No. 08-2262

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RAMAH NAVAJO CHAPTER, *et al.*,

Plaintiffs-Appellants,

v.

KENNETH L. SALAZAR, *et al.*,

Defendants-Appellees

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

OPENING BRIEF OF APPELLANTS

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ORAL ARGUMENT REQUESTED

RULE 26.1 CORPORATE STATEMENT

Plaintiff-Appellant Ramah Navajo Chapter is a political subdivision of the federally recognized Navajo Nation. Plaintiff-Appellants Oglala Sioux Tribe and Pueblo of Zuni are federally recognized Indian Tribes. None of the Plaintiff-Appellants is incorporated and none issues stock.

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STATEMENT OF RELATED CASES

This Court decided a previous appeal in this case, *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (1997), Appx. 139.

JURISDICTIONAL STATEMENT

The Ramah Navajo Chapter commenced this action in the district court pursuant to 25 U.S.C. § 450m-1(a) and 41 U.S.C. § 609(a)(1), following exhaustion of remedies under 25 U.S.C. § 450m-1(d) and 41 U.S.C. § 605(a). Appx. 124. The Oglala Sioux Tribe and the Pueblo of Zuni intervened after exhausting remedies. Appx. 152, 1236, 1274. On August 27, 2008, the district court entered final judgment disposing of all claims, Addenda (Add.) A-18 (Appx. 1743). The Notice of Appeal was timely filed October 24, 2008, under Fed. R. App. 4(a)(1)(B). Appx. 1746. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

Did the United States breach its contract obligations for payment of full "contract support costs" (CSC) under the Indian Self-Determination Act (ISDA) when: (1) appropriations to pay those contract obligations in full were legally available;[1] (2) Congress in any event granted the Secretary "contract authority" to award contracts in "amounts" that were not subject to

[1] Appellants raised this issue below, at Appx. 791, 827-52, 1307, 1317-32, 1375-80. The district court ruled on the issue at A-10 – A-12 (Appx. 1725-32).

the "availability of appropriations";[2] (3) the Executive failed to request sufficient funds to meet contract obligations;[3] and (4) under ISDA and the law of this case, ISDA and its contracts must be construed in favor of the Appellant Tribes and the United States has admitted that ISDA can reasonably be construed as the Tribes contend.[4]

STATEMENT OF THE CASE

This is a class action for breach of contract brought under 25 U.S.C. § 450m-1 of the Indian Self-Determination and Education Assistance Act of 1975, as amended, 25 U.S.C. §§ 450–458aaa-18 (ISDA). Appx. 124; Dkt. 96.

In *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (1997) (*RNC*), Appx. 139, this Court reversed the district court and held that the indirect cost ratemaking method the government used for calculating Appellant Tribes' indirect CSC requirements was contrary to ISDA. That ruling

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[2] Appellants raised this issue below, at Appx. 1315-16, 1323-32. The district court ruled on the issue at Add. A-10 – A-12 (Appx. 1727-29).

[3] Appellants raised this issue below, at Appx. 854-57, 1307, 1332-33, 1580-82. The district court did not address the issue. Add. A-1 (Appx. 1718).

[4] Appellants raised this issue below, at Appx. 1649-60. The district court granted Appellants' motion to consider the admission, Add. A-16 (Appx. 1716), but did not address it in its opinion, Add. A-1 (Appx. 1718).

applied the Indian canon of construction to resolve an ambiguity central to the construction of the parties' contract, *id*. at 1461-62, and held that:

> We therefore agree with Plaintiff that the 1988 amendments to the Act mandate that tribes executing self-determination contracts receive full funding for all reasonable contract support costs associated with self-determination contracts.

Id. at 1463.

On remand, the parties entered into two partial settlements on money damage claims. *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp.2d 1091 (D.N.M. 1999); *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303 (D.N.M. 2002). A third settlement resolving equitable claims as to rate-making procedures was approved August 27, 2008. Dkt. 1159.

On February 23, 2000, Appellants Ramah and Oglala moved for partial summary judgment seeking a declaration that the government breached its contract obligations to Appellants by failing to pay full contract support costs in FY 1994 and later years, leaving the calculation of damages for later proceedings. Appx. 178, 788-89. Zuni filed an amicus brief in support of the motion, Appx. 1035, and by stipulation later intervened as a party. Appx. 1236, 1274. The government cross moved for summary judgment, arguing that it was excused from paying more because Congress in the subject years earmarked the agency's total CSC appropriation at an amount insufficient to pay full nationwide needs. Appx. 1082. On March 3,

2006, Appellants moved the district court to treat as a party admission statements the United States made acknowledging that, under *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) (*Cherokee*), ISDA contracts could reasonably be construed to give rise to liability for full CSCs regardless of whether sufficient appropriated funds were available to pay all contracts. Appx. 1649. The district court granted the motion, Add. A-16 (Appx. 1716), but subsequently ignored the admission. Add. A-1 (Appx. 1718).

By Memorandum Opinion and Order entered August 31, 2006, the district court awarded summary judgment to the government. Add. A-1 (Appx. 1718). The district court held that 25 U.S.C. § 450j-1(b) and Appellants' contracts "make clear that the contractual liability of the Government is subject to the availability of appropriations." Add. A-6. The district court held that the United States is not liable for underpayments of CSC when capped appropriations for CSC are insufficient to pay all contractors their full "contract payments". Add. A-14. It held that other language in ISDA cannot "trump" the proviso in 25 U.S.C. § 450j-1(b), Add. A-9, A13.

The district court did not address the language Congress typically uses to limit an agency's contract authority and it ignored the precise wording of

the limitation at issue here—a limitation on the Secretary's "provision of funds" but not on the amount of the contracts.

Finally, the district court held that the rule of *Cherokee*, 543 U.S. at 637, does not apply "when Congress has specified an insufficient 'not to exceed' lump sum appropriation" "that bulks together funds owed to hundreds of contracts." Add. A-11, A-13 (Appx. 1728, 1730).

STATEMENT OF FACTS

A. Federal Contracting under the Indian Self-Determination Act

Congress enacted ISDA to "assur[e] maximum Indian participation in the direction of educational as well as other Federal services to Indian communities" and to establish "a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in planning, conduct, and administration of those programs and services." 25 U.S.C. § 450a(a), (b). *See generally Cherokee*, 543 U.S. at 639 (discussing ISDA); *Southern Ute Indian Tribe v. Leavitt*, __ F.3d __ (10th Cir. No. 07-2274, May 4, 2009), slip op. at 3-4. The Indian service programs covered by ISDA are carried out either by Appellee Secretary of the Interior (primarily through the BIA) or by the Secretary of Health and Human Services (primarily through the Indian

Health Service (IHS)). 25 U.S.C. § 450b(i). Tribes are encouraged to contract, and program funding must permit the same level of services whether a Secretary or a tribe operates the program. 25 CFR § 900.3(b)(1), (5), (8), (11).

The Act directs that each Secretary award contracts to qualified Indian Tribes and organizations to control and operate Indian-specific programs previously operated by the Secretary. *Id.* § 450f(a)(1). The Act thus requires the Secretary "to divest" himself of operational control and funding for those programs. S. Rep. 100-274, at 6 (1987). *See Southern Ute*, slip op. at 3 ("the ISDA essentially directs the Secretary, upon the request of an Indian tribe, to turn over the direct operation of its federal Indian programs to that tribe"). Not surprisingly, "[t]he transition . . . was not without problems." *Thompson v. Cherokee Nation*, 334 F.3d 1075, 1080 (Fed. Cir. 2003) (*Thompson*), *affirmed*, 543 U.S. 631 (2005).[5]

In the wake of ISDA's enactment Congress witnessed the "agencies' consistent failures . . . to administer self-determination contracts in conformity with the law" and "systematically violat[ing]" tribal contractors' rights. S. Rep. 100-274, at 37. Far and away "the single most serious

[5] S. Rep. 100-274 at 7-10, 20-21, 30-31 (Appx. 665, 676, 694-95) (detailing agency misconduct). *See also RNC*, 112 F.3d at 1462-63, and *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338, 1344-45 (D.C. Cir. 1996) (*RNSB)* (discussing agencies' failures).

problem with implementation of the Indian self-determination policy has been the failure of the [BIA] and [IHS] to provide funding for the indirect costs associated with self-determination contracts." *Id.* at 8. This "practice . . . requires tribal contractors to absorb all or part of such indirect costs [later called 'contract support costs'] within the program level of funding, thus reducing the amount available to provide services to Indians as a direct consequence of contracting." *Id.* at 33. In response, the Senate Indian Affairs Committee declared that the BIA and IHS "must cease the practice of requiring tribal contractors to take indirect costs from the direct program costs, which results in decreased amounts of funds for services." *Id.* at 12. *See generally Thompson*, 334 F.3d at 1080-1082 (discussing these contract funding problems); *Babbitt v. Oglala Sioux Tribal Public Safety Dept.*, 194 F.3d 1374, 1380-84 (Fed. Cir. 1999) (*Oglala*) (Gajarsa, J., concurring) (same). The intent to preserve program levels under contract was central to the 1988 and 1994 amendments. S. Rep. 103-374, at 9 (1994).

By the mid-1990s, Congress had twice substantially rewritten the Act to take away most of the Secretary's contracting discretion, and to guarantee full funding of CSCs. *See* Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. 100-472, 102 Stat. 2285 (1988); Indian Self-Determination Act Amendments of 1994, Pub. L.

103-413, 108 Stat. 4250 (1994). By these amendments the Act in § 450j-1(a) expressly requires that, in addition to the "Secretarial program amount" which the Secretary would have otherwise spent in his direct operation of the programs now being contracted: "*There shall be added . . . contract support costs.*" § 450j-1(a)(2) (emphasis added). These CSC costs "*shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management.*" *Id.*[6] The Senate Committee explained:

> This section protects contract funding levels provided to tribes, and prevents the diversion of tribal contract funds to pay for costs incurred by the Federal government. The protection of contract funding will provide year-to-year stability for tribal contractors and will contribute to better tribal planning, management and service delivery.

S. Rep. 100-274, at 30.

Under a proviso at the end of § 450j-1(b)[7] added in 1988, the Secretary's "provision of funds" under a contract is "subject to the

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[6] Appellees call the CSC entitlement the "need". *See*, *e.g.*, Appx. 625-26, 812 ¶¶ 31-32. *Cf.* 25 U.S.C. § 450j-1(c)(2) (referring to "needed" CSC). It is a need, but as discussed *infra* at *9-10,* it is also an entitlement and a contract price term. 25 U.S.C. §§ 450j-1(g); 450*l*(c), sec. 1(b)(4).

[7] Section 450j-1(b)'s concluding sentence provides:

> Notwithstanding any other provision of this subchapter, the provision of funds under this subchapter is subject to the availability of

availability of appropriations." This payment term is repeated in the mandatory contract added in 1994 setting out the Secretary's duty to "make available" appropriated funds to the contractor. § 450*l*(c), sec. 1(b)(4). This guarantees that the "total amount" of each contract "shall not be less than the applicable amount determined pursuant to [§ 450j-1(a)]." *Id*. The Act thus distinguishes the Secretary's role as payor from the United States' role as obligor.

To reinforce this statutory directive, ISDA was further amended in 1994 to command that "[u]pon 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) of this section . . ." which is the subsection that includes the CSC language set forth above. § 450j-1(g) (emphasis added).

By these means, the amended Act "reflects a congressional concern with [the] Government's past failure adequately to reimburse tribes' indirect administrative costs and a congressional decision to require payment of those costs in the future." *Cherokee*, 543 U.S. at 639.

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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.

Further, the mandatory contract form set forth verbatim in the statute recites that "[t]he provisions of title I of the [ISDA] are incorporated in this agreement, 25 U.S.C. § 450*l*(c), sec. 1(a)(1). Thus, every ISDA contract includes both (1) § 450j-1(g)'s command that "the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under [25 U.S.C. § 450j-1(a)(1)]"; and (2) § 450j-1(a)(2)'s command that "[t]here shall be added . . . [full CSCs]." The mandatory contract form also specifies that the Secretary acts for the United States in awarding contracts, § 450*l*(c), sec. 1(a)(1).

To guarantee that the government would "reimburse tribes' indirect administrative costs," Congress also made plain that ISDA involves the execution of legally binding contracts, *Cherokee*, 543 U.S. at 639, and made them enforceable through the "money damages" remedy under the Contract Disputes Act (41 U.S.C. §§ 601-13), with payment of such damages from the Judgment Fund (31 U.S.C. § 1304). 25 U.S.C. §§ 450m-1(a), (d); *Cherokee*, 543 U.S. at 642-43. This new remedy was a direct result of past contract funding problems:

> The[se] strong remedies . . . are required because of th[e] agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect

> costs. Existing law affords such contractors no effective remedy for redressing such violations.

S. Rep. 100-274, at 37 (1987). At the same time, ISDA grants Tribes additional rights as government contractors, including the mandate that "*each provision of this Contract shall be liberally construed for the benefit of the Contractor* to transfer the funding [and the programs] . . . and all administrative functions, from the Federal Government to the Contractor." § 450*l*(c), sec. 1(a)(2) (emphasis added).

B. The Appropriations Acts

The first "capped" appropriation for BIA CSC payments was in Pub. L. 103-138, 107 Stat. 1379, 1390-91 (1993) (Appx.1436, 1438-39) providing in pertinent part:

> For operation of Indian programs [in FY 1994] by direct expenditure, contracts, cooperative agreements, and grants . . . $1,490,805,000 . . . Provided further, That not to exceed $91,223,000 of the funds in this Act shall be available for payments to tribes and tribal organizations for indirect costs associated with contracts or grants or compacts authorized by [ISDA], for fiscal year 1994 and previous years . . . .

Statutes & Regulations Pamphlet, at 39.

The conference committee report on Pub. L. 103-138 addressed the "Senate earmarking of the total amount [of CSC] in 1994" with the comment that the House Committee had "modified" the bill to "authorize payments for contract support shortfalls from previous years, based on *amounts agreed*

to by tribes and the Inspector General's Office." H. Conf. Rep. 103-299, at 28 (1993) (emphasis added).[8] The Senate Appropriations Committee simply expressed concern over the "significant shortfall which occurred for contract support in 1993." S. Rep. 103-114, at 52 (1993).

The Senate Report accompanying the FY 1995 Appropriations Act, Pub. L. 103-332, 108 Stat 2499, 2528 (1994), addressed the cap and recognized the unmet obligation:

> In order to protect the Bureau's ability to provide services to those tribes who do not elect to contract for a part or all of their programs, the Committee has retained bill language which establishes a limit of the amount of funding to be available for contract support. . . .
>
> The Committee is aware that significant shortfalls exist for fiscal year 1994 contract support funding. Unfortunately, budget constraints preclude the Committee from including sufficient funds to repay these shortfalls. These shortfalls should be treated as one-time occurrences and should not have any impact in determining future indirect cost rates.

S. Rep. 103-294, at 57 (1994). The House Committee agreed:

> Award agreements should limit the amount of the Bureau's obligation under the award to the amounts available for each agreement from the $95,823,000. This will ensure that adjustments are made within overall resources at the local level and will not result in future claims.

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[8] And that is exactly how the cap was understood by the BIA. *See* 58 Fed. Reg. 68694 (1993) ("Based on the [FY 1994 cap] language the Bureau will pay the prior year shortfall 'off the top' from the amount available for [contract support]. . . . After payments are made to cover the prior year shortfall, the amount remaining to meet FY 1994 contractor indirect cost rates will be $75,858,000.").

H. Rep. 103-551, at 56-57 (1994). The Committee thus understood that if the BIA did not "limit the amount of the Bureau's obligation under the award [agreements]"—and as it turns out the BIA did not (because ISDA commanded otherwise)—then "future claims" would follow.

Since the FY 1999 Appropriations Act, Pub. L. 105–277, 112 Stat. 2681, 2681–245 (1998), Congress has inserted a clause in front of the capped CSC appropriation stating: "notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended . . . ."

C. The Immediate Facts

Ramah and Oglala entered into indefinite term ("mature"[9]) contracts under ISDA, Appx. 881-982; 983-1016, obligating the government to pay certain "contract support costs." Appx. 265, 268-69 ¶ 14; 323, 365-69, 370, 383 (Figure 4.8) 388, 400, 410, 421, 425-26, 430, 448-49 ¶ 10; 875-877.[10]

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[9] *See* 25 U.S.C. § 450b(h).

[10] Ramah's programs include law enforcement, natural resources, real estate, land leases, and water rights litigation. Appx. 985-987. Oglala's programs include law enforcement and public safety, tribal courts and prosecution, enrollment services, employment assistance, administration of scholarships, special education, child welfare services, operation of an emergency youth shelter and a juvenile detention center, dam safety and operations and maintenance, and water resources management, among others. Appx. 891, 932, 943. Zuni's particulars are not of record because by stipulation Zuni intervened in the case after discovery had closed and the

For each year, Ramah and Oglala also entered into "annual funding agreements" pursuant to Model Contract sections 1(b)(4) and 1(f). *See*, *e.g.*, Appx. 265, 270-71 ¶ 18, 307; 891-982, 983-984 ¶¶ 5-6, 1007.

Annual CSC appropriations were insufficient to pay 100% of all ISDA contractors' CSC entitlements, though by several orders of magnitude they were sufficient to fully pay any individual contractor. Appx. 383 (Figure 4.8); 417-425, 429-430, 447A-447B. *See also* Appx. 257-58 ¶ 6; 265, 272; 1287.

During each fiscal year, the BIA printed a notice in the Federal Register outlining how it would apportion each capped CSC appropriation if it fell below nationwide "need." Appx. 265, 273-306; 810 ¶ 20; 1187 ¶ 20. Close to the end of the fiscal year, the BIA issued individual notices to each contractor specifying its share based on the nationwide "shortfall percentage." The CSC amount actually paid to each contractor was then computed based on the shortfall percentage and a supplemental payment made to bring each contractor's apportionment up to that percentage of "need." These notices and modifications were sent late in the contract year well after the contractors had substantially performed their services. Appx.

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summary judgment motions were already being briefed. Similar allegations appear in Zuni's complaint. Appx. 1243, 1251-52.

265, 270, 276, 280-81, 288, 301 02, 305-06, 809 ¶ 14; 811 ¶ 24; 1186 ¶ 14; 1188 ¶ 24. At all relevant times there was a nationwide shortfall of CSC. Appx. 383 (Figure 4.8); 417-425, 429-430, 447A-447B. At all relevant times, none of the Appellants received its full CSC price ("need" in the BIA's lexicon).

Uncontradicted evidence showed that Ramah and Oglala were underpaid at least the following amounts for FY 1994-1999 based on the shortfalls reported by the Secretary:[11]

Ramah Navajo Chapter	$1,040,958
Oglala Sioux Tribe	$1,928,983

Appx. 265, 272; 257, 258 ¶ 6.

Illustrative is Ramah's experience in 1997: On September 24, 1997, six days before the end of the fiscal year, the BIA awarding official sent Ramah a letter enclosing a contract modification for the balance of the fiscal year adding $33,861, "which represents the final amount authorized [together with previous payments] of Fiscal Year 1997 Contract Support Funds (CSF) authorized at 77% of CSF need." Appx. 288. This was a direct admission that 23% of the Chapter's need was not paid. The same

[11] These amounts were computed based on pre-*RNC* rate calculations and without the "direct" CSCs that are also required by ISDA. Again, comparable amounts are alleged in Zuni's complaint. Appx. 1243, 1251-52.

admission was made in each year at issue. Appx. 274; 1598 ¶¶ 3, 4; 1612, 1614, 1620, 1623-25, 1628-29, 1632, 1634.

Ms. Earla Begay, Ramah's finance officer, testified: "It was not until the last month of each fiscal year that we received notice of the exact amount of contract support we would receive."[12] Appx. 265, 270 ¶ 17. *See id.* 257, 261-62 ¶¶ 12-18; 263-264; 270 ¶¶ 17, 19; 388, 404-05, 452-98. The government's Rule 36(b) designee James Thomas stated as much. Appx. 388, 392, 431-34.[13] Ramah's accountant John Donham stated: "In effect the system as it has been operated by the BIA and OIG has allowed one party to the contract, the government, to set the price after the service has been performed by the other party, the tribe or tribal entity." Appx. 257, 260 ¶ 10.

Oglala President John Yellowbird Steele testified by affidavit that his Tribe was forced to use program and tribal funds to subsidize its ISDA

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[12] The indirect CSC shortfall percentages paid by BIA from 1994 through 2004 were: 1994–81.2106%; 1995–91.7413%; 1996–88.8959%; 1997–77.3641%; 1998–80.34%; 1999–88.3%; 2000–88.55%; 2001–88.84%; 2002–92.53%; 2003–89.71%; 2004–88.59%. Appx. 274; 1598 ¶¶ 3, 4; 1612, 1614, 1620, 1623-25, 1628-29, 1632, 1634. *See also* Appx. 370, 383 (Figure 4.8).

[13] "**Q.** Is it – given that the system it would seem obvious that the contractor has to fly blind in effect. If he negotiates his rate for, let's say, Fiscal Year 2000 at or about the time that the appropriation is enacted . . . he won't know the exact amount that he is going to get until much later in the fiscal year, is that true? **A.** Yes. . . ." Appx. 388, 431-32.

programs including law enforcement; that the CSC shortfall had caused so much turmoil that tribal members seized the Tribe's administrative building, damaging records and equipment, and were still occupying the building at the time the affidavit was written. He concluded: "The ability of the Oglala Sioux Tribal Council and its officers to effectively administer government has been severely compromised." Appx. 875-877.

Both Ramah and Oglala have suffered serious management and programmatic impairment due to the United States' failure to pay the full CSC required. Appx. 257, 261 ¶ 13; 265, 271 ¶ 19; 323, 361-62; 506, 513, 544-51; 809 ¶ 17; 811 ¶ 25; 875-77; 1187 ¶ 17; 1188 ¶ 25.

Neither the Secretary nor the President requested sufficient funding from Congress to meet the BIA's projected need for required indirect and direct CSC payments. Appx. 370, 367-69, 370, 383 (Figure 4.8); 417-425, 429-430, 447A-447B; 808 ¶ 10; 1185 ¶ 10.

SUMMARY OF ARGUMENT

I. Appropriations were legally available to pay each contractor's total CSC entitlement in full. Under standard appropriations law a contract is an "obligation," and both ISDA and each contract commanded that the contract price include the contractor's "full" CSC need.

The fact that each CSC appropriation was "insufficient to pay *all* the contracts the Secretary had made" does not relieve the United States of its duty to pay each contractor. *Cherokee*, 543 U.S. at 637-638. The determinative fact is that the capped CSC appropriation was itself a large lump sum amount that was more than sufficient to pay each Appellant. This long established rule of federal appropriations law does not apply differently when the lump sum is a departmental appropriation, an agency appropriation or an earmarked appropriation for a subactivity within the agency.

The district court erred in choosing instead to apply the restricted single line-item appropriation rule of *Sutton v. United States*, 256 U.S. 575 (1921), because that rule only applies to an appropriation limited to a specific contract or project, and does not apply to an appropriation intended to pay hundreds of contracts. *See* Appx. 1287-1306 (list of ISDA contractors in class). To the contrary, the Comptroller General has instructed that the lump sum rule applies to appropriations with as few as two objects. Moreover, to adopt the district court's analysis would create considerable uncertainty in government contract law because it would permit the government to unilaterally reduce the price of government contracts even after performance.

Finally, even if there otherwise were a defense based upon the availability of appropriations clause, the agency waived that defense by failing to request sufficient appropriations from Congress. The law does not permit the government to enter into a contract that is limited to available appropriations, secure the benefits of the contractor's services, and then fail to request the necessary appropriations to fully pay the contract. This principle applies with equal force to the next argument.

II. Even if appropriations had not been legally available, the government would still be liable because ISDA conferred upon the Secretary "contract authority" to award contracts in advance and in excess of appropriations. Under that regime, the government is liable without regard to the condition of an appropriation made available to liquidate the obligation.

ISDA specifically commands that the "full" amount of every contract shall include all of a Tribe's CSC requirement and does not limit the government's contract obligation to available appropriations. Although ISDA includes an "availability of appropriations" clause, that clause limits only the *Secretary*'s "provision of funds" as payor and the amount he is to "make available" in the current year—that is, his payment or liquidation of the government's obligation. The clause does not limit the Secretary's

contract authority to bind the United States to the full contract amount. Leading commentators agree that ISDA confers upon the Secretary contract authority to bind the United States in excess of agency appropriations. To read the text otherwise thwarts the clear congressional intent to preserve program levels.

Appropriations earmarks for CSC since 1994 have increased the protection afforded non-contracting Tribes under § 450j-1(b)'s proviso by fencing off general program appropriations from being reprogrammed to pay CSC. But nothing in either § 450j-1(b)'s proviso or in the Appropriations Acts suggests Congress eliminated the CSC obligation that was fixed elsewhere in the Act—a conclusion reinforced by the fact that the same committees and the same session of the 100th Congress that enacted § 450j-1(b) enacted other legislation with very different wording that did clearly and expressly contain such limits. *See* 25 U.S.C. § 1658. Moreover, the 103d Congress further amended ISDA to add a provision "entitl[ing]" contractors to full CSC funding. 25 U.S.C. § 450j-1(g).

The district court's contrary conclusion misquoted a key provision of the contract, and thereby introduced conflicts within ISDA. The conflicts are artificial, conflicting with the plain meaning of the statute. The district

court similarly erred in misreading a different section of the Act, 25 U.S.C. § 450j(c).

III. The appropriation earmarks introduced in 1994 were accompanied by legislative history acknowledging the continuing contract obligation for full CSC. Nothing in those Appropriations Acts meets the high threshold for finding an appropriations measure to have implicitly repealed an authorizing Act or altered statutorily mandated contract terms, as acknowledged by Defendants. This remains the case in the FY 1999 and later Acts, even though Congress in those years added a "notwithstanding" clause to the CSC earmark.

IV. Even if ISDA were less than clear, under both the law of this case and ISDA's mandatory rule of construction Appellants' reading must prevail if it is reasonable. The government has conceded in other litigation that Appellant's construction of ISDA is indeed "reasonable."

STANDARD OF REVIEW

"We review the district court's grant of summary judgment de novo, applying the same standard as the district court under Fed. R. Civ. P. 56(c). Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). We examine the factual record and reasonable

inferences therefrom in the light most favorable to the nonmoving party. If there is no genuine issue of material fact in dispute, we must determine whether the district court correctly applied the law." *RNC*, 112 F.3d at 1460 (internal citations and editing omitted); *Foster v. Alliedsignal, Inc.*, 293 F.3d 1187, 1192 (10th Cir. 2002).

ARGUMENT

I. APPROPRIATIONS WERE LEGALLY AVAILABLE TO PAY APPELLANT TRIBES IN FULL.

A. The Government Had a Binding Contract Obligation to Pay Full Contract Support Costs.

A contract "obligation" is "a definite commitment which creates a legal liability of the Government for the payment of appropriated funds for goods and services ordered or received." II U.S. General Accountability Office, Principles of Federal Appropriations Law (GAO Redbook) 7-3 (3d ed. 2006). *See also* 31 U.S.C. § 1501(a) ("obligation" includes "a binding agreement between an agency and another person . . . that is—(A) in writing . . . and for a purpose authorized by law; and (B) executed before the end of the period of availability for obligation of the appropriation or fund used for specific . . . work or service to be provided"). By this standard test, the government's duty to pay each Appellant's full CSC requirement was an "obligation."

ISDA commands unconditionally that full CSCs be added to every ISDA contract. *Supra*, at 7-8 (discussing 25 U.S.C. §§ 450j-1(a)(2) and (g)). That statutory command is a part of every contract. 25 U.S.C. § 450*l*(c), Model Agreement, sec. 1(a)(1) ("[t]he provisions of title I of the [ISDA] are incorporated in this agreement"). The mandatory contract reiterates that the "total amount" to be included in each ISDA contract is the amount calculated under §§ 450j-1(a)(2) and (g). 25 U.S.C. § 450*l*(c), sec. (1)(b)(4). Since the CSCs are a mandatory part of the contract price, there is a contract obligation for that amount under 31 U.S.C. § 1501(a)(1).

This is precisely how the courts have understood this controlling statutory regime. Thus in *Cherokee* the Supreme Court was clear that the statute directly requires full payment of contract support costs:

> The Act specifies that the Government must pay a tribe's costs, including administrative expenses. See §§ 450j-1(a)(1) and (2).

543 U.S. at 634. The Court explained that Congress purposefully placed this duty to pay in the Act:

> The Act also reflects a congressional concern with [the] Government's past failure adequately to reimburse tribes' indirect administrative costs and a congressional decision to require payment of those costs in the future. See, *e.g.*, § 450j-1(g); see also §§ 450j-1(a), (d)(2).

543 U.S. at 639. Similarly, the Federal Circuit in the same case said that § 450j-1(a)(2) "require[s] that the Secretary provide funds for the <u>full</u>

administrative costs to the tribes," *Thompson*, 334 F.3d at 1081 (emphasis added), as did this Court, *RNC*, 112 F.3d at 1463.

Consistent with these authorities, the Government Accountability Office in its authoritative Principles of Federal Appropriations Law (the "Redbook") instructs that:

> The logical conclusion from the [*Cherokee*] Court's finding that the Indian Self-Determination Act contracts are no different from ordinary procurement contracts is that the Indian Health Service, at the time it entered into the contracts, *should have recorded an obligation against its appropriations for the full amount of the support costs to which the Tribes were entitled.*

II GAO Redbook 6-24 n.22 (emphasis added). The same is equally true of the Interior Secretary's contracts here.

B. Funds Were Legally Available to Pay the Government's Contract Obligations.

Under ISDA contracts, the United States is the obligor while the Secretary is the payor. Only 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. 25 U.S.C. § 450j-1(b). Here, that condition was satisfied.

It is a fundamental principle of appropriations law that an appropriation is "legally 'available'" for a "legal expenditure" if the proposed expenditure is (1) for one of the purposes for which the

appropriation was made, (2) for an obligation arising in the same time period covered by the appropriation; and (3) within the amount statutorily authorized for the obligation. I GAO Redbook 4-6 (2004). This is the familiar "purpose, time, and amount" test. *Id*. If all three of these conditions are satisfied, appropriations are "legally available" to pay a given contract obligation.

For each Appellant in each year, it is undisputed that (1) paying Ramah, Oglala, and Zuni their CSC requirements was a permitted "purpose" for which Congress appropriated the CSC funds; (2) paying them was in satisfaction of contract obligations that covered the same "time" period; and (3) paying each contractor its full CSC obligation was well within the very large lump sums that Congress appropriated for CSC payments.

C. The Fact that the Appropriations Were Insufficient for the Secretary to Pay All Contracts Does Not Change the United States' Liability for Full CSC on an Individual Contract.

The Secretary, however, protests that because of the overall statutory cap on CSC appropriations, sufficient funds were not available for him to pay all CSC obligations for all ISDA contractors. Even if factually correct, this is legally irrelevant because there were sufficient appropriations to pay any individual contractor.

An additional "fundamental principal of appropriations law, *Thompson*, 334 F.3d at 1085-86, involves the distinction between (1) a lump-sum appropriation available for several objects, projects or contracts, *see Int'l Union v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) ("the lump-sum appropriation has a well understood meaning"); and (2) a specific line-item appropriation that restricts the amount available for a single project or contract, the situation presented in *Sutton v. United States*, 256 U.S. 575 (1921).

In the case of a "lump-sum" appropriation, "'[a] contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects.'" *Cherokee*, 543 U.S. at 637-638 (quoting *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892)). *See also Dougherty v. United States*, 18 Ct. Cl. 496, 503 (1883). *See generally* II GAO Redbook 6-22 - 6-23 (discussing what we call here the *Cherokee-Ferris* rule). In the lump-sum situation (and absent special authority, *see* Part II, *infra*), an agency's exhaustion of an appropriation without fully paying the contract at issue naturally prevents the agency from spending more (given the proscription of

the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A)), but it does not bar the contractor from recovering damages for the non-payment.[14]

The natural consequence of this fundamental rule of appropriations law is that the government may be held liable for failing to pay a contractor in full out of an appropriation sufficient to pay that contractor, even though the appropriation is insufficient to pay all of the contracts the agency has made—which is exactly what the Supreme Court declared in *Cherokee*:

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

543 U.S. at 637 (italics in original).[15]

That is the precise situation presented here: there was an appropriation that each year was sufficient to pay each Appellant's contract, though it was "insufficient to pay *all* the contracts the agency ha[d] made." The court

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[14] *New York Cent. R. Co. v. United States*, 65 Ct. Cl. 115, 128 (1928), *affirmed*, 279 U.S. 73 (1929). *See also Lee v. United States*, 129 F.3d 1482, 1483-84 (Fed. Cir. 1997); II GAO Redbook 6-20.

[15] *See also id*. at 640 ("[W]e have found no indication that Congress believed or accepted the Government's current claim that, because of mutual self awareness among tribal contractors, Tribes, not the Government, should bear the risk that an unrestricted lump sum appropriation would prove insufficient to pay *all* contractors.") (emphasis in original).

below recognized that it was dealing with an "insufficient lump sum appropriation" "that bulks together funds owed to hundreds of contracts, as in the immediate case." Add. A-11, A-13 (Appx. 1728, 1730). Accordingly—just as in *Cherokee*, 543 U.S. at 642—the fact of that insufficiency does not excuse the contractual obligation to pay the contract in full, and any underpayment entitles the contractor to recover damages from the Judgment Fund.

D. The District Court Erred in Characterizing the Appropriations as "Restricted" and Thus Exempt From the *Cherokee-Ferris* Lump Sum Rule.

The district court ruled, incorrectly, that the CSC appropriation was "restricted," observing that the Court in *Cherokee* spoke of "unrestricted" appropriations. Add. A-13. The district court's distinction, however, disregarded the fundamental rule of appropriations law for distinguishing lump-sum appropriations from restricted single-purpose appropriations.[16]

A restricted appropriation is a specific line-item appropriation, where Congress designates a specifically-appropriated sum for a given undertaking. In that situation a contractor is generally held to the limits of the specifically capped amount. The classic example is *Sutton*, 256 U.S. at 579-580, where a contractor was held to notice of a $20,000 statutory limit on the agency's

[16] II GAO Redbook 6-15 – 6-24 gives an excellent overview of the law governing restrictions on appropriations supportive of this point.

authority to contract for the specific project the contractor was hired to complete.[17] In this setting it is reasonable to charge the contractor with knowledge of the appropriation's impact upon him because the limitation is specific to a single project and a single contractor, and is apparent on the face of the Appropriations Act.

The restricted line-item appropriation of the type at issue in *Sutton* is plainly not presented here. As the district court acknowledged, at issue here is not an appropriation for a single contractor (the *Sutton*, *Bradley* and *Shipman* situations), but rather an appropriation that "bulk[ed] together funds owed to hundreds of contracts." Add. A-13 (Appx. 1730). And that is the precise situation the Supreme Court in *Cherokee* declared to be subject to the lump sum rule of federal appropriations law.[18]

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[17] *See also Bradley v. United States*, 98 U.S. 104, 108 (1878) (limiting liability to amounts set forth in two carefully restricted Appropriations Acts "[f]or rent of house numbered nine hundred and fifteen E Street northwest"); *Shipman v. United States*, 18 Ct. Cl. 138, 145-146 (1883) (limiting liability to amounts set forth in an 1878 Act appropriating $7,000 for one particular road project); II GAO Redbook 6-5, 6-26, 6-43 – 6-45.

[18] The Federal Circuit in *Thompson* stated in *dictum* that the BIA's 1994 CSC appropriation, also at issue here, was "restricted" within the meaning of the lump sum rule. *See* 334 F.3d at 1084 (citing both *Sutton* and *Oglala* as examples of restricted appropriations). But (1) the *Thompson* appeal did not concern the BIA's capped 1994 appropriation, (2) the cited *Oglala* decision never discussed these appropriations rules, much less whether the CSC appropriation was covered by the lump sum rule or by the *Sutton* restricted appropriation rule (the *Oglala* court instead based its decision on its assessment of the underlying contract right, 194 F.3d at 1378-79, a matter

The district court seems to have considered decisive the fact that the CSC lump sum here was carved out of the BIA's larger lump sum. But nothing in federal appropriations law draws a legal distinction among different levels of lump-sum appropriations, whether it be for an entire Department, for an agency within a Department (the situation in *Cherokee*), or for a sub-activity (such as CSC payments) within an agency—the situation here. While all of these lump sum appropriations are capped at some level, their shared defining characteristic is that each amount is without limitation available for multiple projects or contractors, rather than just one, and is thus "unrestricted".

In fact, the Comptroller General has held that the lump sum rule applies even when an earmarked appropriation is devoted to as few as two objects. In such a situation the entire earmarked appropriation is deemed legally available to spend on just one object. That was the situation in *In re Newport News Shipbuilding & Dry Dock Co.*, where $244,300,000 out of a much larger appropriation for "Naval Vessels" (in turn a part of the Department of Defense appropriations) was earmarked to construct two frigates. The Comptroller General held that the entire amount for the two

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we discuss *infra* in Part II); and (3) neither the *Thompson* court nor the *Oglala* court had the benefit of the Supreme Court's decision in *Cherokee*, expounding upon application of the lump sum rule when total appropriations are "insufficient."

frigates was "legally available" to be spent on just one (contrary to the wishes of the relevant appropriations committee). 55 Comp. Gen. 812, 818-819, 822 (1976). The Comptroller General reasoned that since, under the lump sum rule, an appropriation is "legally available" to cover any one of the multiple objects within it, the rule applies whether the appropriation is a large sum available for a broad range of objects, or (as in *Newport News*) an appropriation available for only two objects. *Id*. at 821-822.[19]

If an appropriation that is unrestricted as between two permitted items is "legally available" in its entirety for one of those items (as *Newport News* holds), then necessarily an appropriation that is unrestricted as among over hundreds of contracts (including Appellants' contracts) is "legally available" insofar as necessary to pay each contract.

E. *Cherokee* Holds that Ordinary Federal Procurement Law is to be Applied to ISDA Contracts "Lest Legal Uncertainty Undermine Contractors Confidence That They Will Be Paid."

The Supreme Court in *Cherokee* cautioned "that Congress, *in respect to the binding nature of a promise*, meant to treat alike promises made under the [ISDA] and ordinary contractual promises (say, those made in

[19] *See also* II GAO Redbook 6-15 *et seq*. (discussing *Newport News*). The Comptroller General's decisions are binding on the Executive Branch (31 U.S.C. § 3526(d)) and persuasive with the courts, *see Ass'n of Civilian Technicians v. FLRA*, 269 F.3d 1112, 1116 (D.C. Cir. 2001).

procurement contracts)." 543 U.S. at 639 (emphasis in original). The Court also emphasized the importance of "provid[ing] a uniform interpretation of similar language used in comparable statutes, lest legal uncertainty undermine contractors' confidence that they will be paid, and in turn increase the cost to the Government of purchasing goods and services." *Id.* at 644. As reflected in *Cherokee* the lump sum rule is a critical component of that body of law, and under that rule the ceiling on the total CSC appropriation, and even its insufficiency to pay all contractors, did not impact the legal sufficiency of the agency's appropriation to pay each of Appellants' contracts in full.

This result is critical to the stability of government contracting. No one would seriously argue that numerous defense contractors would have no right to be paid in full after performance, and would instead be left to the discretion of the Secretary of Defense to pay some contractors but not others or to pay all of them less than they were due. Indeed, a contrary rule—which under *Cherokee* cannot be carved out specially for ISDA contractors—would seriously undermine the reliability of government contracting, since "[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). As another court put it, "[a] party may not reserve to

itself a method of unlimited exculpation without rendering its promises illusory and the contract void." *New Valley Corp. v. United States*, 119 F.3d 1576, 1584 (Fed. Cir. 1997). *See also Precision Pine & Timber, Inc. v. United State*s, 50 Fed. Cl. 35, 66 (2001) (exculpatory clause is viewed narrowly against the United States and favorably to the contractor).

Yet that is the precise result that would obtain if, after substantial performance by the contractor, the Secretary could simply declare what he will pay. Such an outcome is not the law under ordinary government contracting, and under those same rules it is not the law here. Assuring contractors their right to be paid—or to a damage remedy in the case of non-payment—is critical to preserving the reliability of the United States as a contracting party. *See United States v. Winstar Corp.*, 518 U.S. 839, 884-885 & n. 29 (1996) (plurality); *id.*, 518 U.S. at 913 (Breyer, J. concurring).

Indeed, Committee Chairman Daniel Inouye stated this precise objective in crafting the 1988 ISDA Amendments' funding and remedial provisions:

> Whenever the Department of Defense gets into a contract with General Electric or Boeing or any one of the other great organizations, that contract is carried out, even if it means supplemental appropriations. But strangely in this trust relationship with Indians they come to you maybe halfway or three quarters through the fiscal year and say, "Sorry, boys, we don't have the cash, so we're going to stop right here, after you've put up all the money. At the same time,

> you don't have the resources to sue the Government. Obviously, the equity is not on your side. *We're going to change that also.*

Hng. before the Sen. Select Comm. on Indian Affairs on ISDA Amendments of 1987, 100th Cong., 1st Sess., at 55 (1987) (emphasis added).

F. The Government Cannot Invoke a Funds Available Clause in a Contract When the Agency Fails to Seek Sufficient Appropriations to Pay the Contract in Full.

Even were the lump sum *Cherokee-Ferris* rule not applicable here, and if instead the circumstances presented implicated the *Sutton* restricted line-item appropriation rule, Appellants would still be entitled to recover because 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.

The most extensive discussion of this rule is found in an opinion of the Court of Claims. In *S.A. Healy Co. v. United States* (*Healy*), the court was confronted, not with a three-word phrase, but with two lengthy contract clauses that directly spoke to the potential for insufficient appropriations. 576 F.2d 299, 300-301 (Ct. Cl. 1978). Indeed, unlike the situation here, the clauses in *Healy* limited the contractor's rights not only to available appropriations, but to "an appropriate reservation of funds [by the agency] thereunder." *Id*. at 300. However, subsequent to the contract's execution

the agency failed to seek an increase in the budget and in the appropriation to fully pay the contract. *Id*. at 302.

After thoroughly reviewing the law regarding exculpatory appropriations clauses in government contracts, the Court of Claims rejected the argument that the insufficient appropriation relieved the government of liability "no matter what the underlying reason is for Congress' failure to appropriate the needed amounts." *Id*. at 303. To the contrary, the government will be held liable where "Congress cannot be faulted for the shortage . . . because it appropriated all that was requested," "[t]he agency simply did not make an adequate request," and the contract did not clearly place the risk of this occurrence on the contractor. *Id*. at 305. The court explained that:

> Whether or not the funds available clause clearly allocates all risk of loss to the contractor when Congress cuts budget requests, *we hold that the clause as a whole is not sufficient to shift this burden to the contractor when the administrative agency is at least partly to blame for the funds shortage*.

Id at 305.[20] *See also San Carlos Irrigation & Drainage Dist. v. United States*, 23 Cl. Ct. 276, 283 (1991) (following *Healy* and rejecting

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[20] The court emphasized not only that ambiguous clauses are interpreted against the government as drafter but "that bilateral contracts should be interpreted, whenever possible, in a manner which will not place one party at the mere will or mercy of the other." *Id*. at 305 (citing, *inter alia*, *Padbloc Co. v. United States*, 161 Ct. Cl. 369, 376-77 (1963) ("'We are not to

appropriations defense because "the BIA did not attempt to obtain appropriations from Congress" for the purpose).[21]

The point, of course, is that a contractor whose contract is subject to available appropriations may bear the risk that Congress will refuse to appropriate, but it does not bear the risk that the contracting agency will, after signing the contract, fail even to *seek* the appropriations in the first place.

Here, the undisputed evidence, Appx. 506, 540-541; 1281 ¶ 3, 1284; 1401, 1403-05; 1593; 1594-95 ¶ 6, is that the BIA failed to request appropriations from Congress sufficient to fund its direct and indirect CSC obligations to ISDA contractors. Nothing in ISDA comes close to shifting to the tribal contractors the burden of the government's failure to at least seek appropriations to pay the contracts the government has signed, especially where the BIA has a special role in carrying out the United States' trust responsibility to the Tribes. *See* 25 U.S.C. § 450n(2); *RNC*, 112 F.3d at 1461.

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suppose that one party was to be placed at the mercy of the other'" so as to "[give] the United States carte blanche.")).

[21] The Secretary did sometimes supply Congress with required reports showing CSC shortfalls. But these reports were not requests for appropriations, *see* 31 U.S.C. § 1108, and were provided *long* after the close of the fiscal year. Appx. 240-256. Thus, they do not meet the *S.A. Healy* condition for invoking an unavailability defense.

II. ISDA CONFERS "CONTRACT AUTHORITY" ON THE SECRETARY TO AWARD CONTRACTS FOR CONTRACT SUPPORT COSTS IN ADVANCE AND IN EXCESS OF APPROPRIATIONS.

A. ISDA's Contracting Provisions Reflect the Distinction in Appropriations Law Between Contract Authority and Expenditure Authority.

Even if funds had not been legally available to pay Appellants' contracts (and in Part I we demonstrate that they were), the government would still be liable for failing to pay these contracts in full because Congress conferred upon the Secretary the special authority and duty to bind the United States for the full amount of required CSC in advance and in excess of appropriations. *See Cherokee*, 543 U.S. at 642 (recognizing concept). The government is liable in full for obligations incurred under such contract authority, notwithstanding a limitation on appropriations

"Contract authority, usually provided in permanent law, permits agencies to incur obligations in advance of a separate appropriation of the cash for payment or in anticipation of the collection of receipts that can be used for payment." Budget of the United States Government, Fiscal Year 2004: Analytical Perspectives: Budget System and Concepts and Glossary, at 467 (1995). *Accord*, II GAO Redbook, at 6-88.

Congress's decision in ISDA to confer "contract authority" upon the Secretary was critical to fulfilling Congress' goals of ensuring that tribal contracts would receive full CSC, without diminishing either their program levels or the program levels of non-contracting Tribes.

The wording of ISDA's two central funding provisions, the Secretarial program amount, § 450j-1(a)(1), and the contract support cost amount, § 450j-1(a)(2), differs significantly. The Secretarial amount, § 450j-1(a)(1), is conditioned on the existence and size of the Secretary's program. If there is no program appropriation, there is no right to contract since a tribe can only contract to the extent there is an activity the Secretary "would have otherwise provided." *Id*. The same is not true of the CSC amount. Once the duty to transfer the program amount into a contract arises, the Secretary must, under § 450j-1(a)(2), add to it the full amount of CSC which Congress has commanded: "*There shall be added to the [program] amount required by [§ 450j-1(a)(1)] contract support costs* . . . [in] an amount for the reasonable costs for activities which must be carried on . . . to ensure compliance with the terms of the contract and prudent management." (Emphasis added.) In § 450j-1(g), Congress reemphasized this directive by unconditionally commanding that "*the Secretary shall add to the contract*

the full amount of funds to which the contractor is entitled under [§ 450j-1(a)]." (Emphasis added.)

Under established principles of federal procurement law, this language both empowers and directs the Secretary to include full CSC in the contract in advance of and in excess of an appropriation to pay them. For example, the Congressional Budget Act, 2 U.S.C. § 622(2)(A), defines the terms:

> The term "budget authority" means the authority provided by Federal law to incur financial obligations, as follows:
>
> . . .
>
> **(iii) contract authority, which means the making of funds available for obligation but not for expenditure** . . .

(Emphasis added). According to the GAO:

> Since the contracts entered into pursuant to contract authority constitute obligations binding on the United States, Congress has little practical choice but to make the necessary liquidating appropriations.

I GAO Redbook at 2-7.[22] As the GAO put it in discussing Supreme Court case law:

> The expectation is that appropriations will be automatically forthcoming to meet these contractual commitments. This mechanism considerably reduces whatever discretion Congress might have exercised in the course of making annual appropriations. *Train v. City of New York*, 420 U.S. 35, 39 n.2 (1975). *A failure or refusal by*

[22] Providing contract authority to an agency is often advantageous for the government. *See In re Army Corps of Engineers,* 56 Comp. Gen. 437, 1997 WL 10467 (1997).

> *Congress to make the necessary appropriation would not defeat the obligation, and the party entitled to payment would most likely be able to recover in a lawsuit*. *E.g.,* B-211190, Apr. 5, 1983.

Id. at 2-6 (emphasis added).[23] When this expectation is not fulfilled, the contractor has the right to seek payment from the Judgment Fund. *Bath Iron Works v. United States*, 20 F.3d 1567, 1583 (Fed. Cir. 1994). *Cf. Cherokee*, 543 U.S. at 642-43.

The Supreme Court in *Cherokee* recognized that Congress may, if it chooses, confer upon a contracting officer "special statutory authority needed to bind the Government without regard to the availability of appropriations," and that when this "special authority" is conferred a contracting officer can "bind the Government in the absence of an appropriation." 543 U.S. at 643 (citing approvingly *New York Airways, Inc. v. United States*, 369 F.2d 743, 744-49, 751-52 (Ct. Cl. 1966)). *New York Airways* involved long-term implied-in-fact contracts to transport mail in circumstances resembling the facts and statutes at issue here: Both cases involved statutory "entitlements"; the appropriations in *New York Airways* were limited by "not to exceed" language in the same form as the 1994

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[23] The Anti-Deficiency Act, also cited by the Court, anticipates such congressional authority by declaring that an agency "may not . . . involve [the] government in a contract or obligation for the payment of money before an appropriation is made *unless authorized by law*." 31 U.S.C. § 1341(a)(1)(B) (emphasis added). Here, ISDA provides that authorization.

through 1998 CSC Appropriations Acts at issue here; the contract price was set by an objective standard (a postal rate there, an indirect cost rate here); payments were to be made out of appropriations; and the services had been fully performed. The court held that "the failure of Congress to grant appropriations would not relieve the Government of its contract obligation to pay carriers." *Id.* at 746. Although the Court of Claims found the statute ambiguous, it resolved the ambiguity against the government as drafter, stating that "where Congress intends to eliminate or curtail subsidies to certain carriers it accomplishes it forthrightly rather than through pursestring inference." 369 F. 2d at 747.

Courts are particularly keen to uphold the payment rights of federal contractors who, through no fault of their own, are not fully paid after performing significant services expecting to be paid. *See e.g., United Pacific Insurance Co. v. United States,* 464 F.3d 1325, 1333 (Fed. Cir. 2006) ("invalidation of a contract after it has been fully performed is not favored," citing *AT&T v. United States*, 177 F.3d 1368, 1375 (Fed. Cir. 1999)). *See also Wetsel-Oviatt Lumber Co. v. United States,* 38 Fed. Cl. 563, 570-571 (1997) (government obliged to fully compensate lumber company under contract which had been performed despite unavailability of appropriations). *See also St. Regis Mohawk Tribe*, HHS Departmental App. Bd., No. A-02-

12, Dec. No. 1808 (2002) (Congress empowered IHS to enter into a contract for full calendar year funding, even though the funds for the last quarter of that year were not yet appropriated; ISDA provides the authority to enter into the contract in advance of appropriations).[24]

Leading government contracting experts Ralph C. Nash and John Cibinic read *Cherokee* and ISDA to mean that "[contract authority] is the type of authority involved in these tribal contracts," adding that "it has been held that where obligations have been incurred under such 'contract authority,' the Government is bound to those promises even though a subsequent appropriation is insufficient to cover the authorized obligations." *Cherokee Nation: More Than Meets The Eye*, 19 Nash & Cibinic Report No. 29, at 4-5 (2005) (Appx. 1368, 1371-72).

The district court erred in failing to recognize the Secretary's contract authority for CSC.

B. Section 450j-1(b)'s Concluding Proviso Governs Only the Timing and Manner of Payment, Which Is an Exercise of Expenditure Authority, and Not Contract Authority.

1. The proviso does not undo the contract obligation. The concluding proviso in 25 U.S.C. § 450j-1(b) is a single sentence that regulates the Secretary's conduct—his "provision of funds"—and not the

[24] Available at http://www.hhs.gov/dab/decisions/dab1808.html

amount of the underlying contract obligation. The provision-of-funds clause governs the Secretary's duty as paymaster (and does not alter the government's obligation for full CSC). The proviso's plain terms are directed at protecting programs serving non-contracting Tribes from being "reduce[d]" to pay contracting Tribes.[25] In this regard, a Comptroller General Opinion regarding the Boating Safety Act is instructive:

> [T]he clause in the [Boating Safety Act] amendment limiting the Secretary's spending authority 'to such amounts as are provided in appropriations Acts for liquidation of contract authority, only restricts the amounts that can be drawn from the trust fund to liquidate, *i.e.*, to pay, the obligations previously incurred to amounts subsequently appropriated by the Congress.

Comp. Gen. Op. B-211190 (1983), cited at II GAO Redbook 6-88. The opinion goes on to state that if the Congress does not provide sufficient liquidating appropriations "the United States, through the Coast Guard, would nevertheless be liable for payment of the obligations . . . . Any award . . . would then be paid from the permanent judgment appropriation. 31 U.S.C. Sec. 1304(a)." *Id*.

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[25] "The last-sentence proviso of subsection [450j-1](b) makes clear that the Secretary is not required to reduce his discretionary funding of one tribe for the sake of another—all of which has nothing to do with his duty to fully fund the mandatory CSC contracts first." *In re Cherokee Nation*, 01-1 B.C.A. (CCH) ¶ 31,349, 2001 WL 283245 (Interior B.C.A.2001), *affirmed sub nom. Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003), *affirmed*, 543 U.S. 631 (2005).

As said in *New Valley Corp. v. United States*, 119 F.3d at 1584 ("[W]e are charged with interpreting [the Act] in a manner that preserves its validity, not destroys it. . . . This rule applies to the § 450j-1(b) proviso, relied on by the lower court."

2. **The CSC earmarks protect non-contracting Tribes**. In *Lincoln v. Vigil*, 508 U.S. 182 (1993), the Supreme Court held that the Secretary had complete discretion to alter or rescind non-contracted programs serving Indians that were funded by unrestricted appropriations. Following *Vigil*, Congress earmarked the CSC appropriation to eliminate the risk that non-contracting Tribes might lose program funding despite the § 450j-1(b) proviso. By carving out a separate CSC earmark within the larger BIA appropriation, Congress fenced off the general appropriation for those other programs from the specific appropriations that fund CSCs. *See Cherokee*, 543 U.S. at 642 (recognizing that an agency can "[ask] Congress in advance to protect funds needed for more essential purposes with *statutory* earmarks") (emphasis in original).

Nothing in Congress' decision to "protect" the general appropriation serving other Tribes suggests Congress intended to go further and also eliminate the underlying obligation to pay full CSCs to contracting Tribes. Indeed, when Congress capped the CSC appropriation for FY 1995, the

Senate Appropriations Committee acknowledged the obligation to "repay" contractors' shortfalls from previous years and it informed the agencies that they need not abandon indirect cost rates to determine how much CSCs to fund. S. Rep. 103-294, at 57 (1994), Appx. 782, 784

3. § 450j-1(b) does not limit the contract obligation. Statutes employ precise and explicit language—language fundamentally *different* from the § 450j-b proviso—when Congress wishes to confine the United States' contract *obligations* to the amounts appropriated. Appellants' Appendix at 863 contains a collection of 51 such statutes, including the following:

> The authority of the Secretary to enter into contracts under this subchapter shall be to the extent, and in the amount, provided for in appropriation Acts.

25 U.S.C. § 1658.[26] This provision merits special attention because, unlike ISDA, it expressly limits the Secretary's authority "to enter into contracts" (there, for urban Indian health care) beyond appropriations amounts. Section 1658 was enacted by the same session of the 100th Congress that enacted ISDA's § 450j-1(b) proviso, and was vetted by the same committees

[26] *See also* the Tribally Controlled Schools Act, 25 U.S.C. § 2008(j)(2), a companion statute to ISDA and another of the 51 statutes at Appx. 863.

that developed the proviso.[27] When Congress has adopted a particular approach for achieving a given legislative goal, statutes that depart from that approach cannot be given the same meaning. *See Whitfield v. United States*, 543 U.S. 209, 216 (2005)(when Congress has included an express "overt act" requirement in 22 statutes, but not in a 23d, the latter must be assumed to have a different meaning).

Had Congress wanted the ISDA funding obligation for CSC to be confined to available appropriations, it knew precisely how to do so.

4. The district court misread ISDA. The district court's conclusion improperly recast the § 450j-1(b) proviso to bring it within the family of these 51 statutes. The district court concluded that ISDA limited the Secretary's contracting authority by ignoring § 450j-1(g) and then misquoting a parallel provision of ISDA located in the model contract. This was error.

The district court stated:

> Section 450*l* of the [Self-Determination Act] contains a model agreement that provides that the "[f]unding amount" of the contracts are "subject to the availability of appropriations." *See* Section 1(b)(4) of the Model Contract, 25 U.S.C. § 450*l*(c).

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[27] The Supreme Court noted three additional statutes of this kind, *Cherokee*, 543 U.S. at 643 (citing 22 U.S.C. § 2716(a)(1); 42 U.S.C. §§ 6249(b)(4), 12206(d)(1)). The Court granted relief on the *Cherokee-Ferris* argument, 543 U.S. at 637-38, 640-41; it acknowledged but did not reach the special authority argument. *Id*. at 643.

Add. A-6 (Appx. 1718, 1723). But the cited model contract provision actually does not say that "funding amounts" are subject to available appropriations; in fact it says the opposite. It says that the amount the Secretary "shall make available" is what is subject to available appropriations:

> 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 [Self-Determination Act] (25 U.S.C. 450j-1).

25 U.S.C. § 450*l*(c), Model Agreement, sec. 1(b)(4) (emphasis added).

Properly read, the "total amount" in the first sentence is the antecedent of "[s]uch amount" in the second sentence. The second sentence explains that this "total amount" shall not be less than the amount "determined pursuant to [§ 450j-1(a)]"—which is the "full amount of [CSC and program] funds to which the contractor is entitled under [§ 450j-1(a)]." 25 U.S.C. § 450j-1(g). By contrast, under the first sentence, it is only the sum that the Secretary is going to actually "make available"—*i.e.*, pay—that is "[s]ubject to the availability of appropriations."

Thus, when correctly read section 1(b)(4) of the model contract echoes the last sentence of § 450j-1(b) by limiting only the Secretary's expenditure authority. As such, both sections take ISDA's statutory

language far outside the family of 51 statutes where an agency's contracting authority, or the contract amount, are limited to available appropriations. The district court's contrary reading was only possible by conflating two sentences into one, omitting key words from the first, misreading the second, deleting the phrases "make available" and "total amount," and attaching the wrong antecedent to the phrase "such amount." The district court thus overlooked the most basic rule that "the starting point in any case involving statutory construction is the language of the statute itself." *RNC*, 112 F.3d at 1460.

5. Section 450j(c) deals only with multi-year funding arrangements not at issue here. The only other provision relied upon by the district court to effectively group ISDA with the 51 statutes reproduced at Appx. 863 is § 450j(c)(1)(B).[28] But that provision deals only with the "out" years of multi-year contracts, unique instruments that were created in

[28] The section provides:

> A self-determination contract shall be –
>
> > (A) for a term not to exceed three years in the case of other than a mature contract, unless the appropriate Secretary and the tribe agree that a longer term would be advisable, and
> >
> > (B) for a definite or an indefinite term, as requested by the tribe (or, to the extent not limited by tribal resolution, by the tribal organization), in the case of a mature contract.
>
> The amounts of such contracts shall be subject to the availability of appropriations.

1988, before the 1994 Amendments substituted the model contract and annual funding agreements. The legislative history of § 450j(c) is definitive:

> This discretionary authority provides for contracts over a year in length, *but, as to years after the first year, the contract is more of a declaration of intent until sufficient appropriated funds have become available for the future years*.

H. Rep. 93-1600, at 29 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7775, 7790 (statement of Commissioner of Indian Affairs Morris Thompson) (emphasis added). This interpretation makes sense in the case of a multi-year funding agreement because there is a built-in limitation for the first year, given that no duty to contract arises for future years until the Secretary is given an appropriation to operate a program. But once there is a program appropriation, a duty arises to add the full CSC to each ISDA contract without regard to appropriations. And as noted, the provision is simply not relevant when the parties are employing annual funding agreements under the 1994 ISDA Amendments..

6. Contract authority harmonizes ISDA. In sum, all of ISDA's funding provisions can be harmonized to mean that the Secretary has contract authority to award fixed contracts in the current year, with the contract amount in that year fixed as the full program amount plus the full CSC requirement. *See*, *e.g.*, *St. Regis*, *supra*. Under this reading, *payment* of the full amount by the Secretary is subject to available appropriations to

make those payments, but if such appropriations are not available then the underpaid contract *obligation* remains in place and the government remains liable in damages. *That* reading comports with holistic review and harmonizes all elements of the Act. *Corley v. United States*, __ U.S. __, 2009 WL 901513*7-8 (2009); *United Savings Ass'n v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 371 (1988). The district court erred by failing to seek harmony among these provisions and by obliterating the distinction Congress intended to draw between liquidation of the contract by the Secretary as paymaster, and preservation of the full CSC obligation.

The district court instead would have the § 450j-1(b) proviso "trump" the rest of the statute. *See King v. St. Vincent's Hospital*, 502 U.S. 215, 221 n. 10 (1991) (statutes should be construed "to adopt that sense of words which best harmonizes with context and promotes policy and objectives of legislature"); *Colorado Health Care Ass'n v. Colorado Dep't of Social Services,* 842 F.2d 1158, 1171 (10th Cir. 1988) ("statutes must be construed so as to effectuate their intent and beneficial purpose, not defeat them."). *See also Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 877 (1991) (courts should be reluctant to interpret statutory provision so as to render superfluous other provisions in the same enactment).

7. *Oglala* and *RNSB* are not good authority. The central decision the district court relied upon, *Oglala*, failed in this very same respect, by misreading the § 450j-1(b) proviso as limiting the agency's contracting authority, rather than—as § 450j-1(b) states in unmistakable terms—limiting "the provision of funds" by the Secretary. Had the *Oglala* court carefully parsed the statute, there would have been no need for Judge Gajarsa to lament that "[s]adly, in the present case, we are confronted with promises made and promises broken"; to remark that "[i]n the present case, we not only have the Congress' clear intent established as a matter of policy, we also have the requirement that Tribes enter into agreements on the good faith that the Congress will fulfill its legal obligation"; and to conclude that the 1994 earmark "vitiate[ed] the entire program" producing "a travesty that has been perpetrated in these cases." *Id*. at 1382-83. Contrary to the majority opinion and Judge Gajarsa's lament, the *Cherokee* Court has since reconfirmed the contractual nature of every ISDA agreement and their proper construction under ordinary contract law principles. *Oglala* has been overtaken by *Cherokee*. ISDA contracts are to be enforced according to ordinary federal procurement law.

The other decision cited on by the district court, *RNSB v. Babbitt*, 87 F 3d 1338 (DC Cir. 1996), also decided before *Cherokee*, dealt only with

distribution of an insufficient appropriation for CSC and not with a claim for breach of contract, so that its holding addresses only the limits of administrative discretion, not contract rights. The passage cited by the district court, although *dicta*, does not contradict the contract obligation argument set forth here.

Finally, *S.A. Healy* requires a decision for Appellants under this argument just as it does under Part I, regardless of the nature of the contract obligation *See supra*, at 34-36.

III. THE APPROPRIATIONS ACTS DID NOT REPEAL THE STATUTORY COMMAND TO ADD FULL CONTRACT SUPPORT COSTS TO EACH APPELLANT'S ISDA CONTRACT.

A. The Appropriations Acts Prior to 1999 Did Not Amend ISDA.

The court below found that the "not to exceed" language of the Appropriations Acts, in conjunction with the 25 U.S.C. § 450j-1(b) proviso, reduced the CSC obligation to Appellants. Add. A-8, A-14 (Appx. 1725, 1731). This ruling directly conflicts with the express language of 25 U.S.C. § 450j-1(a)(2) and § 450j-1(g) which require the full amount of CSC to be added to each contract. The same Congress reaffirmed and strengthened the contractual obligation to pay full CSC by adding the entitlement provision of § 450j-1(g). Congress enacted the "not to exceed" language to protect

funding for non-contracting Tribes in the first Appropriations Act after the Supreme Court's May 1993 decision in *Lincoln v. Vigil*. *See* discussion at 11-13, 44-45 *supra*. The 103d Congress, which enacted the first capped appropriation, also reaffirmed and strengthened the contractual obligation to pay full CSC by adding the entitlement provision of § 450j-1(g).[29] It did not repeal with the left hand what it granted with the right.

An intention to repeal must be clear and manifest; only a clear repugnancy between the old and the new law means the former must give way." *TVA v. Hill*, 437 U.S. 153, 190 (1978). *Accord*, *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. __, 129 S.Ct. 1436, 1445 (2009). The doctrine disfavoring repeals by implication applies with full vigor when the subsequent legislation is an appropriations measure. *Id*. *See also New York Airways*, 369 F.2d at 747; *Calloway v. District of Columbia*, 216 F.3d 1, 12 (D.C. Cir. 2000) (appropriations cap on attorneys' fees did not amend statutory provision giving courts discretion in awarding such fees); *Gibney v. United States*, 114 Ct. Cl. 38, 53 (1949) ("We know of no case in which any of the courts have held that a simple limitation on an appropriation bill of the use of funds has been held to suspend a statutory obligation."). *See generally* I GAO Redbook 2-66 to 2-69.

[29] 1994 ISDA Amendments, Pub. L. 103-413, § 102(17), 108 Stat. 4250, 4257–4259.

In *Republic Airlines, Inc. v. U.S. Dep't of Transportation,* 849 F.2d 1315 (1988), not a contract case, this Circuit held that an Appropriations Act did amend the underlying authorizing statute because its legislative history made absolutely clear Congress' intent both to amend the authorizing statute and its intent to terminate completely the authorized program. *Id.* at 1320. Nothing of the sort is present here. The threshold for eliminating contract rights is considerably higher than for terminating grants or subsidies. *Star-Glo Associates, LP v. United States*, 414 F.3d 1349, 1355 (Fed. Cir. 2005) (in situations where, unlike *Cherokee*, "the government is not seeking to limit contractual liability, but to limit benefit payments . . . considerations of predictability are far less significant").

Nothing in the Appropriations Acts at issue here provides the required "affirmative showing of an intention to repeal." *Firebaugh Canal Co v. United States*, 203 F.3d 568, 575 (9th Cir. 2000) (quoting *TVA v. Hill*, 437 U.S. at 190), and the government has conceded that the FY 1995 Appropriations Act—with wording substantially identical to all the Acts from FY 1994 through 1998 (*see Statutes & Regulations Pamphlet* at 39-43)—did not amend ISDA. Appx. 869, 872. *See Morf v. Bingaman*, 298 U.S. 407, 414 (1936) ("[r]epeal by implication is not favored, especially

where the one act follows close upon the other, at the same session of the Legislature").

B. The Appropriation Acts from 1999 Forward Did Not Amend ISDA.

In 1998 the House Appropriations Committee learned that a partial settlement was about to be reached in the instant case based on this Court's 1997 ruling, and was worried that payment of the settlement threatened program monies for non-contracting Tribes.[30] In the Interior Appropriations Act for FY 1999, Congress modified the previous cap language to read: "notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed [a specified amount] shall be available for payments to tribes and tribal organizations for contract support costs . . . ." *See*, *e.g.*, Pub. L. 105-277, 112 Stat 2681, 2681-245 (1998).

The legislative history of the appropriation states:

> Without a ceiling on contract support, the Bureau could be required to reprogram from other tribal programs in the Operation of Indian Programs to fund 100 percent of tribal contract support costs. It has always been the Committee's intent that this language would supersede the requirements of the Indian Self-Determination Act and the Committee has included the language for fiscal year 1999 to reinforce that intent.

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[30] H. Rep. 105-609, at 119 (1998).

H. Rep. 105-609 at 57 (1998).[31] Congress' intent to prevent reprogramming from non-contracting Tribes' programs to pay CSC is voiced in this statement. But nothing in the 1999 and later Appropriation Acts can be read to amend ISDA any more than the 1994-1998 Acts did. This is because the new language still speaks only to the Secretary's expenditure authority—his authority to liquidate an obligation created under an ISDA contract by "reprogram[ming] from other tribal programs in the Operation of Indian Programs [account]"—and Congress' intent not to permit such reprogramming to the detriment of non-contracting Tribes. An intent to limit the Secretary's power to "reprogram" from other programs in order "to fund" additional CSC payments does not destroy the underlying contract obligation. Accordingly, the same analysis applicable to the FY 1994 through FY 1998 Appropriations Acts applies to the post-FY 1998 Acts.

IV. THE GOVERNMENT'S ADMISSION THAT THE TRIBES' CONSTRUCTION IS REASONABLE DECIDES THIS CASE UNDER THE MANDATORY RULE OF LIBERAL CONSTRUCTION THAT IS INCLUDED IN THE CONTRACT AND IS THE LAW OF THIS CASE.

Given the weight of the foregoing arguments and the unanimous Supreme Court ruling in *Cherokee*, the government admitted in *Southern*

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[31] Neither the Senate Report nor the Conference Report directly discussed the new language. *See* S. Rep. 105-227, at 46, 51-52 (1998); H. Conf. Rep. 105-825, at 1208-09 (1998).

Ute Indian Tribe v. Leavitt, 497 F.Supp.2d 1245 (D.N.M. 2007), *appeal dismissed on jurisdictional grounds*, __ F.3d ___ (10th Cir. May 4, 2009), that the Tribes' position advanced here regarding the government's liability is a reasonable construction of ISDA. Under the contract's mandated rule of construction and the law of this case, the Tribes' position must therefore prevail.

In *Southern Ute* the IHS declined to enter into an ISDA contract because the Tribe refused to waive its right to full contract support. The government refused to award the contract because, in the wake of *Cherokee*, the government became concerned that ISDA contracts could "reasonabl[y]" be read to create enforceable obligations of the United States for payment of CSC without regard to the "capped" CSC appropriations. In defending the government's refusal to contract, the government's briefs conceded the following:

> Existing contract or not, the 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*.

Appx. 1660 (emphasis added). The government further explained:

> According to the [Supreme] Court [in *Cherokee*], the language [of model contract sec. 1(b)(4)] gave IHS no "legal right to disregard its contractual promises," even in the absence of available appropriations.

> 125 S.Ct. at 1181. Thus, contrary to [Southern Ute's] claim, *defendants might be held liable* for plaintiff's contract support costs despite the inclusion of the [availability] clause in their contract.

Appx. 1673 (emphasis added). In another passage the government asserted:

> [The *Cherokee*] Court held that once the United States enters into a self-determination contract, it is (in the absence of any relevant statutory restriction, 125 S.Ct. at 1177, 1179) *legally obligated to pay* all contract support costs that it promises to pay under the terms of the contract, *regardless of whether sufficient appropriated funds are currently available*.

Appx. 1692 (emphasis added).

These government concessions in *Southern Ute* are party admissions that Appellants' construction is reasonable. *Plastic Container Corp. v. Continental Plastics,* 607 F.2d 885, 906 (10th Cir. 1979) (under Fed. Rule of Evid. 801(d)(2)(D), the statements of an opposing party's counsel made in a brief filed on that party's behalf in a different case are admissible as Rule 801 admissions against that same party in other cases); Michael H. Graham, Federal Practice & Procedure § 7015 (2006) ("Admissions in the form of an opinion are competent, even if the opinion is a conclusion of law"). On Appellants' motion the district court ruled: "Plaintiffs contend that this admission supports their interpretation to the effect that ISDA and its model contracts create enforceable obligations of the United States for payment of contract support costs ("CSC") in amounts in excess of 'capped' CSC appropriations. . . . Plaintiffs' Motion for Leave to File and Have

Considered a Newly Discovered Party Admission is hereby **granted.**" Add. A-16 – A-17 (Appx. 1716-17).

The admission is decisive, because even if Appellants' construction of ISDA is merely plausible (although it is actually the best construction), and by the government's admission is at least "reasonable," then the Appellants' construction must prevail. This is because the parties' contracts command that "[e]ach provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 *et seq*.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor." § 450*l*(c), Model Agreement, sec. 1(a)(2). The government's admissions triggered the liberal rule of construction in the contract.[32] The district court failed to enforce the parties' contractual bargain. That failure is reversible error.

Moreover, this Circuit has already ruled in this case that "for purposes of this case . . . the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes," so that "if the [Act] can reasonably be construed as the Tribe would have it construed, it must be construed that way." *RNC,* 112 F. 3d at 1462. *See also Neal & Co. v. United States*, 19 Cl. Ct. 463, 473 (1990)

[32] "[T]hat there are two reasonable, competing interpretations . . . is the very definition of ambiguity." *Freemanville Water System, Inc. v. Poarch Band of Creek Indians*, _ F.3d _, 2009 WL 805785*4 (11th Cir. 2009) (quoting *Doe v. Bush*, 261 F.3d 1037, 1062 (11th Cir. 2001)).

(where Federal contract provision is susceptible of more than one reasonable interpretation, ambiguity must be resolved in favor of the contractors).

CONCLUSION

For the foregoing reasons, the decision below should be reversed and summary judgment of liability entered for Appellants.

RESPECTFULLY SUBMITTED:

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STATEMENT ON ORAL ARGUMENT

Oral argument is necessary because the case involves a nationwide federal statutory scheme affecting most Indian tribes and the stability of Federal contracting nationwide. The issues are complex, and include the law of this case as previously determined by this Court.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,482 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 2002 in a proportionally spaced Times New Roman typeface in a 14-point font.

/s/ Daniel H. MacMeekin
Assistant to Michael P. Gross
Dated: May 7, 2009

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing Appellants' Opening Brief, as submitted in Digital Form, is an exact copy of the written document filed with the Clerk; that all required privacy redactions have been made;

and that the digital submission has been scanned for viruses with Avira AntiVir Personal antivirus software, version 8.2.0.348, virus definition file 7.01.03.149, dated May 4, 2009, and according to the program, is free of viruses.

/s/ Daniel H. MacMeekin
Dated: May 7, 2009

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Appellants' Opening Brief to be served by Federal Express standard overnight service this 7th day of May, 2009, on:

John S. Koppel, Esq.
U.S. Department of Justice, Civil Division
950 Pennsylvania Ave., NW, Rm. 7264
Washington DC 20530

In addition, on the same day, the digital submission was filed electronically through the Court's CM/ECF system, which caused the foregoing counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing, at the following e-mail address:

john.koppel@usdoj.gov

/s/ Daniel H. MacMeekin

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

RAMAH NAVAJO CHAPTER, OGLALA SIOUX TRIBE and **PUEBLO OF ZUNI**, for themselves and on behalf of a Class of persons similarly situated,

Plaintiffs,

v. **CIV No. 90-957 LH/WWD ACE**

GALE NORTON, Secretary of the United States Department of Interior, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Plaintiffs' Amended Motion for Partial Summary Judgment or in the Alternative to Strike Defense (Docket No. 570).[1] Also under consideration is Defendants' document that contains both a cross-motion for partial summary judgment and a response to Plaintiffs' motion (Docket No. 592).[2]

Plaintiffs' amended motion seeks "judgment in their favor declaring that annual appropriations limitations for FY 1994 forward inserted by Congress as to the amount which the Secretary may use

[1] This amended motion supercedes the original motion, filed on February 23, 2000 (Docket No. 397).

[2] Defendants' motion has the burdensome title, "Defendants' Cross-Motion for Partial Summary Judgment and Opposition to Plaintiffs' Amended Motion for Partial Summary Judgment or in the Alternative to Strike Defense and Opposition to *Amicus* Pueblo of Zuni's Brief in Support of Plaintiffs' Amended Motion for Partial Summary Judgment" (Docket No. 594), referred to herein simply as "Defendants' Cross-Motion" or "Defendants' Response." Defendants also filed a separate response to Plaintiffs' statement of facts (Docket No. 596).

to reimburse contract support costs ("CSC") under contracts with Class members entered pursuant to The Indian Self-Determination and Education Assistance Act of 1975, as amended, 25 U.S.C. Section 450 through 450n ("ISDA"), do not diminish or eliminate (either alone or coupled with ISDA) the obligation of the United States to reimburse CSC at the full level mandated by ISDA otherwise owed to Plaintiffs." (Docket No. 570 at 1).[3] Footnote 1 of the motion specifically states that the appropriations acts at issue are: Public Law 103-138, Public Law 103-272, Public Law 104-134, Public Law 104-208, Public Law 105-83, Public Law 105-277, Public Law 106-113, and Public Law 106-291.

This motion clarifies it applies to the claims, not yet settled for the years FY 1994 and thereafter, including the original cause of action upheld in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), and the Class's second cause of action added by amendment (*see* Docket No. 352) and by complaint in intervention (*see* Docket No. 353).

The second cause of action added by amendment is entitled a "Claim for Underpayment of Indirect Costs for Alleged Insufficiency of Appropriations" (Docket No. 352). This claim specifically states that it applies to the indirect cost shortfalls that have occurred in each fiscal year since FY 1994, when Congress began inserting the phrase "not to exceed" before the specific dollar amount for contract support under ISDA contracts or compacts. Paragraph 29 of this claim states that shortfalls in indirect cost payments to the Class caused by alleged insufficiency of appropriations are different from but also encompass the underpayment of indirect costs to the Class caused by under-calculation of indirect cost rates as pled and litigated to this point in *Ramah Navajo Chapter v. Lujan*,

[3]This motion relies upon materials that accompanied the original motion (Docket No. 397), Attachments A-H, as well as those attached to this amended motion, Attachments I-S. The motion also incorporates by reference Plaintiffs' Attachments to their Motion for Partial Summary Judgment (Docket No. 58).

112 F.3d 1455 (10th Cir. 1997). This claim asserts that the United States owes to Plaintiff and the members of the Class the difference between the contract amount for contract support set by each applicable contract or annual funding agreement for each fiscal year since the beginning of 1994, and the level of reimbursements received (Docket No. 352, ¶ 36).

In its complaint in intervention (Docket No. 353), the Oglala Sioux Tribe states that it seeks to intervene for the purpose of expanding its original claim to encompass all class-wide shortfalls. (*Id.*, ¶ 1). Specifically, in this complaint, Plaintiff-in-Intervention states that it seeks damages for all shortfalls during and since FY 1994, caused by Defendants' assertion that they did not have sufficient funds from annual appropriations to cover 100% of their "need." *Id.*

Defendants filed a cross-motion for partial summary judgment (Docket No. 592), arguing that this Court should hold that Defendants are entitled to judgment as a matter of law on all of Plaintiffs' claims for FY 1994 to the present, based on the conclusion that the ISDA limits the liability of the government to pay Plaintiffs' contract support costs based upon available United States Department of Interior appropriations.

The Court, having read the cross motions for partial summary judgment, as well as all supporting and opposing briefs, including supplementary briefs, the full court record, relevant statutes and case law, for the reasons that follow, concludes that Plaintiffs' motion shall be denied and the Government's motion shall be granted insofar as it opposes Plaintiffs' motion for partial summary judgment.[4]

[4] The real focus of Defendants' cross-motion is its opposition to Plaintiffs' motion for partial summary judgment. Given the result contained in this Memorandum Opinion and Order, it is unnecessary for the Court to reach the alternatives alluded to in the title of Defendants' cross-motion, *i.e.,* the striking of a defense or of an *amicus* brief.

Procedural Background

This class action arises under the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 450, *et seq*. This statute authorizes the Bureau of Indian Affairs ("BIA"), a component of the United States Department of the Interior ("DOI"), to contract with and fund Indian tribes and tribal organizations that choose to take over the operations of programs and services formerly operated by the BIA.

Plaintiffs are tribal contractors who have sued DOI and several of its officials (collectively referred to herein as "Defendants"), alleging violations of the ISDA. In essence, Plaintiffs claim that, as tribal contractors, they are entitled to receive full payment of all contract support costs they seek under their ISDA contracts.

The motions now under consideration were briefed in 2001 and stayed in 2002 (Docket 671), pending completion of the appeal of *Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054 (10th Cir. 2002). The appeal was ultimately decided by the United States Supreme Court in March 2005, in *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005)("*Cherokee Nation*"). The stay was lifted on May 6, 2005, and supplemental briefing was concluded on October 21, 2005.

Statutory Language

As in any case of statutory interpretation, the Court will begin with the language of the relevant statutes. The ISDA's stated purpose is to allow Native American tribes to operate their own federal programs directly. Under the ISDA, a tribe and the Secretary of Interior enter into a "self-determination contract," which incorporates the provisions of the model contract contained in the ISDA text. *See* 25 U.S.C. § 450*l*(a), (c) (1994).

The Act specifies that the Government must pay a tribe's costs, including administrative expenses. *See* 25 U.S.C. §§ 450j-l(a)(1) and (2). Administrative expenses include: (1) the amount that the agency would have spent "for the operation of the progra[m]" had the agency itself managed the program, *id.* § 450j-1(a)(1); and, (2) "contract support costs," the costs at issue in this case. *id.* § 450j-1(a)(2).

The Act defines "contract support costs" as other "reasonable costs" that a federal agency would not have incurred, but which nonetheless "a tribal organization" acting "as a contractor" would incur "to ensure compliance with the terms of the contract and prudent management." *id.* § 450j-1(a)(2). "Contract support costs" can include indirect administrative costs, such as special auditing or other financial management costs, *id.* § 450j-1(a)(3)(A)(ii); they can include direct costs, such as workers' compensation insurance, *id.* § 450j-1(a)(3)(A)(i); and they can include certain startup costs, *id.* § 450j-1(a)(5). Most contract support costs are indirect costs "generally calculated by applying an 'indirect cost rate' to the amount of funds otherwise payable to the Tribe." *Cherokee Nation*, 543 U.S. at 635 (citation omitted); *see* 25 U.S.C. §§ 450b(f)-(g).

Section 25 U.S.C. § 450j-1 is entitled "Contract funding and indirect costs." Subsection (a) describes the amount of funds to be provided. For example, DOI is obligated to provide direct costs "not less than the appropriate Secretary would have otherwise provided for the operation of the programs . . . for the period covered by the contract." 25 U.S.C. § 450j-1(a)(1). In addition, DOI must supply "contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management. . . ." *Id.* § 450j-1(a)(2). The next subsection, 450j-1(b), describes reductions and increases in the amount of funds provided. This subsection

concludes with the unequivocal statement that: "'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* 25 U.S.C. § 450-j(c)(1)("The amounts of [self-determination] contracts shall be subject to the availability of appropriations.")

Section 450*l* of the ISDA contains a model agreement that provides that the "[f]unding amount" of the contracts are "subject to the availability of appropriations." *See* Section 1(b)(4) of the Model Contract, 25 U.S.C. § 450*l*(c). Plaintiffs' actual self-determination contracts contain similar language. (*See* Ex. B to Defs.' Suppl. Mem.). Such provisions make clear that the contractual liability of the Government is subject to the availability of appropriations, and that disbursement of those available funds will be made according to the BIA's "policies and procedures," including procedures for the pro rata distribution of available funds. *Id*.; *see also* Smith Decl., ¶ 4 (*See* Ex. E to Defs.' Suppl. Mem.)(explaining that the BIA sends out notices each fiscal year that set forth the procedures for the pro rata distribution of contract support costs).

The Court has examined the relevant BIA Appropriations Acts. (*See* Ex. A to Defs.' Suppl. Mem.). The first "not to exceed" language, or "cap", was inserted in the appropriation Act for FY 1994, Public Law 103-138: ". . . Provided further, that not to exceed $91,223,000 of the funds in this Act shall be available for payments to tribes and tribal organizations for indirect costs associated with contracts or grants or compacts authorized by the Indian Self-Determination Act of 1975, as amended, for FY 1994 and previous years. . . ."[5] The FY 1995 appropriation act, Public Law 103-332, included

[5] Congress was well aware that there might be shortfalls in contract support costs for ISDA contracts, and it provided for consideration of the shortfalls within the appropriations process. In particular, section 450j-1(c) requires the Secretary to provide an annual report to Congress, including "(2) an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year in which the report is being submitted; . . . . " Pursuant to its reporting requirements, each fiscal year, BIA prepares a table setting forth

similar cap language but substituted the phrase "contract support costs" for "indirect costs," as has every appropriation act since then. The later language covers both indirect and direct contract support payments. (*See* Pls.' Mem. in Supp. of Amend. Mot. for Partial Summ. J., Docket No. 571, n.4).

The language in each of these acts generally follows the same pattern. For example, the 1998 appropriations act, 111 Stat. 1543 (Nov. 14, 1997), provides that nearly $1.53 billion will be provided for the operation of a wide variety of Indian programs, and that the funds will remain available until September 30, 1999. Of this appropriated amount, the Act provides that "not to exceed $105,829,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts entered into with the Bureau prior to fiscal year 1998, as authorized by the Indian Self-Determination Act of 1975, as amended . . . ."

Material Facts Not in Dispute

These facts appear to be undisputed:

1. For every fiscal year since 1994, Congress has placed a cap in the annual appropriations acts for BIA limiting the amount of funding the Secretary could expend from the appropriations.

2. In every fiscal year since 1994, BIA has distributed to tribal contractors the full amount of CSC funding appropriated for that purpose in Public Laws 103-138, 103-332, 104-134, 104-208, 105-83, 106-113, 106-291.

3. The amounts needed by tribal contractors for CSC each year have exceeded the amount of appropriated funds that Congress set aside each year since 1994 for that purpose. For example, in

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the shortfalls in CSC. *See* Declaration of Harry Rainbolt ("Rainbolt Decl."), ¶¶ 3-6 (Ex. C to Defs.' Cross-Mot. for Partial Summ. J. This table is included in the annual President's Budget Request to Congress each fiscal year to aid Congress in the appropriation process. *Id.*¶¶ 5-6.

2001, CSC needs exceeded Congress's $125,209,000 CSC cap by $16 million. (*See* Rainbolt Decl., ¶ 6, Ex. C to Defs.' Cross-Mot. for Partial Summ. J).

Legal Discussion

Both 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. Congress has the authority to determine the amount of appropriated funds the agency may obligate under self-determination contracts, and it has exercised that authority by providing that the amounts of such contracts are "subject to the availability of appropriations," and by placing caps in appropriations statutes. These 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.

Babbitt v. Oglala Sioux Tribal Public Safety Dept., 194 F.3d 1374 (Fed. Cir. 1999), is the Federal Circuit case that examined this issue. That case involved the Oglala Sioux Tribal Public Safety Department, a tribal organization operating an ISDA contract for public safety on the Pine Ridge Reservation in South Dakota for the Oglala Sioux Tribe. In the lawsuit, for fiscal year 1995, Oglala sought reimbursement of the difference between the originally negotiated amount and what it actually received from the Secretary of Interior, a difference of $108,506.00. For fiscal year 1995, Congress appropriated $1.5 billion for the operation of Native American programs, "of which not to exceed $95,823,000 shall be for payments . . . for contract support costs" for contracts authorized by the

ISDA. *See* Interior Appropriations Act of 1995, Pub.L.No. 103-332, 108 Stat. 2499, 2511 (1994).

The Federal Circuit concluded that the language of § 450j-1(b) is clear and unambiguous and that any funds provided under an ISDA contract are "subject to the availability of appropriations." That Court noted that the clause preceding this limitation, "[n]otwithstanding any other provision in this subchapter," further clarifies that other language in the ISDA[6] cannot "trump" this express restriction on ISDA funding. *Id.* at 1378. The Court went on to rely on §§ 450j(c)[7] and 450*l*(c)[8], as indicators of congressional intent to make ISDA funding subject to the availability of funding.

The *Oglala Sioux* Court also concluded that the general intent underlying the ISDA could not trump the express language of the statute. It noted that in the face of congressional under-funding, an agency can only spend as much money as has been appropriated for a particular program. Relying on various canons of statutory construction, the *Oglala Sioux* Court also rejected an argument that Congress intended ISDA indirect costs to be fully funded, noting that such an interpretation of congressional intent would render the "subject-to" appropriations language of § 450j-1(b) meaningless. The Court stated that it would exceed its judicial function if it were to repeal the unambiguous language of § 450j-1(b) in such a fashion, and that it must assume that Congress "says in a statute what it means and means in a statute what it says there . . . . When the words of a statute are unambiguous, then, . . . 'judicial inquiry is complete.' " *Id.* at 1378, quoting *Connecticut Nat'l Bank*

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[6] *See* 450-j-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)."

[7] This section sets the term of self-determination contracts and states "[t]he amounts of such contracts shall be subject to the availability of appropriations."

[8] As mentioned above, this section sets out language of the model agreement referred to in each self-determination contract under the ISDA, which specifies that "[s]ubject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement. . . ."

v. Germain, 503 U.S. 249, 253-54 (1992)(internal citations omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

The *Oglala Sioux* Court distinguished *New York Airways, Inc. v. United States*, 369 F.2d 743 (1966), noting that that case involved a situation in which the Government, as a contracting party, had simply failed to appropriate and pay its unqualified contractual obligation. The *Oglala Sioux* Court noted that the situation before it "differs fundamentally in that the ability of Interior to bind the Government contractually was expressly conditioned on the availability of appropriations." *Oglala Sioux* 194 F.3d at 1379. Accordingly, that Court found the *New York Airways* analysis and conclusion unpersuasive.

The *Oglala Sioux* Court noted that the D.C. Circuit "found the language of 450-j-1(b) as clear as we do," and reached the same conclusion in the case of *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996)("*Ramah I*"). *Oglala Sioux*, 194 F.3d at 1379. *Ramah I* discussed § 450-j-1(b) of the ISDA in its analysis of how much discretion the Secretary had to allocate indirect funds with respect to the 1995 congressional cap on the appropriation amount available for ISDA contract support costs. The *Ramah I* Court noted 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 [§ 450-j-1(b)] says just that . . . ." *Ramah I*, 87 F.3d at 1345. The Court then concluded that despite a Tribe's claim that it is entitled to the funds under the ISDA, if the money is not available, it need not be provided. *Id.*[9]

[9] The ultimate outcome in *Ramah I* turned on the validity of the Secretary's 1995 allocation plan for the limited amount of indirect cost money available.

***Cherokee Nation* is Distinguishable from this Case**

This Court agreed to stay the parties' cross-motions for partial summary judgment, based on its stated belief that it was substantially likely that the issues before the Court in these motions would be addressed in a case that was then pending in the Tenth Circuit Court of Appeals[10] and that was ultimately appealed to the Supreme Court in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). In fact, as noted by Plaintiffs in their supplemental memorandum (Docket No. 962), filed following entry of the Supreme Court opinion, the *Cherokee Nation* case did not reach pivotal issues that remain to be decided by this Court.

Specifically, while arguing that *Cherokee Nation* "affirmed the sanctity of ISDA contracts," Plaintiffs acknowledge that the Supreme Court did not reach the issue as to whether the United States remains liable for shortfalls in contract payments, when Congress has specified an insufficient "not to exceed" lump sum appropriation. (Pls.'Mem. in Supp. of Amend. Mot. for Partial Summ. J. at 2). They also note that the Supreme Court failed to reach the issue as to whether the phrase "subject to availability of appropriations" speaks to the Secretary's expenditure authority or to the liability of the United States. Finally, they note that the Supreme Court did not reach the issue of whether or not the United States remains liable for the full contract amount if the agency fails to request an adequate appropriation and the contract does not clearly impose the risk of an inadequate request on the contractor.

The Supreme Court granted certiorari and consolidated two Court of Appeals cases[11] that

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[10] *See Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054 (10th Cir. 2002).

[11] *See Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054 (10th Cir. 2002) and *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003).

contained identical claims yet reached opposite results. In these cases, the United States and two Indian Tribes had entered into agreements in which the Government promised to pay certain "contract support costs" that the Tribes incurred during fiscal years 1994 through 1997. The Tribes made claims for $3.5 million (Shoshone-Paiute) and $3.4 million (Cherokee Nation) in the first case, and $8.5 million (Cherokee Nation) in the second case. In *Cherokee Nation*, the Supreme Court addressed the Government's liability for contract under-payments in years when Congress did not limit the amount of funds available to the agency to pay the contracts. The parties colloquially call such claims the "lump sum" claims, because the agency simply had a large "lump sum" appropriation from which to pay the contracts.

The Supreme Court phrased the question before it as being "whether the Government's promises are legally binding," and concluded that they are, under the circumstances then before the Court. *Cherokee Nation*, 543 U.S. at 634. In *Cherokee Nation*, Plaintiffs' claims were for far less than the amounts appropriated by Congress (between $1.277 billion and $1.419 billion) for the Indian Health Service to "carry out," the Indian Self-Determination Act. *See* 107 Stat. 1408 (1993); 108 Stat. 2527-2528 (1994); 110 Stat. 1321-189 (1996); *id*. at 3009-212 to 3009-213 (1996). According to the Supreme Court opinion, "*[T]hese appropriations Acts contained no relevant statutory restriction." Cherokee Nation*, 543 U.S. at 637 (emphasis added).

All four of the statutes that were before the Supreme Court in the *Cherokee Nation* case contain language similar to each other. For example, the earliest statute, 107 Stat. 1408 (Nov. 11, 1993) appropriated approximately $1.646 billion for services furnished by the Indian Health Service. Of these funds, approximately $3.61 million were specifically allocated or restricted to the following uses: $12 million for the Indian Catastrophic Health Emergency Fund; $337.8 million for contract

medical care; and, $11.52 million for a loan repayment program. The amount of *unrestricted* funds in this statute is approximately $1.28 billion. The other three statutes provide restrictions for the same categories, but with different amounts for each fiscal year. These other statutes provide for unrestricted funds that range from $1.43 billion to $1.37 billion.

The Supreme Court concluded: "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." *Id*. at 643 (emphasis added). In its opinion, *Cherokee Nation* made repeated reference to the lack of legally binding restrictions in the IHS lump-sum appropriations, implicitly making the distinction between the type of lump-sum appropriations without legal restriction in that case, and the restrictive appropriation statutes now before this Court, containing statutory earmarks and caps. *Id*. at 639-643. The Supreme Court noted that a "fundamental principle of appropriations law [is] that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions. . . . " *Id*. at 637 (internal quotations omitted).

As 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. This is a very different statutory scheme from that considered by the *Cherokee Nation* court. The obvious implication from the *Cherokee Nation* case 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.

Conversely, the "subject to the availability of appropriations" language, given its ordinary

meaning, "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 authority needed to bind the Government without regard to the availability of appropriations." *Cherokee Nation*, 543 U.S. at 643 (citations omitted).

Conclusion

This case, like the *Oglala Sioux* and *Ramah I* cases, involves the issue of congressional under-appropriations of funds. This Court is persuaded by the logic of the *Oglala Sioux* and *Ramah I* cases, and reaches the same conclusion that the United States is not liable for shortfalls in contract payments when Congress has specified an insufficient "not to exceed" lump sum appropriation. This language does not speak to the Secretary's expenditure authority, but ultimately to the lack of liability of the United States to pay contract support costs in excess of the appropriated, capped dollar amounts. The 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.

Congress has the authority to determine the amount of appropriated funds the agency may obligate under self-determination contracts, and it has exercised that authority by providing that the amounts of such contracts are "subject to the availability of appropriations," and by placing caps in the BIA's appropriations statutes. These appropriations were made with Congressional knowledge of the potential for CSC shortfalls for ISDA contracts and it provided for consideration of the shortfalls within the appropriations process.

WHEREFORE, for the reasons stated herein, Plaintiffs' Amended Motion for Partial

Summary Judgment or in the Alternative to Strike Defense (Docket No. 570) is **denied**; and Defendants' Cross-Motion for Partial Summary Judgment and Opposition to Plaintiffs' Amended Motion for Partial Summary Judgment or in the Alternative to Strike Defense and Opposition to *Amicus* Pueblo of Zuni's Brief in Support of Plaintiffs' Amended Motion for Partial Summary Judgment (Docket No. 594) is **granted** to the extent that it opposes Plaintiffs' amended motion for partial summary judgment.

FURTHERMORE, the Court notes that this Memorandum Opinion and Order resolves all remaining pending motions before the Court. The parties are hereby instructed to inform the Court, in writing, within fifteen (15) days, whether or not any issues remain in this matter that require the further attention of the Court, prior to entry of a Final Judgment.

IT IS SO ORDERED.

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

RAMAH NAVAJO CHAPTER,
OGLALA SIOUX TRIBE and
PUEBLO OF ZUNI, for themselves
and on behalf of a Class of persons
similarly situated,

Plaintiffs,

v. **CIV No. 90-957 LH/WWD ACE**

GALE NORTON, Secretary of the
Interior, et al.,

Defendants.

ORDER

THIS MATTER comes before the Court on Plaintiffs' Motion for Leave to File and Have Considered a Newly Discovered Party Admission (Docket No. 1013). The Court, having considered the motion as well as the briefs filed in support and in opposition to it, concludes that it shall be **granted.**

In this motion, Plaintiffs seek for the Court to admit and consider an "admission" made by counsel for the United States Department of Justice in a brief filed in *Southern Ute Indian Tribe v. Michael O. Leavitt, et al.*, Civ. No. 05-CV-0988 WPJ/LAM. Plaintiffs contend that this admission supports their interpretation to the effect that the ISDA and its model contracts create enforceable obligations of the United States for payment of contract support costs ("CSC") in amounts in excess of "capped" CSC appropriations. This alleged "admission" was set out in Plaintiffs' memorandum

in support of their motion (Docket No. 1014), and the Court has duly considered it, along with the many other materials that have been submitted by both parties, relating to the pending cross-motions for summary judgment.

WHEREFORE, Plaintiffs' Motion for Leave to File and Have Considered a Newly Discovered Party Admission is hereby **granted**.

IT IS SO ORDERED.

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

RAMAH NAVAJO CHAPTER, **OGLALA SIOUX TRIBE**, and **PUEBLO OF ZUNI**, for themselves and on behalf of a class of persons similarly situated,

Plaintiffs,

vs. No. CIV 90-0957 LH/KBM

DIRK KEMPTHORNE, Secretary of the Interior, *et al.,*

Defendants.

FINAL JUDGMENT

THIS MATTER came before the Court for an August 26, 2008 Fairness Hearing on a Joint Motion for Preliminary and Final Approval of Third Partial Settlement Agreement and For an Order That Notice Be Sent to the Class (Docket No. 1138). An Order Approving the Third Partial Settlement Agreement, an Order Approving Attorneys' Fees, and an Order Approving Costs have been entered on this date. The Court's entry of these orders resolves all remaining disputed claims in this case.

IT IS HEREBY ORDERED that the Third Partial Settlement Agreement is approved and incorporated herein as the Judgment of the Court.

IT IS FURTHER ORDERED that, pursuant to the Court's Order Approving Attorneys' Fees, Class Counsel are awarded $700,000 in fees plus gross receipts tax not to exceed $57,000, based on the Santa Fe County Gross Receipts Rate, to be paid from the Reserve Accounts. Class

Counsel shall receive post-judgment interest on this fee, to be paid from the Reserve Accounts, from the date of the award until paid, at a rate allowed by law. These fees shall be paid in the time-frame specified in the Court's Order Approving Attorneys' Fees.

IT IS FURTHER ORDERED that, pursuant to the Court's Order Approving Attorneys' Fees, Class Counsel are awarded an additional $25,000 in fees, plus supplemental costs, to be determined by the Court and paid from the Reserve Accounts, at the conclusion of the training program.

IT IS FURTHER ORDERED that, pursuant to the Court's Order Approving Costs, Class Counsel are awarded $17,873 in costs, to be paid from the Reserve Accounts, at the time that payment of Counsel's fee of $700,000 is made.

IT IS FURTHER ORDERED that this Court retains jurisdiction to enforce the Third Partial Settlement Agreement and to handle issues specifically delineated in Section XII of the Third Partial Settlement Agreement.

IT IS FURTHER ORDERED that Final Judgment is entered in favor of Plaintiffs. The "Settled Claims" as defined in the Third Partial Settlement Agreement are hereby dismissed with prejudice. This Final Judgment adjudicates all existing claims and liabilities of the parties. This case is **DISMISSED with prejudice.**

IT IS SO ORDERED.

[redacted]**RICT JUDGE**

Approved as to form

For Plaintiffs

Michael P. Gross
Lead Class Counsel

C. Bryant Rogers
Co-Class Counsel

Telephonically Approved 08/26/08
Lloyd B. Miller
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