APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2010-1013

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
Appellant,

v.

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

December 15, 2010, Decided

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

OPINION BY: DYK

OPINION

DYK, *Circuit Judge*.

Arctic Slope Native Association ("ASNA") filed suit against the Secretary of Health and Human Services ("Secretary") for breach of contract, alleging that the government failed to pay ASNA's so-called contract support costs shortfall for fiscal years 1999 and 2000. The Secretary argued that the obligation to pay, under the contract and the statute, was subject to the availability of appropriations and that there were no available appropriations because Congress had provided that the appropriations available for the

funding of contract support costs were "not to exceed" specified amounts. The Civilian Board of Contract Appeals ("the Board") granted summary judgment for the Secretary. *Arctic Slope Native Ass'n, Ltd. v. Dep't of Health & Human Servs.*, CBCA 294-ISDA, et al., 09-2 BCA ¶ 34,281 (C.B.C.A. Oct. 1, 2009). We affirm.

BACKGROUND

I

This case is the latest in a long-running dispute between the various Indian tribes and the Secretary concerning the Secretary's obligation to pay contract support costs. This dispute has led to decisions by the Supreme Court and this court. *See*, *e.g.*, *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005) [hereinafter *Cherokee II*], *aff'g sub nom*, *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003) [hereinafter *Cherokee I*]; *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000).

Briefly, the Indian Self-Determination Act ("ISDA"), Pub. L. No. 103-413, 108 Stat. 4250 (codified at 25 U.S.C. §§450-450n), as amended in 1994, authorizes the Secretary to enter into contracts with tribes, under which the tribes supply health services that a government agency would otherwise provide, *id*. § 450f(a)(1). This case concerns indirect costs under the contracts for fiscal years 1999 and 2000. Indirect costs are "administrative or other expense[s] related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program . . . ." *Id*. § 450j-1(a)(3)(A)(ii). The Act and the contract entered into pursuant to the Act require that the Secretary pay the tribal contractors' indirect costs. *Id*. § 450j-1(a). These indirect costs include the

secretarial amount, *id*. § 450j-1(a)(1), and contract support costs, *id*. § 450j-1(a)(2). *See also Cherokee II*, 543 U.S. at 634-35. The secretarial amount is the amount the Secretary would have expended had the government itself run the program. The secretarial amount does not include the additional indirect costs that the tribes incur in their operation of the programs, which the Secretary would not have directly incurred (i.e., the cost of administrative resources that the Secretary could draw from other government agencies). These additional indirect costs, which are not included in the secretarial amount, are referred to as contract support costs. *See* 25 U.S.C. § 450j-1(a)(2); *Cherokee II*, 543 U.S. at 635.

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

A similar dispute arose previously for fiscal years 1994 through 1997. *See Cherokee II*, 543 U.S. at 634-35; *Cherokee I*, 334 F.3d at 1079. The Secretary did not deny the promise to pay, nor the failure to pay, but argued that the legal obligation to pay arose "if, and only if, Congress appropriated sufficient funds,

and that, in this instance, Congress failed to do so." *Cherokee II*, 543 U.S. at 636. The Secretary admitted that the relevant appropriations acts did not include an explicit cap on appropriations, but nonetheless argued that "specific recommendations of funding amounts for contract support costs in the appropriations committee reports" were sufficient to impose a cap. *Cherokee I*, 334 F.3d at 1083. Both the Supreme Court and this court rejected the argument that committee report language is sufficient to impose a cap, holding specifically that "restrictive language contained in Committee Reports is not legally binding." *Cherokee II*, 543 U.S. at 646; *see Cherokee I*, 334 F.3d at 1085. "[I]n order for a statutory cap to be binding on an agency, it must be carried into the legislation itself; such a cap cannot be imposed by statements in committee reports or other legislative history." *Cherokee I*, 334 F.3d at 1085.

This court held, and the Supreme Court affirmed, that where there are "no statutory caps on available appropriations, the Secretary [is] not excused from meeting his contractual obligations by the availability clause of section 450j-1(b)."[1] *Cherokee I*, 334 F.3d at 1093; *see Cherokee II,* 543 U.S. at 641. "[I]f the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment *even if the agency has allocated the funds to*

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

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

25 U.S.C. § 450j-1(b).

another purpose or assumes other obligations that exhaust the funds." *Cherokee II*, 543 U.S. at 641. Absent explicit restriction, an agency is generally permitted to reprogram funds within a lump-sum appropriation. U.S. Gov't Accountability Office, Principles of Federal Appropriations Law 2-25 (3d ed. 2006) [hereinafter GAO Redbook]. Thus, where there is no "statutory cap or other explicit statutory restriction," the Secretary is required to reprogram funds if doing so is necessary to fund the contract. *Cherokee I*, 334 F.3d at 1086.

The Secretary further argued that under § 450j-1(b) there was no obligation to reprogram funds to pay the claims at issue because "doing so would require a reduction of funds for programs serving other tribes." *Id.* at 1083. This court and the Supreme Court found this argument unpersuasive because "the relevant congressional appropriations contained *other* unrestricted funds . . . sufficient to pay the claims at issue" that would not require a reduction in funding for programs serving other tribes. *Cherokee II*, 543 U.S. at 641 (emphasis added); *see Cherokee I*, 334 F.3d at 1093.

II

After the dispute arose with respect to fiscal years 1994 through 1997, Congress acted to impose a statutory cap on funding for contract support costs in fiscal years 1999 and 2000. The appropriations act for fiscal year 1999 provided that "notwithstanding any other provision of law, of the amounts provided herein, *not to exceed* $203,781,000 shall be for payments . . . for contract or grant support costs."[2] Omnibus Con-

[2] Congress also imposed a statutory cap phrased in "not to exceed" language for fiscal year 1998, but claims for contract

solidated & Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-279 (1998) (emphasis added) [hereinafter 1999 Appropriations Act]. Similarly, the appropriations act for fiscal year 2000 provided that "notwithstanding any other provision of law, of the amounts provided herein, *not to exceed* $228,781,000 shall be for payments . . . for contract or grant support costs." Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-182 (1999) (emphasis added) [hereinafter 2000 Appropriations Act]. The Conference Report viewed this language as imposing a statutory cap, specifically approving our earlier decision in *Oglala Sioux*. H.R. Conf. Rep. No. 106-479, 494-95 (1999). There, as discussed below, we explicitly held that "not to exceed" language was sufficient to impose a statutory cap. *Oglala Sioux*, 194 F.3d at 1376, 1379-80.

III

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

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support costs in fiscal year 1998 are not involved in this litigation. *See* Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1583 (1997).

failed to pay the secretarial amount, or the contract support costs specified in the Annual Funding Agreements—approximately $1.29 million for fiscal year 1999[3] and approximately $3 million for fiscal year 2000.[4] ASNA claims instead that the Secretary has failed to pay ASNA's contract support cost shortfall—the difference between the amount of support costs specified in the Annual Funding Agreement and ASNA's actual expenditures.

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

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

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

10a. Accordingly, the Board granted the Secretary's motion for summary judgment. ASNA timely appealed and this court has jurisdiction pursuant to 41 U.S.C. § 607(g)(1)(A) and 28 U.S.C. § 1295(a)(10).

DISCUSSION

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

I

Like the contract at issue in *Cherokee*, the contract here contains an availability clause (i.e., the contract is subject to the appropriation of funds by Congress). *See Cherokee I*, 334 F.3d at 1082. In stark contrast to *Cherokee*, however, where the Secretary unsuccessfully relied on committee report language to impose a cap, here there is a statutory cap on funding for contract support costs phrased in traditional not to exceed language. As the Government Accountability Office has noted, the phrase "not to exceed" is a standard phrase used to express Congress's intent to designate a given amount as the maximum available amount for a particular purpose. *See* GAO Redbook 6-32. The opinions of the Government Accountability Office, as expressed in the GAO Redbook, note that "the most effective way to establish a maximum (but not minimum) earmark is by the words 'not to exceed' or 'not more than.'" Additionally, the Comptroller General has recognized that "not to exceed" language "is susceptible of but one meaning"—it restricts agency spending by establishing the maximum amount that an agency may spend. 64 Comp. Gen. 263, 264 (1985).

The opinions of the Government Accountability Office and the Comptroller General, while not binding, are "expert opinion[s], which we should prudently consider." *Delta Data Sys. Corp. v. Webster,* 744 F.2d 197, 201 (D.C. Cir. 1984); *see also Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (relying on GAO Redbook at 6-159).

Our court (explicitly) and the Supreme Court (implicitly) have recognized that "not to exceed" language imposes a binding statutory cap. In *Oglala Sioux*, the appropriations act contained traditional "not to exceed" language. 194 F.3d at 1376. This court explicitly held that "not to exceed" language was sufficient to impose a statutory cap. *Id.* at 1380. The tribe argued that, despite the statutory cap, it was entitled to full funding of its contract support costs. *Id*. at 1378. We rejected that argument, holding that the availability clause in § 450j-1(b*)* limits the Secretary's ability to bind the government beyond the statutory cap; thus, the Secretary may not reallocate funding beyond that limit. *Id.* at 1379-80.

Subsequently, in *Cherokee I* we also noted that "Congress generally uses standard phrases to impose a statutory cap," the most common of which is the phrase "not to exceed." 334 F.3d at 1084. We characterized the "not to exceed" language in *Oglala Sioux* as "a statutory cap on appropriations that excused the agency from paying full contract support costs," *id.* at 1083, and concluded that in *Cherokee* there was no statutory cap because "[t]he appropriations acts at issue . . . do not include 'not to exceed language,'" *id.* at 1089. Further, we stated that "if there is a statutory restriction on available appropriations for a program, either in the relevant appropriations act or in a separate statute, the agency is not free to increase

funding for that program beyond that limit." *Id.* at 1084. The Supreme Court decision in *Cherokee* did not disagree, assuming that "not to exceed" statutory language was sufficient to impose a statutory cap even though committee reports were not. *See Cherokee II*, 543 U.S. at 642. The Court made clear that reallocation of funds may be prohibited where Congress protects the funds using "statutory earmarks." *Id*. Thus, we conclude that the "not to exceed" language in the appropriations acts for fiscal years 1999 and 2000 imposes a statutory cap on funding for contract support costs, such that the Secretary is not permitted to make payments beyond the maximum specified in the appropriations acts.

II

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

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

In *Ferris*, the court held that where the appropriation covers multiple contracts, the contractor may sue for breach if the appropriation is sufficient to cover the contract at issue, even if not sufficient for all purposes. *Id.* at 546. The court stated specifically that "[a] contractor who is one of several persons to be paid out of an appropriation is *not chargeable with knowledge* of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects." *Id*. (emphasis added). Thus, the insufficiency of an appropriation does not "cancel [the government's] obligations, nor defeat the rights of other parties" unless the contractor has notice of a limitation on appropriations. *Id*.

There are important differences between this case and *Ferris*. In *Ferris*, the contractor had no notice of the limited nature of the appropriation, and the court declined to charge "[a] contractor who is one of several persons to be paid out of an appropriation . . . with knowledge of its administration." 27 Ct. Cl. at 546. The GAO Redbook notes that in situations like *Ferris*, where the contractor is "one party out of several to be paid from a general appropriation," the contractor is not deemed to have notice because "the contractor is under no obligation to know the status or condition of the appropriation account." *GAO Redbook* at 6-44. As we have noted, subsequent to *Ferris*, "subject to the availability of appropriations" language was adopted to change the *Ferris* rule by providing the required notice to the contractor. For example, our predecessor court noted in *C. H. Leavell & Co. v. United States*, 530 F.2d 878, 892 (Ct. Cl. 1976) (citing *Ferris*, 27 Ct. Cl. at 542), that before the incorporation of "subject to the availability of appropriations" language into Army Corps of Engineers

contracts, "a failure on the part of Congress for any reason to fund an existing Government contract was held to be a breach of contract." The court further noted that "subject to the availability of appropriations" provisions were included in contracts to overcome the *Ferris* rule by providing notice to the contractor of the limitation on funding. *Id.* at 892. The present contract includes such an availability of funds provision; the contract explicitly states that CSC funding is subject to the availability of appropriations. Joint App. at 133.

ASNA, however, contends that both this court's decision in *Cherokee I* and the Supreme Court's decision in *Cherokee II* hold that the *Ferris* rule applies even where the contract and statute include subject-to-availability language.[6] This is partly correct in that subject-to-availability language does not excuse the failure to pay in the absence of a statutory cap and where the Secretary has the ability to reallocate funds from non-contract uses. *Cherokee II*, 543 U.S. 641; *Cherokee I*, 334 F.3d at 1093-94. But here there is a statutory cap and no ability to reallocate funds

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[6] ASNA seeks to read *Ferris* more broadly based on the Supreme Court's description of the tribes' argument in *Cherokee*, but the tribes' argument is not adopted by the Court. *See Cherokee II,* 543 U.S. at 649. There the Court stated:

> The Tribes and their amici add . . . that as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on the grounds of "insufficient appropriations," even if the contract uses language such as "subject to the availability of appropriations," and even if an agency's total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made. *See Ferris v. United States*, 27 Ct.Cl. 542, 546 (1892).

Cherokee II, 543 U.S. at 637.

from non-contract uses. In *Ferris* the appropriations act did not contain a statutory cap with respect to the project in question and there was no finding that funds could not be reallocated from discretionary spending to satisfy contractual obligations. *See Ferris,* 27 Ct. Cl. at 546; An Act Making Appropriations for the Construction, Repair, Preservation, and Completion of Certain Works on Rivers and Harbors, and for Other Purposes, ch. 181, 20 Stat. 363, 364, 370, 372 (1879). But a statutory cap bars such reallocation. Adopting ASNA's approach would effectively defeat the statutory cap because the Secretary would be obligated to pay a total amount of tribal obligations exceeding the cap.[7]

Moreover, such reallocation from one tribe to another would be particularly inappropriate here in light of the statutory language specifically providing that the Secretary need not reallocate funds from one tribe to another, a provision that did not appear in *Ferris* (where there was no language dealing with reallocation among contracts). *See* 25 U.S.C. § 450j-1(b). Here § 450j-1(b) provides that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available

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[7] *In re Newport News Shipbuilding & Dry Dock Co.*, 55 Comp. Gen. 812 (1976), is not to the contrary. In *Newport News*, the government argued that the total appropriation was not available for the contract at issue because language in the committee report divided the total appropriation among several contracts. *Id.* at 818-19. As in *Cherokee*, this argument was rejected. The Comptroller General stated that "subdivisions of an appropriation contained in the agency's budget request or in committee reports are not legally binding . . . unless they are specified in the appropriation act itself." *Id.* at 819-20. Thus, the entire appropriation was available to fund the contract at issue. *Id.* at 822.

to another tribe or tribal organization." 25 U.S.C. § 450j-1(b). In *Cherokee*, both the Supreme Court and this court were careful to point out that such reallocation from one tribe to another was not required because there were *other* unrestricted funds available that would not require the Secretary to utilize funds devoted to another tribe. *Cherokee II,* 543 U.S. at 641; *Cherokee I,* 334 F.3d at 1093. This court, for example, declined to decide "how much money was obligated to [funding another tribe] and, therefore, unavailable" because the relevant congressional appropriations contained *other* funds not subject to the restriction of § 450j-1(b) which were sufficient to pay full contract support costs to the tribe. *Cherokee I,* 334 F.3d at 1093. Here there are no such unrestricted funds.

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

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

III

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

The case on which ASNA relies, *S.A. Healy Co. v. United States*, 576 F.2d 299, 300 (Ct. Cl. 1978), involved a situation in which the "plaintiff was awarded a fixed price [construction] contract," which included an availability clause. The plaintiff sought a monetary award for losses incurred due to a shutdown of work allegedly "caused by [the government's] failure to request and secure sufficient funds from Congress." *Id*. However, in holding that the contractor should not bear the risk of loss, the court relied on the fact that "the contractor was not warned of the lack of funding." *Id.* at 306.

In this case, it is not clear that the Secretary failed to request adequate funding. The Secretary requested a given amount for contract support costs in both fiscal year 1999 and fiscal year 2000. *See* President's Budget for Fiscal Year 1999 (1998), Budget App. 403; President's Budget for Fiscal Year 2000 (1999), Budget App. 434. As it turns out, additional funds were required in both years. As required by statute, the Secretary "prepare[d] and submit[ted] to Congress an

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objectives . . . the decision to allocate funds is committed to agency discretion by law."). We need not decide that issue in this case.

annual report . . . includ[ing] . . . an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted."[9] 25 U.S.C. § 450j-1(c*)*. Despite notice of the shortfall, Congress chose to impose a statutory cap on funding for contract support costs. *See* 1999 Appropriations Act, 112 Stat. 2681, 2681-279; 2000 Appropriations Act, 113 Stat. 1501, 1501A-182 (1999). In fact, the committee report for the original version of the 2000 Appropriations Act specifically acknowledged that because "contract support costs . . . have outpaced available funding . . . [w]e have reached a point at which we can no longer offset these costs . . . by continuing to downsize the Federal bureaucracy in IHS." H.R. Rep. No. 106-222, 112-13 (1999).[10] The committee report further stated that Congress "cannot afford to appropriate 100% of contract support costs at the expense of basic program funding for tribes." *Id*.

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[9] *See* Office of Tribal Programs, Indian Health Service Contract Support Cost Data, at 5 (Aug. 27, 1999), *available at* http://www.ncai.org/fileadmin/contract_support/IHS_Contract_ Support_Data_FY1999.pdf; Office of Tribal Programs, Indian Health Service Contract Support Costs Shortfall Report, at 1, *available at* http://www.ncai.org/fileadmin/contract_support/FY2000_CSC_Shortfall_Report.pdf.

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

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

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

AFFIRMED

[11] Before the Board, ASNA argued that unexpended funds for each of the two years in question were available, and that these amounts were later returned to the Treasury. The amounts were $179,539 for fiscal year 1999 and $137,013.51 for fiscal year 2000. The Board held that these amounts were not available because they were returned to the Treasury. That holding appears to conflict with our holding in *Cherokee I* that the proper question is "whether funds *were* available for the Secretary to meet his contract obligations, not whether those funds *remain available* now." 334 F.3d at 1092. However, while mentioned in the Statement of the Case of ASNA's opening briefs, the availability of the lapsed funds was not argued and thus not properly raised. *See SmithKline Beecham Corp. v. Apotex Corp.,* 439 F.3d 1312, 1319 (Fed. Cir. 2006); *Becton Dickinson & Co. v. C.R. Bard, Inc.,* 922 F.2d 792, 800 (Fed. Cir. 1990).

APPENDIX B

UNITED STATES CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: October 1, 2009

CBCA 294-ISDA, 295-ISDA,
296-ISDA, 297-ISDA

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent.

Lloyd Benton Miller and Donald J. Simon of Sonosky, Chambers, Sachse, Miller & Munson, LLP, Anchorage, AK, counsel for Appellant.

Sean Dooley, Office of the General Counsel, Department of Health and Human Services, Rockville, MD, counsel for Respondent.

Before Board Judges SOMERS, HYATT, and STEEL.

SOMERS, *Board Judge*.

The Arctic Slope Native Association, Ltd. (ASNA) provided health care services to its members under self-determination contracts with the Department of Health and Human Services (HHS), Indian Health Service (IHS). The contracts were entered into pursuant to the Indian Self-Determination and Education

Assistance Act (ISDA or Act), Pub. L. No. 93-638, codified as amended at 25 U.S.C. §§ 450, *et seq*. (2006). In the appeals currently pending before the Board, ASNA seeks additional amounts of indirect contract support costs (CSC) funding from IHS under ISDA contracts for fiscal years (FYs) 1999 and 2000.[1] IHS has moved to dismiss ASNA's FY 1999 and FY 2000 claims, contending that the appellant has failed to state a claim upon which relief can be granted. Alternatively, IHS moves for summary relief as to these appeals. ASNA opposes and has cross-moved for summary relief. For the reasons set forth below, we grant the Government's motion for summary relief and deny ASNA's motion.

Background

In 1975, Congress enacted the ISDA to promote tribal autonomy by permitting Indian tribes to manage federally-funded services that were previously administered by the Federal Government. *See* 25 U.S.C. § 450a; *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 634 (2005). Transfers of federal programs to

[1] Initially, ASNA filed appeals on claims for FYs 1996-2000 (CBCA 190-ISDA and 289-ISDA through 297-ISDA). By decision dated July 28, 2008, the Board dismissed the FY 1996 through FY 1998 claims (CBCA 190-ISDA, 289-ISDA, 290-ISDA, 291-ISDA, 292-ISDA, and 293-ISDA) for lack of subject matter jurisdiction because ASNA failed to submit these claims to the awarding official within six years after they accrued, as required by the Contracts Disputes Act of 1978, 41 U.S.C. § 605(a). The appellant appealed the Board's decision to the United States Court of Appeals for the Federal Circuit. The Federal Circuit consolidated that appeal with other cases and issued a decision affirming in part, reversing in part, and remanding the cases. *Arctic Slope Native Association, Ltd. v. Department of Health and Human Services*, Nos. 2008-1532, et al. (Fed. Cir. Sept. 29, 2009) [583 F.3d 785 (Fed. Cir. 2009)].

tribal control under the ISDA are accomplished through "self-determination contracts" under which a tribe agrees to take over administration of a federal program such as an IHS hospital or clinic. 25 U.S.C. § 450f(a). The Government is required to provide self-determination contractors with the same amount of funding that would have been appropriated for the tribal programs if IHS had continued to operate the programs directly. This amount is known as the "Secretarial amount" or "tribal share." 25 U.S.C. § 450j-1(a)(1).

Originally, the ISDA did not require the Government to pay the administrative costs that the tribes incurred to operate the programs. As a result, the tribes absorbed those costs, which reduced the funds available for the tribes to provide direct services to their members. *See Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075, 1080 (Fed. Cir. 2003). Congress amended the ISDA in 1988 to require the Federal Government to provide funds to pay the administrative expenses of covered programs. Those expenses included "contract support costs," defined in the statute as costs that a federal program would not have directly incurred, but that tribal organizations acting as contractors reasonably incur in managing the program. 25 U.S.C. § 450j-1(a)(2).

In addition, Congress amended the ISDA to authorize IHS to negotiate additional instruments, self-government "compacts," with a select number of tribes. Pub. L. No. 100-472, tit. II, § 201(a), (b)(1), 102 Stat. 2288, 2289 (1988); *see* 25 U.S.C. § 450f note, *repealed by* Pub. L. No. 106-260, § 10, 114 Stat. 711, 734 (2000). The selected tribes were given the option

of entering into either contracts or compacts[2] with IHS to perform certain programs, functions, services, or activities (PFSAs) which IHS had operated for Indian tribes and their members. If a tribe and IHS entered into a contract or a compact, they also entered into annual funding agreements (AFAs) as to the years covered by the instrument.

The provision of funds for CSC is "subject to the availability of appropriations," notwithstanding any other provision in the ISDA, and IHS is not required to reduce funding for one tribe to make funds available to another tribe or tribal organization. 25 U.S.C. § 450j-1(b).

In January 1996, ASNA began operating the Samuel Simmonds Memorial Hospital and associated programs, functions, and services in Barrow, Alaska, under a contract with IHS. From October 1, 1997, to the present, ASNA has operated the Barrow Service Unit as a member of the "Alaska Tribal Health Compact between Certain Alaska Native Tribes and the United States of America" (ATHC), a compact which authorized thirteen Alaskan tribes to operate health care programs. Complaint ¶ 6.

With regard to funding, the contract stated:

> Subject only to the appropriation of funds by the Congress of the United States and to adjustments pursuant to § 106(b) of the Indian Self-Determination and Educational Assistance Act, as amended, the Secretary shall provide the total amounts specified in the Annual Funding Agreements.

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[2] For the purposes of this decision, there are no significant differences between contracts and compacts.

Appeal File, Exhibit 7 at 16. For each fiscal year, the contract required that the Secretary shall, among other things:

> make available the funds specified for that fiscal year under the Annual Funding Agreements by paying the respective total amount as provided for in each Annual Funding Agreement in advance lump sum, as permitted by law, or such other payments as provided in the schedule set forth in each Annual Funding Agreement.

Id. at 17.[3] The contract acknowledges that the program funding may not meet all needs; as summarized in section 17:

> The parties to the Compact understand that the Indian Health Service budget is inadequate to fully meet the special responsibilities and legal obligations of the United States to assure the highest possible health status for American Indians and Alaska Natives and that, accordingly, the funds provided to the Co-Signers are inadequate to permit the Co-Signers to achieve this goal. The Secretary commits to advocate for increases in the Health Service budget . . . .

Id. at 34.

The annual funding agreements for FY 1999 and FY 2000 set forth the funding available for CSC. For FY 1999, although the agreement identified zero funding for CSC, the agreement confirmed in a footnote that ASNA would be paid no less than $ 500,000 for CSC for that fiscal year. Appeal File, Exhibit 8 at

[3] The annual funding agreement stated that "one annual payment in lump sum [would] be made annually in advance by check or wire transfer." Appeal File, Exhibit 8 at 10.

7. The parties later amended the annual funding agreement to add $ 297,059 in direct and $ 902,263 in indirect, non-recurring CSC. *Id.,* Exhibit 24 at 53. The parties amended the AFA again to add $ 72,662 in direct and $ 21,697 in indirect, non-recurring CSC. *Id.* at 64.

For FY 2000, the AFA lists $ 5,254,412 in recurring base funds (including recurring CSC) and $ 902,263 in non-recurring CSC. Appeal File, Exhibit 10 at 6. The FY 2000 AFA was amended several times to add additional CSC. *Id.,* Exhibit 24 at 68-106. In total, for FY 2000, IHS promised to pay ASNA $ 896,483 (direct CSC) and $ 2,162,108 (indirect CSC), totaling $ 3,058,591.[4] *Id.* at 103.

On September 30, 2005, ASNA submitted and the awarding official received claims for additional direct and indirect administrative CSC. Complaint ¶ 15.[5] The amounts claimed for the two fiscal years at issue here are $ 2,028,723 for FY 1999 and $ 621,530 for FY 2000. As to these fiscal years, IHS argued that ASNA failed to state a claim upon which relief can be granted because in FY 1999 and FY 2000, Congress limited the funds available for CSC.

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[4] During FY 1999, IHS transferred to tribal management all non-residual PFSAs of the Area Office and the Alaska Native Medical Hospital not under contract or other funding agreements as of October 1997. By FY 2000, the transition plan was fully implemented, resulting in a significant increase in the funding amount provided for CSC to ASNA for its additional PFSAs. Appeal File, Exhibit 8 at 1-9.

[5] Each fiscal year had two claims, one for the alleged failure to pay additional direct and indirect administrative CSC, and the second for the alleged failure to properly calculate the administrative CSC. Each claim has been docketed separately.

In our previous decision, we concluded, based upon the record, that Congress had restricted funds available for CSC for FY 1999 and FY 2000. *Arctic Slope Native Association, Ltd. v. Department of Health and Human Services*, CBCA 190-ISDA, *et al.*, 08-2 BCA ¶ 33,923, at 167,873. The requirement to fund CSC is subject to the availability of appropriations, notwithstanding any other provisions in the ISDA. 25 U.S.C. § 450j-1(b). Congress restricted IHS's FY 1999 appropriation when it provided "not to exceed $ 203,781,000 . . . for payments to tribes and tribal organizations for contract or grant support costs . . . ." Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 328, 112 Stat. 2681, 2681-337 (1998). No separate amount had been designated for the Indian Self-Determination Fund for initial and expanded programs. *Id.* Likewise, Congress restricted IHS's FY 2000 appropriation when it provided "not to exceed $ 228,781,000 . . . for payments to tribes and tribal organizations for contract or grant support costs . . . ." Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-182 (1999).

However, because we could not determine, based upon the record, whether providing ASNA with additional funding for CSC would have caused IHS to expend more than $ 203,781,000 for CSC for FY 1999, or $ 228,781,000 for CSC for FY 2000, we denied the IHS motion to dismiss the FY 1999 and FY 2000 claims for failure to state a claim upon which relief can be granted. On this issue, we stated that if providing ASNA with additional funding for CSC would have caused IHS to expend more than the funds appropriated for CSC for the appropriate fiscal year, ASNA had no statutory or contractual right to such additional funding and its claim for additional

funding would not be one upon which we could grant relief, citing *Greenlee County, Arizona v. United States*, 487 F.3d 871 (Fed. Cir. 2007); *Babbitt v. Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999); and *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). If, however, IHS could have provided additional funding for CSC without expending more than $ 203,781,000 for CSC for FY 1999, or more than $ 228,781,000 for CSC for FY 2000, we concluded that ASNA might be able to establish that it had a statutory or contractual right to such funding up to the amount of the unexpended funds, in which case its claim would be one upon which we could grant relief.

After the Board issued its decision, the parties agreed that IHS would supplement the appeal file with documentation addressing the issue of whether IHS could have provided additional funding for CSC without expending more than the amount appropriated for the fiscal year. Accordingly, IHS supplemented the record with the declaration of Elizabeth Fowler, the Director of the Office of Finance and Accounting (OFA) at IHS.

In her declaration, the Director stated that one of her responsibilities includes monitoring the obligation and expenditure of funds that Congress appropriates for IHS. Declaration of Elizabeth Fowler (Oct. 29, 2008) at 1. The Director explained that, since FY 1998, Congress included a "cap" in the annual IHS appropriations for CSC. The funds appropriated by Congress for CSC are "one-year" funds, meaning that the funds must be obligated before the end of the fiscal year in which they were appropriated. The funds remain available for five years after the close of the fiscal year for liquidation of obligations incurred

during that one fiscal year. After the expiration of that period, the funds are statutorily withdrawn. *Id.* at 2.

Each year, IHS allots its CSC funding among the twelve IHS area offices. Each area office obligates its CSC allotment to the tribes and tribal contractors in its area by incorporating the funding into annual funding agreements or modifications to self-governance contracts or compacts. IHS then records the obligations in its accounting system. At some point thereafter, the Department of the Treasury disburses the obligated funds. Fowler Declaration at 2.

Since 1998, IHS has obligated almost all of the funds appropriated by Congress for CSC. These funds have never been sufficient to satisfy all of the requests for CSC made by IHS's tribal contractors. Therefore, pursuant to published policies, IHS has divided the funding among the various contractors. Fowler Declaration at 3.

In FY 1999, there were apportioned to IHS, in a one-year account, $ 203,781,000 for CSC for ongoing self-determination contracts and compacts. OFA records show that $ 203,567,506 was obligated by the close of the fiscal year, leaving what appeared to be an unobligated balance of $ 213,494. However, the records contained a pen-and-ink change in the amount of $ 213,494 for a CSC award that was not posted to the accounting system due to an omission. Thus, the actual unobligated balance at the end of the fiscal year was $ 0. Fowler Declaration at 3, Attachments A-F.

The balance in the account fluctuated over the next five years due to administrative recording errors, de-obligations, and refunds. The funds were statutorily

withdrawn in September 2004. OFA records show that as of September 30, 2004, when the funds were statutorily withdrawn, the unobligated balance in the account was $ 179,539. The unobligated balance included $ 37,750 in the Phoenix area, $ 5609 in the Oklahoma area, and $ 136,178 at IHS headquarters. The balance of undelivered orders on September 30, 2004, was $ 4251.93. Fowler Declaration at 3, Attachments G-H.

In FY 2000, there were apportioned $ 228,781,000 for CSC in a one-year account. Fowler Declaration at 3, Attachments I-K. OFA records show that of this amount, $ 228,700,203 was obligated by the close of FY 2000, leaving an unobligated balance of $ 80,797. *Id.* at 4, Attachments L-N. OFA records show that as of September 30, 2005, when the funds were statutorily withdrawn, the unobligated balance in the account was $ 137,013.51. The unobligated balance included $ 835.51 in the Oklahoma area and $ 136,178 at IHS headquarters. The balance of the undelivered orders on September 30, 2005, was $ 10,140. *Id.* at 4, Attachments O-P.

Generally, unobligated funds at the end of the fiscal year occur for three reasons: (1) a de-obligation, in which IHS determines that the amount of an obligation not yet disbursed is in excess of the amount that actually should have been obligated; (2) a refund, in which IHS determines that the amount of an obligation that was disbursed was in excess of the amount that actually should have been obligated and disbursed, and IHS has thus recovered the funds; and (3) IHS never obligated the funds. Fowler Declaration at 5.

During this time period, an additional reason caused the amount of unobligated funds to fluctuate. As the

result of a pending lawsuit, a United States district court ordered IHS to make payments into the court registry from various CSC accounts, including $ 136,178 for FY 1999 and $ 136,178 for FY 2000, to secure funding in the event that IHS did not prevail in its appeal. However, IHS ultimately prevailed in the litigation, and on October 15, 2002, the court returned a total of $ 1,025,185.78 to IHS, representing payments to the registry and interest. As a result, the original obligations of $ 136,178 for FY 1999 and $ 136,178 for FY 2000 were de-obligated and the original disbursement of these amounts was credited. Thus, these amounts were reflected in the fiscal year unobligated balances of September 30, 2004 and 2005, when the funds were statutorily withdrawn. Fowler Declaration at 7-8.

Discussion

The Government has asked the Board to resolve this appeal by granting its motion to dismiss for failure to state a claim upon which relief can be granted. The appellant has countered by filing its opposition to the motion and a motion for summary relief. We address the Government's motion first.

Resolving a dispute on a motion to dismiss for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle it to a legal remedy. *Boyle v. United States*, 200 F.3d 1369 (Fed. Cir. 2000). When considering a motion for failure to state a claim, we must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant. *Anaheim Gardens v. United States*, 444 F.3d 1309, 1314-15 (Fed. Cir. 2006) (citing *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). Dismissal for failure to state a claim should

not be granted unless it appears beyond doubt that the appellant cannot prove any set of facts in support of its claim that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

In general, a case can only be dismissed for failure to state a claim for which relief may be granted when that conclusion can be reached by looking solely to the pleadings. In this case, the parties have submitted materials outside the pleadings, so we consider this motion as a motion for summary relief. *Walker Equipment v. International Boundary and Water Commission*, GSBCA 11527-IBWC, 93-3 BCA ¶ 25,954, at 129,074 (citing *Carter v. Stanton*, 405 U.S. 669 (1972)). In resolving the motion, we consider the facts alleged in the light most favorable to the appellant, the non-moving party. *Id.* (citing *Armco, Inc. v. Cyclops Corp.*, 791 F.2d 147, 149 (Fed. Cir. 1986); *Johns-Manville Corp. v. United States*, 12 Cl. Ct. 1, 14-15 (1987)).

ASNA argues that it is entitled to receive, at a minimum, all "unexpended funds" remaining in each appropriation. It contends, however, that the Government is liable in damages for all of the unpaid CSC for each year, a total of no less than $ 2,146,762 in FY 1999 and no less than $ 525,526 in FY 2000.

"'Unexpended funds' are the portion of the appropriation that the agency did not spend during the fiscal year, including both obligated amounts that the agency had not yet disbursed, and unobligated amounts." Government Accountability Office, *Principles of Federal Appropriations Law* (the "*GAO Redbook*"), vol. I at 5-67 to -68; *see also* 31 U.S.C. § 1551(a). As is evident from the record, however, no unexpended funds remained in the fiscal year accounts with which we are concerned. Thus, in FY

1999, IHS obligated the entire $ 203,781,000 that Congress appropriated for CSC, leaving nothing for additional obligations or expenditures. Once IHS fully obligated the amount appropriated by Congress for CSC, any additional obligation or expenditure would have caused IHS to exceed the Congressional cap, in violation of 31 U.S.C. § 1341(a)(1)(A). That statute prohibits an agency from making a disbursement or obligation that exceeds the amount appropriated by Congress.

For FY 2000, Congress appropriated $ 228,781,000 to IHS for payment of CSC. According to IHS records, IHS obligated all but $ 80,797 of the $ 228,781,000 by the close of the fiscal year. The unobligated balance was allotted to the Albuquerque and Oklahoma Area offices. No other unobligated funds remained to pay ASNA's CSC.

However, even assuming that unexpended funds remained to pay ASNA's additional CSC, ASNA submitted its claim for these additional costs after the funds had been returned to the Treasury. Pursuant to 31 U.S.C. § 1552(a), "[o]n September 30 of the 5th fiscal year after the period of availability for obligation of a fixed appropriation account ends, the account shall be closed and any remaining balance (whether obligated or unobligated) in the account shall be canceled and thereafter shall not be available for obligation or expenditure for any purpose." *See also City of Houston, Texas v. Department of Housing and Urban Development*, 24 F.3d 1421, 1426 (D.C. Cir. 1994) ("[I]t is an elementary principle of the budget process that, in general, a federal agency's budgetary authority lapses on the last day of the period for which the funds were obligated. At that point, the unobligated funds revert back into the gen-

eral Treasury." (citing *West Virginia Association of Community Health Centers v. Heckler*, 734 F.2d 1570, 1576 (D.C. Cir. 1984)); *National Association of Regional Councils v. Costle*, 564 F.2d 583, 587 (D.C. Cir. 1977); *Principles of Federal Appropriations Law,* vol. II, at 5-73 to -75.

ASNA did not file its claim for additional contract support funds for FY 1999 until after the appropriated funds had lapsed. In addition, although it filed its claim for FY 2000 funds on the date that the appropriation finally lapsed, in order to reach that appropriation, ASNA would have had to take immediate action on that same date to preserve the status quo, which may have preserved the funds, by seeking injunctive relief through the appropriate forum. *West Virginia Association*, 734 F.2d at 1576-77 ("Notwithstanding these basic principles of federal budgetary law, an equitable doctrine has been fashioned by the federal courts in recent years to permit funds to be awarded to a deserving plaintiff even after the statutory lapse date, *as long as the lawsuit was instituted on or before that date.*"(emphasis added)); *City of Houston, Texas*, 24 F.3d at 1426; *National Association*, 564 F.2d at 587-88 ("If, however, budget authority has lapsed before suit is brought, there is no underlying congressional authority for the court to preserve. It has vanished, and any order of the court to obligate public money conflicts with the constitutional provision vesting sole power to make such authorization in the Congress."). ASNA did not take action to preserve the status quo; thus, the budget authority lapsed without action. Once the budget authority had lapsed, the agency properly returned the funds to the Treasury in compliance with statutory requirements.

ASNA does not dispute that any unexpended funds eventually lapsed at the end of the account period for each fiscal year, but instead reiterates its position that the pre-existing contract obligated IHS to pay full CSC from the available and unexpended funds. ASNA asserts that, under *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005), as a government contractor, it is entitled to the full panoply of damage remedies afforded by the Contract Disputes Act, 41 U.S.C. §§ 601-613. The remedy available to ASNA, however, is constrained by the mandate that the appellant is entitled to be paid its full CSC requirement only as long as appropriations are legally available to do so. As explained above, ASNA did not submit its claim for additional CSC until after the appropriations had lapsed. Once the appropriations lapsed, the funds were no longer available with which to pay any claims. Accordingly, for the same reasons that we grant the Government's motion for summary relief, we must deny ASNA's motion for summary relief, which seeks an award of additional CSC for FYs 1999 and 2000.

Decision

For the foregoing reasons, respondent's motion for summary relief is granted, and appellant's motion for summary relief is denied. The appeals are DENIED.

JERI KAYLENE SOMERS

Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

CANDIDA S. STEEL
Board Judge

APPENDIX C

UNITED STATES CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS
GRANTED AS TO CBCA
190-ISDA AND CBCA 289-ISDA THROUGH
293-ISDA AND DENIED AS TO CBCA 294-ISDA
THROUGH 297-ISDA: July 28, 2008

CBCA 190-ISDA, CBCA 289-ISDA, CBCA 290-ISDA,
CBCA 291-ISDA, CBCA 292-ISDA, CBCA 293-ISDA,
CBCA 294-ISDA, CBCA 295-ISDA, CBCA 296-ISDA,
CBCA 297-ISDA

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent.

Lloyd Benton Miller and Donald J. Simon of Sonosky, Chambers, Sachse, Miller & Munson, LLP, Anchorage, AK, counsel for Appellant.

Sean Dooley, Office of the General Counsel, Department of Health and Human Services, Rockville, MD, counsel for Respondent.

Before Board Judges HYATT, DeGRAFF, and STEEL.

STEEL, *Board Judge*.

For all the years at issue in these appeals, the Arctic Slope Native Association, Ltd. (ASNA) provided health

care services to its members under self-determination contracts or compacts with the Department of Health and Human Services (HHS) Indian Health Service (IHS), pursuant to the Indian Self-Determination and Education Assistance Act (ISDA or Act), Pub. L. No. 93-638, codified as amended at 25 U.S.C. §§ 450, *et seq*. (2000). ASNA seeks additional amounts of indirect contract support cost (CSC) funding from IHS under ISDA contracts and compacts for fiscal years (FYs) 1996 through 2000. IHS moves to dismiss the appeals.

Background

In 1975, Congress enacted the ISDA to encourage Indian self-government by allowing the transfer of certain federal programs operated by the Federal Government, including health care services programs, to tribal governments and other tribal organizations by way of contracts. The amount of contract funds provided to the tribes was the same as the amount IHS would have provided if it had continued to operate the programs. This amount is known as the "Secretarial amount" or "tribal shares." 25 U.S.C. § 450j-l(a). The Secretarial amount, however, included only the funds IHS would have provided directly to operate the programs. It did not include funds for additional administrative costs the tribes incurred in running the programs, but which IHS would not have incurred, such as the cost of annual financial audits, liability insurance, personnel systems, and financial management and procurement systems. S. Rep. No. 100-274, at 8-9 (1987).

In 1988, Congress amended the ISDA to authorize IHS to negotiate additional instruments, self-governance "compacts," with a selected number of tribes. Pub. L. No. 100-472, tit. II, § 201(a), (b)(1), 102 Stat. 2288, 2289 (1988); *see* 25 U.S.C. § 450f note (repealed

by Pub. L. No. 106-260, § 10, 114 Stat. 711, 734 (2000)). Under this more flexible Tribal Self-Governance Demonstration Project, the selected tribes were given the option of entering into either contracts or compacts[1] with IHS to perform certain programs, functions, services, or activities (PFSAs) which IHS had operated for Indian tribes and their members. If a tribe and IHS entered into a compact, they also entered into annual funding agreements (AFAs).

The 1988 amendments also provided for funding for the additional administrative costs which tribes incurred in running health services programs. The statute as amended provides that there shall be added to the Secretarial amount 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." 25 U.S.C. § 450j-l(a)(2). These amounts are for "costs which normally are not carried on by the respective Secretary in his direct operation of the program; or . . . are provided by the Secretary in support of the contracted program from resources other than those under contract." *Id.*

There are three categories of CSC: start-up costs, indirect costs (IDC), and direct costs. Start-up costs are one-time costs necessary to plan, prepare for, and assume operation of a new or expanded PFSA, such as the start-up costs for a new clinic. Indirect costs are those costs incurred for a common or joint purpose, but benefiting more than one PFSA, such as administrative and overhead costs. Direct CSC are

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[1] For the purposes of this decision, there are no significant differences between contracts and compacts.

expenses which are directly attributable to a certain PFSA but which are not captured in either the Secretarial amount or indirect costs, such as workers' compensation insurance, which the Secretary would not have incurred if the agency were operating the program. 25 U.S.C. § 450j-1(a).

The provision of funds for CSC is "subject to the availability of appropriations," notwithstanding any other provision in the ISDA, and IHS is not required to reduce funding for one tribe to make funds available to another tribe or tribal organization. 25 U.S.C. § 450j-1(b).

From one fiscal year to the next, IHS cannot reduce the Secretarial amount and the CSC it provides except pursuant to:

> (A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;
>
> (B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;
>
> (C) a tribal authorization;
>
> (D) a change in the amount of pass-through funds needed under a contract; or
>
> (E) completion of a contracted project activity or program.

25 U.S.C. § 450j-l(b)(2).

IHS is required to prepare annual reports for Congress regarding the implementation of the ISDA. Among other things, these reports include an accounting of any deficiency in the funds needed to provide contractors with CSC. 25 U.S.C. § 450j-l(c).

The reports which set out the deficiencies in funds needed to provide CSC are known as "shortfall reports." 25 U.S.C. § 450j-1(c), (d).

For FYs 1996 through 1998, Congress set aside $7.5 million of IHS's appropriated funds into the Indian Self-Determination (ISD) fund which were to be used for the transitional costs of new or expanded tribal programs. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-189 (1996); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-12 (1996); Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1582 (1997). In connection with the ISD fund, IHS developed a policy for funding CSC for new or expanded programs. IHS established a priority list, called the "queue," and funded CSC for new or expanded programs on a first-come, first-served basis, as determined by the date on which IHS received a tribe's request for funding. *See, e.g.*, IHS Circular No. 96-04, § 4.A(4)(a)(ii). Thus, IHS would fund the first request it received for funding CSC for a new or expanded program, then it would fund the next request it received, and it would continue funding CSC requests until the ISD funds were exhausted for a fiscal year. Requests not funded during one fiscal year moved up the queue to be paid when the next fiscal year's funds were distributed. Appeal File, Exhibit 4-19, Indian Self-Determination Memorandum (ISDM) 92-2 ¶ 4-C(1), at 4.

One of the 1988 amendments to the ISDA provided that the Contract Disputes Act (CDA) "shall apply to self-determination contracts." 25 U.S.C. § 450m-1(d). In 1994, Congress amended the Contract Disputes Act to include a six-year time limit for presenting a

claim to the contracting officer (often an awarding official in the ISDA context):

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. . . . Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud.

41 U.S.C. § 605(a).

Findings of Fact

In January 1996, ASNA began operating the Samuel Simmonds Memorial Hospital and associated programs, functions, and services in Barrow, Alaska, under contract 243-96-6025 with IHS. The "Alaska Tribal Health Compact between Certain Alaska Native Tribes and the United States of America" (ATHC) and related negotiated AFAs authorized thirteen Alaskan tribes to operate health care programs. From October 1, 1997, to the present, ASNA has operated the Barrow Service Unit as a member of the ATHC. Complaint ¶ 6.

On September 30, 2005 ASNA submitted and the awarding official received claims for each of the fiscal years 1996 through 2000 for (1) additional direct and indirect administrative CSC, as confirmed in IHS's annual CSC shortfall and related queue reports, and (2) additional indirect CSCs calculated in accordance with the decision in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). Complaint ¶ 15.

The amounts claimed for each fiscal year, based on the shortfall report and *Ramah* recalculations, are $2,301,631 for FY 1996, $1,568,828 for FY 1997, $1,008,622 for FY 1998, $2,028,723 for FY 1999, and $621,530 for FY 2000, for a total of $7,529,334.

The awarding official did not issue decisions on these claims. They are therefore deemed denied. 41 U.S.C. § 605(c)(5). Appeals were filed with the Department of the Interior Board of Contract Appeals on August 23, 2006, and docketed as cases IBCA 4794-4803/2006. On January 6, 2007, the Department of the Interior Board of Contract Appeals was merged with other civilian agency boards into the Civilian Board of Contract Appeals (CBCA), where the cases were docketed as described below. Pub. L. No. 109-163, § 847, 119 Stat. 3136 (2006).

Discussion

In their briefs, the parties make a great many arguments, all of which we carefully considered. Due to the manner in which we resolve the issues before us, it is not necessary for us to address each of the arguments they raised in order to resolve the motion to dismiss. As explained below, we lack subject matter jurisdiction to consider the FY 1996, FY 1997, and FY 1998 claims. We possess subject matter jurisdiction to consider the FY 1999 and FY 2000 claims and we cannot dismiss them for failure to state a claim upon which relief can be granted. Therefore, we grant the motion to dismiss in part.

FY 1996 - FY 1998 (CBCA 190-ISDA and 289-ISDA - 293-ISDA)

IHS moves to dismiss the FY 1996 through FY 1998 claims for lack of subject matter jurisdiction because ASNA failed to submit the claims to the

awarding official within six years after they accrued, as required by section 605(a) of the CDA. Respondent's Motion to Dismiss at 8-12. In resolving IHS's motion, we assume all well-pled factual allegations are true and find all reasonable inferences in favor of the non-moving party. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (stating that decisions on such motions to dismiss rest "on the assumption that all the allegations in the complaint are true"); *Leider v. United States*, 301 F.3d 1290, 1295 (Fed. Cir. 2002); *Gould Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Kawa v. United States*, 77 Fed. Cl. 294, 298 (2007); *Barth v. United States*, 28 Fed. Cl. 512, 514 (1993).

The FY 1996 claims accrued on the last day of the fiscal year, which was September 30, 1996, since appellant could expect no further payments for the fiscal year after this date. Similarly, the FY 1997 claims accrued on September 30, 1997, and the FY 1998 claims accrued on September 30, 1998. ASNA submitted its claims for these three fiscal years to the awarding official on September 30, 2005. ASNA contends the six-year time limit was met, because the time limit was either equitably or legally tolled. Memorandum in Opposition to Respondent's Motion to Dismiss at 27-33.

Tolling, whether equitable or legal, is a concept which applies to statutes of limitation. If a court (or a board) possesses jurisdiction to consider a claim, the claim must be filed before the limitations period expires or else it becomes unenforceable. A time limit for filing suit can be suspended, in effect, based upon equitable considerations, *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), or based upon legal considerations, *Stone Container Corp. v. United*

States, 229 F.3d 1345, 1354 (Fed. Cir. 2000). If the applicable statute is tolled for a sufficient period, the time limit for filing suit is met.

Section 605(a) does not contain a statute of limitations which imposes a time limit for filing suit. Rather, it imposes a time limit which this Board's precedent establishes is a prerequisite to our jurisdiction. *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514; *accord*, *Gray Personnel, Inc.*, ASBCA 54652, 06-2 BCA ¶ 33,378; *see also Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099 (D.N.M. 2006). As *Gray Personnel* explained:

> Under the CDA, there are two prerequisites to an appeal to the Board or to the United States Court of Federal Claims:
>
> > Those prerequisites are (1) that the contractor must have submitted a proper CDA claim to the contracting officer requesting a decision, . . . [41 U.S.C.] § 605(a), and (2) that the contracting officer must either have issued a decision on the claim, . . . § 609(a), or have failed to issue a final decision within the required time period, . . . § 605(c)(5).
>
> *England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 852 (Fed. Cir. 2004). If a contractor has not submitted a proper claim, the contracting officer does not have the authority to issue a decision:
>
> > The Act . . . denies the contracting officer the authority to issue a decision at the instance of a contractor until a contract "claim" in writing has been properly submitted to him for a decision. § 605(a). Absent this "claim", no "decision" is possible—and, hence, no basis for jurisdiction . . . .

> *Paragon Energy Corp. v. United States*, 645 F.2d 966, 971 (Ct. Cl. 1981). Thus, "[i]t is well established that without . . . a formal claim and final decision by the contracting officer, there can be no appeal . . . under the CDA. It is a jurisdictional requirement." *Milmark Services, Inc. v. United States*, 231 Ct. Cl. 954, 956 (1982).
>
> Section 605(a) as implemented by FAR subpart 33.2, Disputes and Appeals, is the key provision in determining whether there is a proper or formal claim for purposes of the CDA. *See, e.g., Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc) (definition of a claim); *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1576 (Fed. Cir. 1992) (requirement that a claim be submitted for a decision). [The Federal Acquisition Streamlining Act] added the six-year requirement to this key provision, rather than, for example, to 41 U.S.C. §§ 606 or 609, establishing filing periods at the boards and the United States Court of Federal Claims. We conclude, in view of the placement of the six-year provision in § 605(a), that the requirement that a claim be submitted within six years after its accrual, like the other requirements in that section, is jurisdictional. *Accord Axion Corp. v. United States*, 68 Fed. Cl. 468, 480 (2005).

Gray Personnel, Inc., 06-2 BCA at 165,474-75; *cf. John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008).

ASNA's failure to submit its FY 1996 through FY 1998 claims to the awarding official within six years after they accrued, as required by section 605(a) of the CDA, deprived this Board of jurisdiction to consider the claims. We cannot suspend the running

of the six-year time limit any more than we could suspend the requirements, also found in section 605, that a claim must be submitted to the contracting officer, that a claim must be submitted in writing, and that a claim in excess of $100,000 must be certified. In the absence of a claim which meets all the requirements of section 605, we lack jurisdiction to consider an appeal.

We grant the motion to dismiss the FY 1996, FY 1997, and FY 1998 claims for lack of subject matter jurisdiction because ASNA failed to submit these claims to the awarding official within six years after they accrued, as required by section 605(a) of the CDA.

FY 1999 (CBCA 294-ISDA and 295-ISDA)

The FY 1999 claims accrued on the last day of the fiscal year, which was September 30, 1999. ASNA submitted these claims to the awarding official on September 30, 2005. We have jurisdiction to consider these claims because ASNA submitted them to the awarding official within six years after they accrued, as required by section 605(a) of the CDA. IHS argues that ASNA fails to state a claim upon which relief can be granted because in FY 1999, Congress limited the amount of money which IHS had available to fund CSC. Respondent's Motion to Dismiss at 12-13.

We agree with IHS that Congress restricted the funds available for CSC in FY 1999. The requirement to fund CSC is subject to the availability of appropriations, notwithstanding any other provisions of the ISDA. 25 U.S.C. § 450j-1(b). Congress restricted IHS's FY 1999 appropriation when it provided "not to exceed $203,781,000 shall be for payments to tribes and tribal organizations for contract or grant support

costs . . . ." Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 328, 112 Stat. 2681, 2681-337 (1998). No separate amount was designated for the Indian Self-Determination Fund for initial and expanded programs. *Id*.

The fact that funds for CSC were restricted in FY 1999 does not, however, mean that ASNA has failed to state a claim upon which relief can be granted. If providing ASNA with additional funding for CSC would have caused IHS to expend more than $203,781,000 for CSC in FY 1999, ASNA had no statutory or contractual right to such additional funding and its claim for additional funding would not be one upon which we could grant relief. *Greenlee County, Arizona v. United States*, 487 F.3d 871 (Fed. Cir. 2007); *Babbitt v. Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999); *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). If, however, IHS could have provided ASNA with additional funding for CSC without expending more than $203,781,000 for CSC in FY 1999, ASNA might be able to establish it had a statutory or contractual right to such funding up to the amount of the unexpended funds, in which case its claim would be one upon which we could grant relief. We do not know how much of the $203,781,000 IHS expended during FY 1999.

Because we do not know whether providing ASNA with additional funding for CSC would have caused IHS to expend more than $203,781,000 for CSC for FY 1999, we deny the motion to dismiss the FY 1999 claim for failure to state a claim upon which relief can be granted.

FY 2000 (CBCA 296-ISDA and 297-ISDA)

The FY 2000 claims accrued on the last day of the fiscal year, which was September 30, 2000. ASNA submitted these claims to the awarding official on September 30, 2005. We have jurisdiction to consider these claims because ASNA submitted them to the awarding official within six years after they accrued, as required by section 605(a) of the CDA. IHS argues that ASNA fails to state a claim upon which relief can be granted because in FY 2000, Congress limited the amount of money which IHS had available to fund CSC. Respondent's Motion to Dismiss at 12-13.

We agree with IHS that Congress restricted the funds available for CSC in FY 2000, for the same reason we agree with IHS that Congress restricted the funds available for CSC in FY 1999. Congress restricted IHS's FY 2000 appropriation when it provided "not to exceed $228,781,000 shall be for payments to tribes and tribal organizations for contract or grant support costs . . . ." Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-182 (1999).

The fact that funds for CSC were restricted in FY 2000 does not, however, mean that ASNA has failed to state a claim upon which relief can be granted. If providing ASNA with additional funding for CSC would have caused IHS to expend more than $228,781,000 for CSC in FY 2000, ASNA had no statutory or contractual right to such additional funding and its claim for additional funding would not be one upon which we could grant relief. *Greenlee County, Arizona; Oglala Sioux Tribal Public Safety Department; Ramah Navajo School Board, Inc*. If, however, IHS could have provided ASNA with additional funding for CSC without expending more than

$228,781,000 for CSC in FY 2000, ASNA might be able to establish it had a statutory or contractual right to such funding up to the amount of the unexpended funds, in which case its claim would be one upon which we could grant relief. We do not know how much of the $228,781,000 IHS expended during FY 2000.

Because we do not know whether providing ASNA with additional funding for CSC would have caused IHS to expend more than $228,781,000 for CSC for FY 2000, we deny the motion to dismiss the FY 2000 claim for failure to state a claim upon which relief can be granted.

Decision

The motion to dismiss is GRANTED as to CBCA 190-ISDA and 289-ISDA through 293-ISDA. The motion to dismiss is DENIED as to CBCA 294-ISDA through 297-ISDA.

CANDIDA S. STEEL
Board Judge

We Concur:
CATHERINE B. HYATT
Board Judge

MARTHA H. DeGRAFF
Board Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2010-1013

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
Appellant,

v.

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

April 19, 2011, Decided
April 19, 2011, Filed

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on April 26, 2011.

Dated: 04/19/2011

APPENDIX E

STATUTORY PROVISIONS INVOLVED

The Indian Self-Determination and Education Assistance Act of 1975, as amended, 25 U.S.C. §§ 450-458bbb-2 provides in relevant part as follows:

* * * *

§ 450b. Definitions

For purposes of this subchapter, the term—

* * * *

(f) "indirect costs" means costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved;

(g) "indirect cost rate" means the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency;

* * * *

(i) "Secretary", unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both;

(j) "self-determination contract" means a contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this subchapter between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: *Provided*, That except as provided the last proviso in section 450j(a) of this title, no contract (or grant or cooperative

agreement utilized under section 450e-1 of this title) entered into under part A of this subchapter shall be construed to be a procurement contract;

* * * *

(*l*) "tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: *Provided*, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant; and

* * * *

§ 450f . Self-determination contracts

(a) Request by tribe; authorized programs

(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—

(A) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C. 452 et seq.];

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) [25 U.S.C. 13], and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended [42 U.S.C. 2001 et seq.];

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of paragraph (4), the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the

contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that–

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured;

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a) of this title; or

(E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

* * * *

§ 450j-1. Contract funding and indirect costs

(a) Amount of funds provided

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard

to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(2) There shall be added to the amount required by paragraph (1) 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, but which—

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3) (A) The contract support costs that are eligible costs for the purposes of receiving funding under this subchapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of–

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,

except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

* * * *

(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary—

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management.

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

(b) Reductions and increases in amount of funds provided

The amount of funds required by subsection (a) of this section—

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to–

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this subchapter or as provided in section 450j(c) of this title.

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

(c) Annual reports

Not later than May 15 of each year, the Secretary shall prepare and submit to Congress an annual report on the implementation of this subchapter. Such report shall include—

(1) an accounting of the total amounts of funds provided for each program and the budget activity for direct program costs and contract support costs of tribal organizations under self-determination;

(2) an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted;

(3) the indirect cost rate and type of rate for each tribal organization that has been negotiated with the appropriate Secretary;

(4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(5) the indirect cost pool amounts and the types of costs included in the indirect cost pool; and

(6) an accounting of any deficiency in funds needed to maintain the preexisting level of services to any Indian tribes affected by contracting activities under this subchapter, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal year accounting cycle, as authorized by section 450j(d) of this title.

(d) Treatment of shortfalls in indirect cost recoveries

(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the

basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

(2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.

* * * *

(g) Addition to contract of full amount contractor entitled; adjustment

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) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

* * * *

§ 450k. Rules and regulations

(a) Authority of Secretaries of the Interior and of Health and Human Services to promulgate rules and regulations; time restriction

(1) Except as may be specifically authorized in this subsection, or in any other provision of this subchapter, the Secretary of the Interior and the Secretary of Health and Human Services may not promulgate any regulation, nor impose any non-regulatory requirement, relating to self-determination contracts or the approval, award, or declination of such contracts, except that the Secretary of the Interior and the Secretary of Health and Human Services may prom-

ulgate regulations under this subchapter relating to chapter 171 of Title 28 [28 USC 2671 et seq.], commonly known as the "Federal Tort Claims Act", the Contract Disputes Act of 1978 [41 U.S.C. 7101 et seq.], declination and waiver procedures, appeal procedures, reassumption procedures, discretionary grant procedures for grants awarded under section 103 [25 USC 450h] of this title, property donation procedures arising under section 105(f) [25 USC 450j(f)] of this title, internal agency procedures relating to the implementation of this subchapter, retrocession and tribal organization relinquishment procedures, contract proposal contents, conflicts of interest, construction, programmatic reports and data requirements, procurement standards, property management standards, and financial management standards.

* * * *

§ 450*l*. Contract or grant specifications

(a) Terms

Each self-determination contract entered into under this subchapter shall–

(1) contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) of this section (with modifications where indicated and the blanks appropriately filled in), and

(2) contain such other provisions as are agreed to by the parties.

* * * *

(c) Model agreement

The model agreement referred to in subsection (a)(1) of this section reads as follows:

"Section 1. Agreement between the Secretary and the _____ Tribal Government.

"(a) Authority and Purpose.—

"(1) Authority.—This agreement, denoted a Self-Determination Contract (referred to in this agreement as the 'Contract'), is entered into by the Secretary of the Interior or the Secretary of Health and Human Services (referred to in this agreement as the 'Secretary'), for and on behalf of the United States pursuant to title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and by the authority of the _____ tribal government or tribal organization (referred to in this agreement as the 'Contractor'). The provisions of title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) are incorporated in this agreement.

"(2) Purpose.—Each 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 to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractable under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: (List functions, services, activities, and programs).

"(b) Terms, Provisions, and Conditions.—

* * * *

"(2) Effective date.—This Contract shall become effective upon the date of the approval and execution by the Contractor and the Secretary, unless the Contractor and the Secretary agree on an effective date other than the date specified in this paragraph.

* * * *

"(4) Funding amount.—Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

"(5) Limitation of costs.–The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this Contract or a specific activity conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the contract until such time as additional funds are awarded.

"(6) Payment.—

* * * *

"(B) Quarterly, semiannual, lump-sum, and other methods of payment.—

* * * *

"(iii) Applicability. Chapter 39 of title 31, United States Code, shall apply to the payment of funds due under this Contract and the annual funding agreement referred to in clause (i).

* * * *

"(11) Federal program guidelines, manuals, or policy directives.–Except as specifically provided in the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) the Contractor is not required to abide by program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law.

* * * *

"(c) Obligation of the Contractor.—

"(1) Contract performance.—Except as provided in subsection (d)(2), the Contractor shall perform the programs, services, functions, and activities as provided in the annual funding agreement under subsection (f)(2) of this Contract.

"(2) Amount of funds.—The total amount of funds to be paid under this Contract pursuant to section 106(a) shall be determined in an annual funding agreement entered into between the Secretary and the Contractor, which shall be incorporated into this Contract.

"(3) Contracted programs.—Subject to the availability of appropriated funds, the Contractor shall administer the programs, services, functions, and activities identified in this Contract and funded through the annual funding agreement under subsection (f)(2).

* * * *

"(d) Obligation of the United States.—

"(1) Trust responsibility.—

* * * *

"(B) Construction of Contract.—Nothing in this Contract may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the tribe(s) or individual Indians. The Secretary shall act in good faith in upholding such trust responsibility.

"(2) Good faith.—To the extent that health programs are included in this Contract, and within available funds, the Secretary shall act in good faith in cooperating with the Contractor to achieve the goals set forth in the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.).

* * * *

"(f) Attachments.—

* * * *

"(2) Annual funding agreement.—

"(A) In general.–The annual funding agreement under this Contract shall only contain—

"(i) terms that identify the programs, services, functions, and activities to be

performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and

"(ii) such other provisions, including a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agree.

"(B) Incorporation by reference.—The annual funding agreement is hereby incorporated in its entirety in this Contract and attached to this Contract as attachment 2."

* * * *

§ 450m-1. Contract disputes and claims

(a) Civil actions; concurrent jurisdiction; relief

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations

promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

(b) Revision of contracts

The Secretary shall not revise or amend a self-determination contract with a tribal organization without the tribal organization's consent.

* * * *

(d) Application of Contract Disputes Act

The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) [41 U.S.C. 7101 et seq.] shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act [41 USC 7105].

* * * *

§ 450n. Sovereign immunity and trusteeship rights unaffected

Nothing in this subchapter shall be construed as—

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

* * * *

§ 458aaa–6. Provisions relating to the Secretary

* * * *

(g) Trust responsibility

The Secretary is prohibited from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions.

* * * *

§ 458aaa-14. Disclaimers

* * * *

(b) Federal trust and treaty responsibilities

Nothing in this subchapter shall be construed to diminish in any way the trust responsibility of the United States to Indian tribes and individual Indians that exists under treaties, Executive orders, or other laws and court decisions.

* * * *

The Judgment Fund Act, 31 U.S.C. § 1304, provides in relevant part as follows:

§ 1304. Judgments, awards, and compromise settlements

(a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—

(1) payment is not otherwise provided for;

(2) payment is certified by the Secretary of the Treasury; and

(3) the judgment, award, or settlement is payable—

(A) under section 2414, 2517, 2672, or 2677 of title 28;

(B) under section 3723 of this title;

(C) under a decision of a board of contract appeals; or

(D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 203 of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2473)

* * * *

The Anti-Deficiency Act, 31 U.S.C. § 1341, provides in relevant part as follows:

§ 1341. Limitations on expending and obligating amounts

(a) (1) An officer or employee of the United States Government or of the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

(C) make or authorize an expenditure or obligation of funds required to be sequestered under

section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or

(D) involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.

(b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

* * * *

31 U.S.C. § 1501 provides as follows:

(a) An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of—

(1) a binding agreement between an agency and another person (including an agency) that is—

(A) in writing, in a way and form, 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 goods to be delivered, real property to be bought or leased, or work or service to be provided;

(2) a loan agreement showing the amount and terms of repayment;

(3) an order required by law to be placed with an agency;

(4) an order issued under a law authorizing purchases without advertising—

(A) when necessary because of a public exigency;

(B) for perishable subsistence supplies; or

(C) within specific monetary limits;

(5) a grant or subsidy payable—

(A) from appropriations made for payment of, or contributions to, amounts required to be paid in specific amounts fixed by law or under formulas prescribed by law;

(B) under an agreement authorized by law; or

(C) under plans approved consistent with and authorized by law;

(6) a liability that may result from pending litigation;

(7) employment or services of persons or expenses of travel under law;

(8) services provided by public utilities; or

(9) other legal liability of the Government against an available appropriation or fund.

(b) A statement of obligations provided to Congress or a committee of Congress by an agency shall include only those amounts that are obligations consistent with subsection (a) of this section.

31 U.S.C. §§ 1552, 1553 provide in relevant part as follows:

§ 1552. Procedure for appropriation accounts available for definite periods

(a) On September 30th of the 5th fiscal year after the period of availability for obligation of a fixed appropriation account ends, the account shall be closed and any remaining balance (whether obligated or unobligated) in the account shall be canceled and thereafter shall not be available for obligation or expenditure for any purpose.

* * * *

§ 1553. Availability of appropriation accounts to pay obligations

(a) After the end of the period of availability for obligation of a fixed appropriation account and before the closing of that account under section 1552(a) of this title, the account shall retain its fiscal-year identity and remain available for recording, adjusting, and liquidating obligations properly chargeable to that account.

* * * *

The Contract Disputes Act, 41 U.S.C. §§ 7101-7109, provides in relevant part as follows:

* * * *

§ 7103. Decision by contracting officer

(a) Claims generally.—

(1) Submission of contractor's claims to contracting officer.—Each claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision.

(2) Contractor's claims in writing.—Each claim by a contractor against the Federal Government relating to a contract shall be in writing.

(3) Contracting officer to decide federal government's claims.—Each claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer.

(4) Time for submitting claims.—

(A) In general.—Each claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim.

(B) Exception.—Subparagraph (A) of this paragraph does not apply to a claim by the Federal Government against a contractor that is based on a claim by the contractor involving fraud.

* * * *

(d) Issuance of decision.—The contracting officer shall issue a decision in writing and shall mail or otherwise furnish a copy of the decision to the contractor.

(e) Contents of decision.—The contracting officer's decision shall state the reasons for the decision reached and shall inform the contractor of the contractor's rights as provided in this chapter [41 USC 7101 et seq.]. Specific findings of fact are not required. If made, specific findings of fact are not binding in any subsequent proceeding.

(f) Time for issuance of decision.—

(1) Claim of $ 100,000 or less.—A contracting officer shall issue a decision on any submitted claim of $ 100,000 or less within 60 days from the contracting officer's receipt of a written request from the contractor that a decision be rendered within that period.

(2) Claim of more than $ 100,000.—A contracting officer shall, within 60 days of receipt of a submitted certified claim over $ 100,000—

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) General requirement of reasonableness.—The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations prescribed by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of information in support of the claim provided by the contractor.

* * * *

(5) Failure to issue decision within required time period.—Failure by a contracting officer to issue a decision on a claim within the required time period is deemed to be a decision by the contracting officer denying the claim and authorizes an appeal or action on the claim as otherwise provided in this chapter [41 USC 7101 et seq.]. However, the tribunal concerned may, at its option, stay the proceedings of the appeal or action to obtain a decision by the contracting officer.

(g) Finality of decision unless appealed.—The contracting officer's decision on a claim is final and

conclusive and is not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or action is timely commenced as authorized by this chapter [41 USC 7101 et seq.]. This chapter [41 USC 7101 et seq.] does not prohibit an executive agency from including a clause in a Federal Government contract requiring that, pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

* * * *

§ 7104. Contractor's right of appeal from decision by contracting officer

(a) Appeal to agency board.—A contractor, within 90 days from the date of receipt of a contracting officer's decision under section 7103 of this title, may appeal the decision to an agency board as provided in section 7105 of this title.

(b) Bringing an action de novo in Federal court.—

(1) In general.—Except as provided in paragraph (2), and in lieu of appealing the decision of a contracting officer under section 7103 of this title [41 USC 7103] to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

* * * *

(3) Time for filing.—A contractor shall file any action under paragraph (1) or (2) within 12 months from the date of receipt of a contracting officer's

decision under section 7103 of this title [41 USC 7103].

(4) De novo.—An action under paragraph (1) or (2) shall proceed de novo in accordance with the rules of the appropriate court.

§ 7105. Agency boards

* * * *

(b) Civilian Board.—

(1) Establishment.—There is established in the General Services Administration the Civilian Board of Contract Appeals.

* * * *

(4) Functions.—

(A) In general.—The Civilian Board has jurisdiction as provided by subsection (e)(1)(B).

(B) Additional jurisdiction.—With the concurrence of the Federal agencies affected, the Civilian Board may assume—

(i) jurisdiction over any additional category of laws or disputes over which an agency board of contract appeals established pursuant to section 8 of the Contract Disputes Act [of 1978] [former 41 USC 607] exercised jurisdiction before January 6, 2007; and

(ii) any other function the agency board performed before January 6, 2007, on behalf of those agencies.

* * * *

(e) Jurisdiction.—

(1) In general.—

* * * *

(B) Civilian Board.—The Civilian Board has jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Regulatory Commission, or the Tennessee Valley Authority) relative to a contract made by that agency.

* * * *

(2) Relief.—In exercising this jurisdiction, an agency board may grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.

* * * *

(g) Decisions.—An agency board shall—

(1) to the fullest extent practicable provide informal, expeditious, and inexpensive resolution of disputes;

(2) issue a decision in writing or take other appropriate action on each appeal submitted; and

(3) mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.

* * * *

§ 7107. Judicial review of agency board decisions

(a) Review.—

(1) In general.—The decision of an agency board is final, except that—

(A) a contractor may appeal the decision to the United States Court of Appeals for the Federal Circuit within 120 days from the date the contractor receives a copy of the decision; or

(B) if an agency head determines that an appeal should be taken, the agency head, with the prior approval of the Attorney General, may transmit the decision to the United States Court of Appeals for the Federal Circuit for judicial review under section 1295 of title 28, within 120 days from the date the agency receives a copy of the decision.

* * * *

(b) Finality of agency board decisions on questions of law and fact.—Notwithstanding any contract provision, regulation, or rule of law to the contrary, in an appeal by a contractor or the Federal Government from the decision of an agency board pursuant to subsection (a)—

(1) the decision of the agency board on a question of law is not final or conclusive; but

(2) the decision of the agency board on a question of fact is final and conclusive and may not be set aside unless the decision is—

(A) fraudulent, arbitrary, or capricious;

(B) so grossly erroneous as to necessarily imply bad faith; or

(C) not supported by substantial evidence.

(c) Remand.—In an appeal by a contractor or the Federal Government from the decision of an agency board pursuant to subsection (a), the court may render an opinion and judgment and remand the case

for further action by the agency board or by the executive agency as appropriate, with direction the court considers just and proper.

* * * *

§ 7108. Payment of claims

(a) Judgments.—Any judgment against the Federal Government on a claim under this chapter [41 USC 7101 et seq.] shall be paid promptly in accordance with the procedures provided by section 1304 of title 31.

(b) Monetary awards.—Any monetary award to a contractor by an agency board shall be paid promptly in accordance with the procedures contained in subsection (a).

(c) Reimbursement.—Payments made pursuant to subsections (a) and (b) shall be reimbursed to the fund provided by section 1304 of title 31 by the agency whose appropriations were used for the contract out of available amounts or by obtaining additional appropriations for purposes of reimbursement.

* * * *

The Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-245 to -246, 2681-278 to -279, 2681-288, 2681-291 to -292 (1998), provides in relevant part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * *

AN ACT Making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1999, and for other purposes.

DEPARTMENT OF THE INTERIOR

* * * *

BUREAU OF INDIAN AFFAIRS

OPERATION OF INDIAN PROGRAMS

For expenses necessary for the operation of Indian programs, as authorized by law, including the Snyder Act of November 2, 1921 (25 U.S.C. 13), the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, the Education Amendments of 1978 (25 U.S.C. 2001-2019), and the Tribally Controlled Schools Act of 1988 (25 U.S.C. 2501 et seq.), as amended, $1,584,124,000, to remain available until September 30, 2000 except as otherwise provided herein, of which not to exceed $94,010,000 shall be for welfare assistance payments and notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $114,871,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 1999, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs, and of which not to exceed $387,365,000 for school operations costs of Bureau-funded schools and other education programs shall become available on July 1, 1999, and shall

remain available until September 30, 2000; and of which not to exceed $52,889,000 shall remain available until expended for housing improvement, road maintenance, attorney fees, litigation support, self-governance grants, the Indian Self-Determination Fund, land records improvement, the Navajo-Hopi Settlement Program: Provided, That notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, and 25 U.S.C. 2008, not to exceed $42,160,000 within and only from such amounts made available for school operations shall be available to tribes and tribal organizations for administrative cost grants associated with the operation of Bureau-funded schools: Provided further, That hereafter funds made available to tribes and tribal organizations through contracts, compact agreements, or grants, as authorized by the Indian Self-Determination Act of 1975 or grants authorized by the Indian Education Amendments of 1988 (25 U.S.C. 2001 and 2008A) shall remain available until expended by the contractor or grantee: Provided further, That hereafter, to provide funding uniformity within a Self-Governance Compact, any funds provided in this Act with availability for more than two years may be reprogrammed to two year availability but shall remain available within the Compact until expended: ….

* * * *

INDIAN HEALTH SERVICE

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles II and III of the Public Health

Service Act with respect to the Indian Health Service, $1,950,322,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 238(b) for services furnished by the Indian Health Service: Provided, That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: Provided further, That $12,000,000 shall remain available until expended, for the Indian Catastrophic Health Emergency Fund: Provided further, That $373,801,000 for contract medical care shall remain available for obligation until September 30, 2000: Provided further, That of the funds provided, up to $17,000,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act: Provided further, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: Provided further, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall remain available until expended for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, or construction of new facilities): Provided further, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care

Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 2000: Provided further, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended: Provided further, That, notwithstanding any other provision of law, of the amounts provided herein, not to exceed $203,781,000 shall be for payments to tribes and tribal organizations for contract or grant support costs associated with contracts, grants, self-governance compacts or annual funding agreements between the Indian Health Service and a tribe or tribal organization pursuant to the Indian Self-Determination Act of 1975, as amended, prior to or during fiscal year 1999: Provided further, That funds provided to the Ponca Indian Tribe of Nebraska in previous fiscal years that were retained by the tribe to carry out the programs and functions of the Indian Health Service may be used by the tribe to obtain approved clinical space to carry out the program.

* * * *

SEC. 328. Notwithstanding any other provision of law, none of the funds in this Act may be used to enter into any new or expanded self-determination contract or grant or self-governance compact pursuant to the Indian Self-Determination Act of 1975, as amended, for any activities not previously covered by such contracts, compacts or grants. Nothing in this section precludes the continuation of those specific activities for which self-determination and self-governance contracts, compacts and grants currently exist or the renewal of contracts, compacts and grants for those activities; implementation of

section 325 of Public Law 105-83 (111 Stat. 1597); or compliance with 25 U.S.C. 2005.

* * * *

The Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-148 to -149, 1501A-181 to -182, 1501A-192 (1999), provides in relevant part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the several departments, agencies, corporations and other organizational units of the Government for the fiscal year 2000, and for other purposes, namely:

* * * *

INDIAN HEALTH SERVICE

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, $2,078,967,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 238(b) for services furnished by the Indian Health Service: Provided, That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the

tribe or tribal organization without fiscal year limitation: Provided further, That $12,000,000 shall remain available until expended, for the Indian Catastrophic Health Emergency Fund: Provided further, That $395,290,000 for contract medical care shall remain available for obligation until September 30, 2001: Provided further, That of the funds provided, up to $17,000,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act: Provided further, That funds provided in this Act may be used for 1-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: Provided further, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall remain available until expended for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, or construction of new facilities): Provided further, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 2001: Provided further, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended: Provided further, That, notwithstanding any other provision of law, of the amounts provided herein, not to exceed $228,781,000 shall be for payments to tribes and tribal organizations for contract or grant support costs associated

with contracts, grants, self-governance compacts or annual funding agreements between the Indian Health Service and a tribe or tribal organization pursuant to the Indian Self-Determination Act of 1975, as amended, prior to or during fiscal year 2000, of which not to exceed $10,000,000 may be used for such costs associated with new and expanded contracts, grants, self-governance compacts or annual funding agreements: Provided further, That funds available for the Indian Health Care Improvement Fund may be used, as needed, to carry out activities typically funded under the Indian Health Facilities account.

* * * *

APPENDIX F

COMPARABLE STATUTES

1. 7 U.S.C. § 8503(a) ("Subject to the availability of appropriations to carry out this section, the Secretaries shall provide funds to support brown tree snake control, interdiction, research, and eradication efforts carried out by the Department of the Interior and the Department of Agriculture, other Federal agencies, States, territorial governments, local governments, and private sector entities. Funds may be provided through grants, contracts, reimbursable agreements, or other legal mechanisms available to the Secretaries for the transfer of Federal funds.").

2. 8 U.S.C. § 1324b(l)(2)(A) ("In order to carry out the campaign under this subsection, the Special Counsel . . . may, to the extent deemed appropriate and subject to the availability of appropriations, contract with public and private organizations for outreach activities under the campaign . . . .").

3. 10 U.S.C. § 1076a(i) ("The authority of the Secretary of Defense to enter into a contract under this section for any fiscal year is subject to the availability of appropriations for that purpose.").

4. 10 U.S.C. § 1092(b) ("Subject to the availability of appropriations for that purpose, the Secretary of Defense may enter into contracts with public or private agencies, institutions, and organizations to conduct studies and demonstration projects under subsection (a).").

5. 10 U.S.C. § 2324(e)(3)(A) ("Pursuant to the Federal Acquisition Regulation and subject to the availability of appropriations, the head of an agency awarding a covered contract (other than a contract to which paragraph (2) applies) may waive the application of the provisions of paragraphs (1)(M) and (1)(N) to that contract . . . .").

6. 10 U.S.C. § 2360(a) ("Subject to the availability of appropriations for such purpose, the Secretary of Defense may procure by contract under the authority of this section the temporary or intermittent services of students at institutions of higher learning for the purpose of providing technical support at defense research and development laboratories.").

7. 10 U.S.C. § 2780(a)(2) ("The authority of the Secretary to enter into a contract under this section for any fiscal year is subject to the availability of appropriations.").

8. 16 U.S.C. § 1863(a)(3) ("Subject to the availability of appropriations, the Secretary shall award contracts, grants and other financial assistance to United States citizens to carry out the purposes of subsection (1) . . . .").

9. 22 U.S.C. § 277d-44(c)(1) ("Notwithstanding any provision of Federal procurement law, the Commission may enter into a multiyear fee-for-services contract with the owner of a Mexican facility in order to carry out the secondary treatment requirements of sub-section (a) of this section and make payments under such contract, subject to the availability of appropriations and subject to the terms of paragraph (2).").

10. 22 U.S.C. § 1465d(b) ("The Board may carry out the purposes of section 1465a of this title by means of grants, leases, or contracts (subject to the availability of appropriations), or such other means as the Board determines will be most effective.").

11. 22 U.S.C. § 1465cc(c) ("The Board may carry out the purposes of this subchapter by means of grants, leases, or contracts (subject to the availability of appropriations), or such other means as the Board determines will be most effective.").

12. 22 U.S.C. § 2716(a)(1) ("Subject to the availability of appropriations, the Secretary of State shall enter into contracts for collection services to recover indebtedness owed by a person, other than a foreign country, to the United States which arises out of activities of the Department of State and is delinquent by more than 90 days.").

13. 22 U.S.C. § 4024(a)(4)(B) ("In the exercise of functions under this subchapter, the Secretary of State may . . . if and to the extent determined to be necessary by the Secretary of State, obtain without regard to the provisions of law governing appointments in the competitive service, by appointment or contract (subject to the availability of appropriations), the services of individuals to serve as language instructors, linguists, and other academic and training specialists (including, in the absence of suitably qualified United States citizens, qualified individuals who are not citizens of the United States) . . . .").

14. 22 U.S.C. § 4026(a) ("In order to facilitate their transition from the Service, the Secretary may provide (by contract or otherwise, subject to the availability of appropriations) professsional career counseling, advice, and placement assistance to members of the Service, and to former members of the Service who were assigned to receive counseling and assistance under this subsection before they were separated from the Service, other than those separated for cause.").

15. 22 U.S.C. § 6435a(c)(1) ("Subject to the availability of appropriations, the Commission may contract with and compensate Government agencies or persons for the conduct of activities necessary to the discharge of its functions under this subchapter."

16. 22 U.S.C. § 6435a(c)(2) ("In the case of a study requested under section 6474 of this title, the Commission may, subject to the availability of appropriations, contract with experts and shall provide the funds for such a study.").

17. 25 U.S.C. 450j(c)(1) ("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.").

18. 25 U.S.C. § 450j-1(b) ("Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.").

19. 25 U.S.C. § 450*l*(c) ("The model agreement referred to in subsection (a)(1) of this section reads as follows . . . 'Funding amount—Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2).'").

20. 25 U.S.C. § 458aaa-18(b) ("Notwithstanding any other provision of this subchapter, the provision of funds under this subchapter shall be subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe in order to make funds available to another tribe or tribal organization under this subchapter.").

21. 33 U.S.C. § 891d(a)(3)(A) ("The Secretary may not enter into a contract pursuant to this subsection unless the contract includes a provision under which the obligation of the United States to make payments under the contract for any fiscal year is subject to the availability of appropriations provided in advance for those payments . . . .").

22. 38 U.S.C. § 2021(a) ("Subject to the availability of appropriations provided for such purpose, the Secretary of Labor shall conduct, directly or

through grant or contract, such programs as the Secretary determines appropriate to provide job training, counseling, and placement services (including job readiness and literacy and skills training) to expedite the reintegration of homeless veterans into the labor force.").

23. 38 U.S.C. § 8111A(b)(1) ("[T]he Secretary, to the extent authorized by the President and subject to the availability of appropriations or reimbursements under subsection (c) of this section, may enter into contracts with private facilities for the provision during such period by such facilities of hospital care and medical services described in paragraph (2) of this subsection.").

24. 41 U.S.C. § 256(e)(2)(A) ("Pursuant to the Federal Acquisition Regulation and subject to the availability of appropriations, an executive agency, in awarding a covered contract, may waive the application of the provisions of paragraphs (1)(M) and (1)(N) to that contract . . . .").

25. 41 U.S.C. § 4304(b)(1) ("Pursuant to the Federal Acquisition Regulation and subject to the availability of appropriations, an executive agency, in awarding a covered contract, may waive the application of paragraphs (13) and (14) of subsection (a) to that contract . . . .").

26. 42 U.S.C. § 293k-2(e) ("The period during which payments are made to an entity from an award of a grant or contract under subsection (a) shall be 5 years. The provision of such payments shall be subject to annual approval by the Secretary and subject to the availability of appropriations for the fiscal year involved to make the payments.").

27. 42 U.S.C. § 295o-1(e)(1) ("Subject to paragraph (2), in the case of an award to an entity of a grant, cooperative agreement, or contract under this subchapter, the period during which payments are made to the entity under the award may not exceed 5 years. The provision of payments under the award shall be subject to annual approval by the Secretary of the payments and subject to the availability of appropriations for the fiscal year involved to make the payments.").

28. 42 U.S.C. § 296e(d)(1) ("Subject to paragraph (2), in the case of an award to an entity of a grant, cooperative agreement, or contract under this subchapter, the period during which payments are made to the entity under the award may not exceed 5 years. The provision of payments under the award shall be subject to annual approval by the Secretary of the payments and subject to the availability of appropriations for the fiscal year involved to make the payments.").

29. 42 U.S.C § 1437f(c)(2)(B) ("The contract shall further provide for the Secretary to make . . . additional adjustments in the maximum monthly rent for units under contract (subject to the availability of appropriations for contract amendments) to the extent the Secretary determines such adjustments are necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units that have resulted from the expiration of a real property tax exemption.").

30. 42 U.S.C § 1437f(c)(8)(A) ("Any contract covered by this paragraph that is renewed may be renewed for a period of up to 1 year or any

number or years, with payments subject to the availability of appropriations for any year.").

31. 42 U.S.C. § 6249(b)(4) ("A contract entered in-to under subsection (a) of this section shall include a provision that the obligation of the United States to make payments under the contract in any fiscal year is subject to the availability of appropriations.").

32. 42 U.S.C. § 12206(d)(1) ("Each Federal agency that has responsibility under subsection (c)(2) of this section for implementing this chapter may make grants or award contracts to effectuate the purposes of this section, subject to the availability of appropriations.").

33. 42 U.S.C. § 12655n(c) ("Contract authority under this division shall be subject to the availability of appropriations.").

34. 46 U.S.C. § 51317(b)(3) ("Each contract under the program . . . shall be subject to the availability of appropriations.").

35. 50 U.S.C. § 1521(n)(3)(B) (An incentives clause under this subsection shall specify that the obligation of the Government to make payment under such incentives clause is subject to the availability of appropriations for that purpose.").

36. Pub. L. No. 106-31, Title III, § 3011, May 21, 1999, 113 Stat. 93, 93-94, as amended Pub. L. No. 106-113, Div. B § 1000(a)(2) [Title V, § 585], Nov. 29, 1999, 113 Stat. 1535, 1501A-117; Pub. L. No. 106-554, § 1(a)(2) [Title III, § 310], Dec. 21, 2000, 114 Stat. 2763, 2763A-119 ("Subject to the availability of appropriations, the head of the administering agency—(i) may contract with nongovernmental organizations having expertise

in carrying out the activities described in subsection (a) for the purpose of carrying out the administrative functions of the program (other than the awarding of grants) . . . .").

37. Pub. L. No. 103-322, § 130007(b)(1), Sept. 13, 1994, 108 Stat. 2024, 2029, as amended Pub. L. No. 104-208, Div. C, Title III, § 308(g)(5)(F), (10)(F), Title VI, § 671(a)(6), Sept. 30, 1996, 110 Stat. 3009-623, 3009-625, 3009-721 ("Subject to the availability of appropriations, the Attorney General may—(1) construct or contract for the construction of 2 Immigration and Naturalization Service Processing Centers to detain criminal aliens . . . .").

38. Pub. L. No. 102-484, Div. B, Title XXVIII, § 2822(a), Oct. 23, 1992, 106 Stat. 2608 ("Subject to the availability of appropriations therefor, the Secretary of Defense shall enter into a one-year contract with a private relocation contractor operating on a nationwide basis to test the cost-effectiveness of using national relocation contractors to administer the Homeowners Assistance Program.").

39. Pub. L. No. 102-135, § 2(a), Oct. 24, 1991, 105 Stat. 635 ("The Secretary of Commerce shall, within 30 days after the date of enactment of this Act, and subject to the availability of appropriations, contract with the National Academy of Sciences (hereinafter in this Act referred to as the 'Academy') to study—(1) means by which the Government could achieve the most accurate population count possible; and (2) consistent with the goal under paragraph (1), ways for the Government to collect other demographic and housing data.").

40. Pub. L. No. 111-281, Title III, § 307(d), Oct. 15, 2010, 124 Stat. 2927, 2928 ("The Secretary of the department in which the Coast Guard is operating may, subject to the availability of appropriations, enter into cooperative agreements, contracts, or other agreements with, or make grants to individuals and governments to carry out the purpose of this section or any agreements established under subsection (b).").

41. Pub. L. No. 105-277, Div. A, § 101(e) [Title IV, § 401], Oct. 21, 1998, 112 Stat. 2681-305, 2681-308, as amended Pub. L. No. 107-171, Title VI, § 6102(d)(5), May 13, 2002, 116 Stat. 419; Pub. L. No. 110-161, Div. F, Title IV, § 434, Dec. 26, 2007, 121 Stat. 2153; Pub. L. No. 111-8, Div. E, Title IV, § 428, Mar. 11, 2009, 123 Stat. 749 ("The Forest Service, subject to the availability of appropriations, may carry out any (or all) of the requirements of this section using private contracts.").

42. Pub. L. No. 94-329, Title IV, § 413(b), (c), June 30, 1976, 90 Stat. 761 ("Subject to the availability of appropriations therefor, the President is authorized to adopt as a contract of the United States Government, and assume any liabilities arising thereunder (in whole or in part), any contract which had been funded or approved for funding by the Agency for International Development prior to June 30, 1975 . . . .").

43. Pub. L. No. 103-236, Title V, § 573(c), Apr. 30, 1994, 108 Stat. 486 ("The Secretary of State shall, subject to the availability of appropriations, contract with appropriate individuals and organizations to carry out the purpose of the Office.").

44. Pub. L. No. 104-239, § 16(c)(3), Oct. 8, 1996, 110 Stat. 3133, 3138 ("Each contract with a shipyard under this section shall . . . be renewable, subject to the availability of appropriations, for each subsequent fiscal year through fiscal year 1998.").

45. Pub. L. No. 111-204, § 2(h)(2)(B)(iii), July 22, 2010, 124 Stat. 2228, 2228-89 ("In conducting recovery audits under this subsection, the head of an agency . . . may conduct recovery audits directly, by using other departments and agencies of the United States, or by procuring performance of recovery audits by private sector sources by contract (subject to the availability of appropriations), or by any combination thereof.").

46. Pub. L. No. 106-256, § 3(c)(2), Aug. 7, 2000, 114 Stat. 644, 646, as amended Pub. L. No. 107-206, Title I, § 206, Aug. 2, 2002, 116 Stat. 833; Pub. L. No. 107-372, Title III, § 306, Dec. 19, 2002, 116 Stat. 3096 ("In carrying out its functions under this section, the Commission . . . may enter into contracts, subject to the availability of appropriations for contracting . . . .").

47. Pub. L. No. 106-579, § 7(f)(1)(B), Dec. 28, 2000, 114 Stat. 3078, 3082, as amended Pub. L. No. 110-161, Div. H, Title I, § 1502(e), Dec. 26, 2007, 121 Stat. 2250 ("Subject to the availability of appropriations, to carry out this Act, the Chairperson or Vice Chairperson of the Commission or the Executive Director and White House Liaison may, on behalf of the Commission . . . enter into contracts, leases, and other legal agreements.").

48. Pub. L. No. 104-299, § 3(b), Oct. 11, 1996, 110 Stat. 3644 ("The Secretary of Health and Human Services shall ensure the continued funding of

grants made, or contracts or cooperative agreements entered into, under subpart I of part D of title III of the Public Health Service Act (42 U.S.C. 254b et seq.) (as such subpart existed on the day prior to the date of enactment of this Act), until the expiration of the grant period or the term of the contract or cooperative agreement. Such funding shall be continued under the same terms and conditions as were in effect on the date on which the grant, contract or cooperative agreement was awarded, subject to the availability of appropriations.").