to receive its annual ISDA contract funding over a period of two fiscal years. *See* Exh. A to NCAI Brief, Recommended Decision in *In re St. Regis Mohawk Tribe*, United States Department of the Interior, Office of Hearings and Appeals, at 10.

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[11](...continued)

> contracting party, had simply failed to appropriate and pay its unqualified contractual obligation. Oglala's situation differs fundamentally in that the ability of Interior to bind the Government contractually was expressly conditioned on the availability of appropriations.

Oglala, 194 F.3d at 1379.

Noting that during the years in question, sufficient appropriations were made by Congress for the payment of ISDA contracts, the ALJ rejected IHS's assertion that it did not have sufficient funding to make a lump-sum payment to tribes in the first year of the contract. *Id.* at 9-10. In analyzing the agency's obligations, the ALJ actually agreed with the Federal Circuit in *Oglala* that the Secretary did not have the power to bind the government financially *beyond available appropriations*, noting in passing that the appropriations statute capping contract support costs was "an express restriction on [ISDA] funding." *Id.* at 8. *St. Regis Mohawk* provides no support for plaintiffs' arguments.[12]

In short, plaintiffs have offered no relevant case law that supports their arguments, let alone compels a deviation from Supreme Court precedent and the clear language of the authorizing statute as to the meaning of the "subject to the availability of appropriations" clause. As the Federal Circuit stated in *Oglala*, "in the absence of ambiguity the agreement 'must be interpreted according to [its] natural and ordinary significance.'" *Oglala*, 194 F.3d at 1379, citing *United States v. Choctaw Nation*, 179 U.S. 494, 531 (1900).

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[12] NCAI's reliance upon *Appeals of Mississsippi Band of Choctaw Indians*, IBCA No. 4711, 2006 WL 1009210 (April 14, 2006) (NCAI Brief, Exh. B), is equally misguided, as that administrative holding was "limited to the facts of this Appeal" -- involving CSC "inadvertently omitted" by BIA when it disbursed CSC funds.

B. Government Liability Does Not Turn On The Existence Of A Line Item Appropriation, But On Whether The Government Has A Binding Obligation.

Plaintiffs argue that because BIA's appropriations statutes did not contain specific restrictions on funding amounts for each and every tribal contractor, the appropriations caps are not sufficient to limit the United States' liability to pay all of the tribes' contract support costs. Plaintiffs suggest that BIA's appropriation caps are more akin to the general lump-sum appropriation at issue in *Ferris v. United States*, 27 Ct. Cl. 542 (Ct. Cl. 1892), a case in which the claims court found the government liable, than they are to the specific restricted appropriation at issue in *Sutton v. United States*, 256 U.S. 575, 580 (1921), a case in which the Supreme Court found that the United States was not contractually liable beyond available appropriations. *See* Pl. Br. 22-36.

In *Ferris*, the claims court held that the exhaustion of a general appropriation did not excuse the government's obligation to pay a contractor for the work already performed. *See Ferris*, 27 Ct. Cl. at 546. The court reasoned that a contractor who is but 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*. In a futile attempt to fit the instant case within the mold of *Ferris* and *Cherokee*,

plaintiffs equate BIA's capped appropriations with unrestricted, lump-sum appropriations because the statutory cap is not "a specific line-item appropriation that restricts the amount available for a single project or contract . . . ." Pl. Br. 26; *see generally id.* at 26-31.

Plaintiffs' reliance on *Ferris* is misplaced. In *Ferris*, the contract at issue did not contain a "funds available" clause. *Ferris*, 27 Ct. Cl. 542. Furthermore, the appropriation in *Ferris* was an appropriation to fund multiple projects connected to improving the Delaware River, ranging from constructing a tramway to purchasing a waste removal plant. *Id.* at 542-43. With such a panoply of projects under one appropriation, the court of claims concluded that the contractor should not be presumed to assume the risk of insufficient appropriations because the contractor had no reason to have notice of a possible funding limitation. *Id.* at 542, 546.

By contrast, in the instant case, the relevant appropriation was designated for one object only: ISDA contract support costs. Not only does the "subject to the availability of appropriations" language of ISDA and the contracts limit the government's liability to the appropriation cap, but it also gave plaintiffs notice of the possible limitations. Moreover, BIA annually reported CSC shortfalls to Congress and publicly disseminated protocols for paying CSC in a pro rata allocation in the event of appropriation limits, obviating the need for tribes to track ISDA contractors

to learn of the appropriations limit.[13] *See* Declaration of Michael R. Smith (Smith Decl.), Doc. 971, Exh. E, ¶¶ 4, 6, App. Vol. VII 1551, 1552 (indicating that BIA sends out a Federal Register notice annually regarding caps and CSC shortfalls).

Plaintiffs' argument wrongly assumes that the only type of appropriation restriction that would put contractors on "notice" that their contracts are subject to the limits of congressional appropriations would be "line item appropriations." *See* Pl. Br. 25-28. But Congress is not so limited in its power over the purse. Both statutory earmarks and line items are congressional means of limiting the amount of government funds that can be used for a specific purpose. *See* Principles of Federal Appropriations Law, General Accounting Office (GAO Redbook) at 6-4, 6-161, Doc. No. 971, Exh. F, App. Vol. VII 1556, 1560.[14] A line-item appropriation limits the government's liability because it is a restriction that limits an agency's ability to pay more for a particular object or purpose. Such a limitation puts contractors on notice

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[13] It also bears mention that the district court certified a class of plaintiff contractors in the instant case in 1990 to address the very issue of insufficient CSC payments by BIA. The plaintiff contractors have been represented by counsel during all of the years in question. This is not a situation where one contractor acting alone is without sufficient knowledge of the insufficiency of CSC appropriations.

[14] The GAO Redbook makes clear that for Congress to limit spending only by line items is very tedious. *See* GAO Redbook 6-159, Doc. No. 971, Exh. F, App. Vol. VII 1558 ("For example, an appropriation act for an establishment the size of the Defense Department structured solely on a line-item basis would rival the telephone directory in bulk.").

that appropriations for their contracts may be limited. That is precisely what the capped appropriations (another form of statutory restriction) have done here.

In *Cherokee*, the Supreme Court concluded that the government's liability under ISDA contracts extended to the whole lump-sum appropriation amount because it was "unrestricted" by Congress. *Cherokee*, 543 U.S. at 643. Plaintiffs here suggest that BIA's capped CSC appropriation should be viewed in the same light as a lump-sum appropriation, in an effort to shift the assumption of the risk of insufficient appropriations to the government as opposed to the tribes. *See* Pl. Br. 25-31. Had the appropriations not been restricted as they were and had the tribes' contracts not contained a condition of "available appropriations," plaintiffs' position might have more validity. But here, tribes were on notice both that the funding of their contracts was "subject to the availability of appropriations," and -- contrary to the situation in *Cherokee* -- that Congress had limited the BIA's payment of CSC to a specific finite amount that was less than the stated tribal need. *See* 25 U.S.C. § 450j-1(c) (requiring annual reporting on any deficiency of funds).

The conclusion that the BIA's capped appropriations limit the government's liability finds support in *Sutton*, 256 U.S. at 580. In *Sutton*, the Supreme Court concluded that the government was not liable to pay a contractor for dredging a channel after available appropriations were exhausted. The Supreme Court's decision

did not stem from the existence of a line-item appropriation, but rather held that the government was not liable inasmuch as "no official of the Government could have rendered it liable for this work" because "the Secretary of War [did not have] authority [] to obligate the government." *Id.* at 580-81. The contractor's recovery was limited to the "extent of the available appropriations." *Sutton*, 256 U.S. at 581.

The *Sutton* contract also contained the restriction "within the limits of available funds," and the capped appropriation for the channel improvement constituted a restriction on the disbursement of funds in excess of that amount. *Id.* at 577. Thus, the government's liability was limited to the $20,000 appropriations cap. *Sutton*, 256 U.S. at 581; *see also Wetsel-Oviatt Lumber Co. v. United States*, 38 Fed. Cl. 563, 571 n.9 (1997) ("[I]n the absence of a 'funds available' type clause limiting the government's liability, there is no bar to a Court's otherwise valid declaration of parties' rights in a contractual claim against the government.").[15] Similar to *Sutton*, the tribes' contract support costs here were funded from a capped earmarked appropriation, not a lump-sum, and they had knowledge of the appropriations limits in their contracts and in ISDA through a "funds available" clause.

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[15] Not surprisingly, the Federal Circuit in *Oglala* also focused its inquiry not on the existence or non-existence of a line-item appropriation for each and every tribal contractor, but on the limitation on the government's liability created by the "subject to the availability of appropriations" language and the knowledge that language gave to the contractors. *Oglala*, 194 F.3d at 1378.

The facts of the present action thus closely resemble those of *Sutton* and *Oglala*, and fall short of a logical comparison to *Ferris*. Like *Sutton* and *Oglala* and unlike *Ferris*, the government's liability here did not exist prior to the appropriation. Like *Sutton* and *Oglala* and unlike *Ferris*, the appropriation here involved a capped restriction on the agency's lump-sum appropriation. Like *Sutton* and *Oglala* and unlike *Ferris*, plaintiffs here had notice of this restriction and possible appropriation limits. Therefore, the "not to exceed" language in the appropriations statutes is an earmark that legally restricts the funds that can be spent by the government, not just the Secretary, on ISDA contract support costs.

Nor is this case like *Train v. City of New York*, 420 U.S. 35 (1975), in which the statute at issue stated that the approval of the Administrator of the Environmental Protection Agency of plans for a water pollution control project "shall be deemed a contractual obligation of the United States for the payment of its proportional contribution to such project." *Id.* at 39. The Supreme Court held that this statute "established a funding method differing in important respects from the normal system of program approval and authorization of appropriation followed by separate annual appropriation acts," and that "[t]his mechanism considerably reduces whatever discretion Congress might have exercised in the course of making annual appropriations." *Id.* at 39 n.2; *see also* Comp. Gen. Op. B-211190, 1983 WL 207412

(April 5, 1983). Here, in contrast, Congress has established no such unusual funding method, but rather has exercised its unquestionable authority to specifically cap annual appropriations for CSC each fiscal year -- and plaintiffs were fully aware, through ISDA and their individual contracts, that CSC payments would be "subject to the availability of appropriations."

Plaintiffs' reliance (Pl. Br. 52-56) upon the doctrine that repeals by implication are disfavored is equally misplaced. That doctrine does not come into play here, because nothing has been repealed; rather, ISDA states that CSC funding shall be "subject to the availability of appropriations," and the various BIA appropriations statutes for all fiscal years from 1994 onward have contained specific caps on CSC appropriations. Contrary to plaintiffs' assertion, ISDA itself simply does not guarantee full CSC funding, and under ISDA and applicable principles of government contract law, it is plaintiffs who bear the risk that Congress will not appropriate sufficient CSC funds. The principle that repeals by implication are disfavored is thus wholly inapposite, and there is no need to "harmonize[]" (*see* Pl. Br. 49-50) various ISDA provisions, because they are not in discord.

Indeed, it is plaintiffs' proposed construction that does violence to the ISDA scheme, essentially rendering meaningless the oft-repeated "subject to the availability of appropriations" language and reading it out of the statute, in contravention of the

well-established canon that statutes should be interpreted to give meaning to every phrase, instead of turning legislative language into surplusage. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (reiterating canons against rendering any part of a statute "'superfluous, void, or insignificant,'" or "'surplusage'"; citations omitted); *Dunn v. CFTC*, 519 U.S. 465, 472 (1997) (legislative enactments "should not be construed to render their provisions mere surplusage"); *Wyoming ex rel. Crank v . United States*, 539 F.3d 1236, 1247 (10th Cir. 2008) (same).

Nor does the government's congressionally mandated inability to provide full CSC funding somehow render plaintiffs' ISDA contracts "'absurd[],'" "'illusory'" or "'void.'" Pl. Br. 32-33 (citations omitted). CSC, although undoubtedly important, is only one component of the much larger ISDA contract, and if there is any "'absurdity'" (*id.* at 32) being bruited here, it is the suggestion that a fair, across-the-board reduction in tribal CSC amounts vitiates entire ISDA contracts; the CSC tail should not be allowed to wag the ISDA dog, as plaintiffs would have it.

C. The Government Cannot Be Made Fully Liable Where Tribes Agreed That Funding Would Be "Subject To The Availability of Appropriations" And The Secretary Satisfied Her Statutory Obligation To Report Annually To Congress On The Amounts Of The Contract Support Cost Shortfalls.

Citing *S.A. Healy Co. v. United States*, 576 F.2d 299 (Ct. Cl. 1978), plaintiffs assert that notwithstanding the "subject to availability of appropriations" clause in the

statute and the tribes' contracts, "the law does not permit the government to enter into a contract limited to available appropriations, secure the benefits of the contractor's services, and then fail to request appropriations sufficient to fully pay the contract." Pl. Br. 34. In *S.A. Healy*, however, the court explicitly stated that:

> we are not holding that under this contract the defendant's executive branch was contractually obligated to request from defendant's legislative branch appropriations adequate to fund continued performance. It may well have been free to decide it would request any level it pleased.

576 F.2d at 307. The court nonetheless concluded that "the protective umbrella of the funds available clause . . . [did not] extend to an exhaustion of funds occasioned by the agency's decision to request funding grossly inadequate to support the level of earnings approved by the agency for the fiscal year." *Id.*

S.A. Healy is inapposite to the present case in one very important respect. In *S.A. Healy*, the government was not relieved of liability because it had failed to make Congress aware of the need for funding through its budget request. As a consequence, the appropriated funding in that case was "grossly inadequate" to meet the need. *Id.* at 307. In the instant case, by contrast, BIA made Congress fully aware that deficiencies in CSC appropriations existed and the exact level of those deficiencies.

In ISDA, Congress contemplated a specific process by which the Secretary would inform Congress of CSC needs and deficiencies. It was not, as plaintiffs suggest, through the President's annual budget request. Rather, Congress affirmatively obligated the Secretary to submit an annual "accounting of deficiencies" in CSC appropriations. *See* 25 U.S.C. § 450j-1(c).

Pursuant to its statutory obligation, BIA has reported annually to Congress the deficiencies in CSC appropriations and outlined the current year's estimated CSC need. *See*, *e.g.*, 1998 Shortfall Report, Doc. No. 971, Exh. C, App. Vol. VII 1490-1544 (showing by areas and contractors the deficiencies in contract support appropriations); Declaration of Harry A. Rainbolt, Doc. No. 592, Exh. C, ¶ 5, App. Vol. V 1089. Congress, as it intended, was well aware of the funding shortfalls from those reports, yet determined, as was its right, to limit the funding for CSC.[16]

[16] In addition, plaintiffs fail to mention that the tribes have participated in annual budget consultations with BIA. Pursuant to Executive Order 13175, which provides for tribal consultation, the BIA actively solicits tribal input into the budget priorities of the agency. *See* Smith Decl. ¶ 3, Doc. No. 971, Exh. E, App. Vol. VII 1551. Tribal budget priorities shift from year to year and, for at least the last five years addressed by the Smith Declaration, tribes did not make full payment of CSC one of their top priorities during tribal consultations over the annual budget request. *Id.* at ¶ 5, App. Vol. VII 1552. Moreover, the annual reports to Congress on the deficiencies in CSC appropriations were provided to the tribes. *Id.* at ¶ 6, App. Vol. VII 1552.

It cannot be predicted with any degree of certainty what Congress might do with respect to funding under *any* circumstances, and it is by no means inevitable that Congress would have appropriated additional CSC funds had the Executive Branch requested them. Given that Congress put into place a specific procedure for shortfall reports in anticipation of the insufficiency of appropriations, and also included specific language making the payment of CSC funds "subject to the availability of appropriations," plaintiffs' argument that the Secretary's failure to actually "request" full payment of CSC makes the government fully liable is entirely unpersuasive.

D. The Government Has Not Conceded In Another Case The Issue Before The Court On This Appeal.

Finally, plaintiffs misconstrue the government's recognition of the uncertain outcome of other litigation as an "admission" in this particular case. *See* Pl. Br. 56-60. Not only does the legal doctrine upon which they rely have no application here, but plaintiffs rely upon statements that are taken completely out of context, and that in any event do not constitute an "admission" in this case.

In this litigation, the government consistently has maintained that the limiting language in the tribes' contracts, as well as the "subject to the availability of appropriations" language contained in ISDA, 25 U.S.C. § 450 *et seq.*, specifically limit the government's liability to pay contract support costs to "available

appropriations." *See, e.g.*, Defendants' Reply in Support of Defendants' Cross Motion for Partial Summary Judgment and In Opposition to Plaintiffs' Motion for Partial Summary Judgment (Defs' Reply), Doc. No. 605, 3-4, App. Vol. V 1230-31 (explaining that the language in plaintiffs' contracts limit the government's liability to the "availability of funding," consistent with the "subject to the availability of appropriations" language in ISDA). In *Cherokee*, the Supreme Court clarified that language making a contract "subject to the availability of appropriations" does not limit the government's liability unless Congress has actually limited the appropriations available for payment of CSC through a statutory restriction. Because Congress placed statutory funding caps limiting the amount of available appropriations for payment of CSC in every appropriations statute for BIA since 1994, the liability of the government to pay CSC is limited to those appropriated, capped dollars. *See* Defs' Reply 1, App. Vol. V 1228. Notwithstanding the clear contract language, the language of ISDA, and the statutory restrictions set forth in the appropriations statutes for BIA and IHS -- all of which serve to limit the government's liability -- plaintiffs assert an entitlement to full payment of all of their CSC.

Thus, the issue presently under consideration by this Court is whether the government's liability to pay CSC is limited to the amount of the appropriations caps.

Plaintiffs, however, contend that in another case the government made "party admissions" (Pl. Br. 58) that they assert contradict the position that the government has taken in this case. The purported "admissions" consist of statements made in pleadings filed in district court by counsel for the defendant in *Southern Ute Indian Tribe v. Leavitt, supra* -- a single-plaintiff suit challenging IHS's denial of the plaintiff tribe's proposal to contract for new programs and services. The statement upon which plaintiffs chiefly rely (*see* Pl. Br. 57) simply asserts:

> [T]he issue here is whether IHS is *potentially* liable for contract support costs once it signs on the dotted line. Given the decision in Cherokee, IHS at a minimum was reasonable in its belief that by entering a new self-determination contract with plaintiff, it *might be implicitly promising* to pay contract support costs in excess of Congressional appropriations.

See Reply in Support of Defendants' Motion for Summary Judgment in *Southern Ute Indian Tribe v. Michael O. Leavitt, et al.*, Civ. Act. 05-988 (D. N.M.) (*Southern Ute* Reply), Doc. No. 1018, Exh. A, page 6, App. Vol. VII 1675 (emphasis added). The other two statements plaintiffs cite (*see* Pl. Br. 57-58) -- omitting a crucial explanatory footnote concerning *Cherokee* from one of them, *compare* Pl. Br. 58 *with* App. Vol. VII 1692 -- are no more compromising.

First and foremost, the case cited by plaintiffs for what is actually known as the "judicial admission" doctrine, *Plastic Container Corp. v. Continental Plastics of Okla., Inc.*, 607 F.2d 885, 906 (10th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980),

does not even say what plaintiffs' parenthetical (Pl. Br. 58) says it does. Furthermore, this Court has made clear that the rule only applies to factual matters that are formally, deliberately and indisputably conceded, not to legal propositions. *See Guidry v. Sheet Metal Workers' Nat'l Pension Fund*, 10 F.3d 700, 715-16 (10th Cir. 1993), *reaffirmed on reh'g en banc*, 39 F.3d 1078, 1081 n.3 (10th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995); *U.S. Energy Corp. v. Nukem, Inc.*, 400 F.3d 822, 833 n.4 (10th Cir. 2005).

Moreover, given the uncertain outcome of various pending actions concerning the government's liability to pay contract support costs, the government in *Southern Ute* merely recognized that this issue is unsettled in the courts, and reflected this uncertainty by utilizing words such as "potentially" and "might be." The government's recognition of the uncertainty of pending litigation is far from constituting any sort of "admission" of liability in this particular case. The government consistently has argued that it is not liable to pay CSC in excess of congressional appropriations. Thus, even if a legal argument could qualify as a judicial admission (*but see, e.g., Guidry, supra*), a legal argument made in a different case, phrased in words of contingency, to defend the reasonableness of a different agency's refusal to enter into a new contract with a different tribe cannot possibly be

construed as an "admission" concerning the legal reasonableness of plaintiffs' arguments in this case.

Not only does the statement by government counsel in *Southern Ute* not contradict the position taken by defendants in this case, it is taken wholly out of context -- as a review of the various pleadings filed by the government in *Southern Ute*, reveals. *See Southern Ute* Reply, *supra*, Doc. No. 1018, Exh. A, App. Vol. VII 1670-80; Defs' Mem. In Opp. to Plf's Motion for A Preliminary Injunction in *Southern Ute*, Doc. No. 1018, Exh. B, App. Vol. VII 1681-98; Defendants' Memorandum In Support of Motion for Summary Judgment in *Southern Ute*, Doc. No. 1018, Exh. C, App. Vol. VII 1699-1704. *Southern Ute* involves the thoroughly distinct issue of IHS's authority to decline to enter into a *new* ISDA contract calling for the payment of CSC when IHS knew that all of its capped CSC funds for the fiscal year in question had already been expended. That forward-looking controversy is far removed from this retrospective one.

The disputes in *Southern Ute* and this case, however, do reveal the underlying contradiction in the tribes' position in the ongoing CSC litigation against the government.[17] The tribes in this case argue that they have a contractual "entitlement"

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[17] Indeed, it is apparent that the government will be sued whatever it does. If the government contracts with tribes, the tribes accuse the government of not living up (continued...)

to full funding of CSC, and that contract principles apply. Yet the tribes also conveniently dismiss as irrelevant clear language in the contracts that explicitly makes contract funding "subject to the availability of appropriations." Given the position taken by tribes in other litigation that "subject to the availability of appropriations" does nothing to limit the government's liability, it is little wonder that in *Southern Ute* IHS chose to avoid giving the tribe the impression that it was "implicitly promising" to pay CSC by entering into a new contract where it knew in advance that no funds were available.

Considering the full context of *Southern Ute*, it is therefore clear that what plaintiffs claim here to be an "admission" was merely an acknowledgment by the government that entering into a new contract containing a provision for CSC when (1) it is known in advance that no funds are available to pay for those costs and (2) the tribe already had declined to release the government from liability for CSC, would expose the government to a potential lawsuit over its alleged "implicit promise" to

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[17](...continued)
to its contractual promises to pay full CSC even where language is included in the contract making funding "subject to the availability of appropriations." If, when it knows that it has *no* contract support cost funding available, the government refuses to enter a contract to avoid being accused of making promises it cannot keep, the tribes sue the government for its failure to enter into a contract. This Hobson's choice illustrates with clarity that the tribes' problem is actually not with the actions of the agencies who administer the provisions of the ISDA, but with the limits Congress has placed on the availability of funding for CSC.

pay. In this case, on the other hand, there is no question of BIA making "implicit" promises to pay, because the terms of the contracts are explicit: BIA will pay the tribes CSC, but the amounts will be limited to the amount appropriated by Congress for that purpose. Plaintiffs are entitled to no more.

Thus, plaintiffs have identified no statement that could support a finding of a "judicial admission," and the government made no concession in *Southern Ute* that could conceivably trigger application of the rule of liberal construction of ambiguous statutes in favor of Indian tribes. Nor is there any ambiguity in the relevant ISDA provisions that would trigger the liberal construction rule. Inasmuch as the government has consistently relied upon the plain language of ISDA and the clear legislative intent, rather than principles of deference, the government has made no damning "admission" in *Southern Ute*, and the canon invoked by plaintiffs has no bearing here.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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JUNE 2009

STATEMENT REGARDING ORAL ARGUMENT

Because of the complexity of the ISDA statutory scheme and the importance of the issues involved, oral argument may assist the Court in resolving the dispute in this case.

CERTIFICATE OF COMPLIANCE

I hereby certify that, according to the word count provided in Corel WordPerfect 12, the foregoing brief contains 12,967 words. The text of the brief is in proportional Times New Roman font with 14-point type, and the brief thus complies with the type-volume limitations, typeface requirements and type style requirements of Federal Rule of Appellate Procedure 32(a)(5)(B) and 10th Circuit Rule 32(a).

s/
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CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's General Order filed March 18, 2009, I hereby certify that:

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 the following commercial virus scanning program, which indicates that the submissions are free of viruses.

Program:	Trend Micro OfficeScan
Version:	6.5
Last Updated:	June 10, 2009

s/
JOHN S. KOPPEL
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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June, 2009, I filed and served the foregoing "BRIEF FOR THE APPELLEES" by submitting a digital copy via the ECF system and causing the original and 7 hard copies to be dispatched to the Clerk of this Court by Federal Express overnight delivery, and by effecting service via the ECF system and causing hard copies be served upon the following by Federal Express overnight delivery:

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