CASE NO. 09-2281/09-2291

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SOUTHERN UTE INDIAN TRIBE,

Plaintiff-Appellant

v.

KATHLEEN SEBELIUS,
Secretary of the United States Department of Health and Human Services, et al.,

Defendants-Appellees

_____

On Appeal from the United States District Court for the District of New Mexico
The Honorable William P. Johnson, Judge
05-CV-0988

APPELLANT'S OPENING BRIEF

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PRIOR OR RELATED APPEAL

This appeal is related to 07-2274, *Southern Ute Indian Tribe v. Leavitt, et. al*.

STATEMENT OF JURISDICTION

The United States District Court for the District of New Mexico had jurisdiction over this matter pursuant to 25 U.S.C. §§ 450f(b)(3) and 450m-1(a), sections of the Indian Self-Determination and Education Assistance Act ("ISDA" or "Act"), 25 U.S.C. § 450, *et seq*. The District Court entered its final order on September 16, 2009. The notice of appeal was timely filed on November 4, 2009 in accordance with Fed. R. App. P. 4(a)(1)(B). App. 564. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court erred by requiring the Tribe to enter into a self-determination contract containing terms that violate the ISDA's funding requirements.[1]

2. Whether the District Court incorrectly established the contract start date as the date on which the Tribe began actual operation of the Southern Ute Health Clinic.[2]

[1] The Tribe raised this issue in its briefs and in oral argument. App. at 394-97, 417-21, 429-30, 448-49. The District Court discussed and decided the issue in its Second Order, App. at 461-66, and this decision was incorporated into the Final Order. App. at 562. This issue, however, has been argued throughout this case. In its first form, the issue was whether the IHS could decline the Tribe's contract because of the Tribe's refusal to include contract language that did not conform to the ISDA's model agreement. The District Court decided this issue in its First Order. The issue arose again and was essentially relitigated by the parties prior to the Second Order.

[2] The Tribe raised this issue in its briefs and in oral argument. App. at 389-94, 408-12, 422-23, 425, 450-51. The District Court discussed and decided the issue in its Second Order. App. at 457-61, 465-66. This decision led to denial of all of the Tribe's damages claims in the Final Order. App. at 562.

3. Whether the District Court exceeded its authority by dictating the terms of a document, the Annual Funding Agreement, which was not before the court.

4. Whether the District Court exceeded the limited jurisdiction conferred upon it by the ISDA when it granted a remedy in favor of the IHS and against the Tribe.

STATEMENT OF THE CASE

A. Nature of the Case

This case focuses on the congressionally-mandated procedures for the formation of self-determination contracts under the ISDA and the efforts of a federal agency to circumvent those procedures in order to insulate itself from tribal claims that may later arise during contract performance.

The Southern Ute Indian Tribe ("Tribe") appeals the District Court's Order of September 16, 2009 ("Final Order") concerning the Tribe's ISDA proposal to contract with the Indian Health Service ("IHS") to operate and manage the Southern Ute Health Clinic ("Clinic"). The District Court initially found that the Defendants'/Appellees' (collectively referred to hereinafter as "IHS") declination of the Tribe's contract proposal violated the ISDA, and the court reversed the declination (*see* June 15, 2007 Order ("First Order") App. at 319-25). The District Court's Order of October 18, 2007 ("Second Order") then erroneously mandated inclusion of a contract provision in a collateral document not before the District Court—the Annual Funding Agreement ("AFA"). App. at 462-66. The Second Order also dictated a contract start date that was inconsistent with the First Order and the ISDA. App. at 457-61, 465. The Second Order then specifically directed the parties to "negotiate" a contract with the court-mandated terms—terms that

violate the ISDA, and, which, according to the First Order, the Tribe had a right to reject. App. at 465-55. The Final Order incorporated the directives of the Second Order and required both parties to execute a self-determination contract and an AFA that contained terms that violate the requirements of the ISDA by directing both parties to agree to a contract support costs (CSC) term stating that "the Secretary currently owes the Tribe $0 in CSC funds for new or expanded PSFAs [Programs, Services, Functions, and Activities] under this AFA." App. at 481, 562.

B. Statutory Background

1. Purpose of the ISDA and guiding principles.

Congress requires federal agencies, such as the IHS, to enter into self-determination contracts with tribes, upon demand, for tribal operation and management of programs and services provided to Indians by the federal agencies, such as medical clinics on Indian reservations. 25 U.S.C. § 450f(a); *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 634 (2005) (*Cherokee III*). The vehicle for transfer of programs from federal to tribal control is the ISDA.

By enacting the ISDA, Congress sought to free tribes from federal domination and to promote tribal self-governance in the planning and implementation of federal programs provided for the benefit of Indians. 25 U.S.C. § 450. This approach marked a radical departure from the termination-era policies that preceded the ISDA, which Congress recognized had served to retard the development of self-sufficient Indian communities. *Id*. If Congress's goals had been implemented, federal agencies, such as the IHS, would have gradually disappeared, to be replaced by tribally-operated programs that were

responsive to the needs of Indian communities. *Id*. Unfortunately, there was a fundamental flaw in Congress's design, because the transfer of these federal programs would be the responsibility of the very federal agencies that would disappear if the ISDA were ever fully implemented.

The history of the ISDA, from its enactment in 1975 through the substantial amendments of 1988 and 1994, shows the unusual evolution of a statute under which Congress has repeatedly stripped IHS and other federal agencies of their discretion, *see generally* S. Rep. 100-274 100th Cong.1st Sess. (1987), largely because of Congress's conclusion that the agencies were protecting their own bureaucracies and budgets at the expense of tribal self-determination. *See id*. at 6. Entrenched agency resistance to carrying out Congress's intent led to amendments that created deadlines for the evaluation of tribal self-determination contract proposals, § 450f(a)(2), narrowly defined the grounds upon which a proposal could be declined, § 450f(a)(2), defined the precise funding amounts that must be included in a contract, 25 U.S.C. § 450j-1(a)(1)-(2), and stated the exact language that a federal agency must include in a contract, 25 U.S.C. § 450*l*(a),(c). In short, Congress placed the Secretary under the strongest possible obligation to enter into self-determination contracts utilizing procedures and containing substance set forth in minute detail by Congress, leaving the federal agencies with almost no measurable discretion, even (as *Cherokee III* reflects) at the expense of the agencies' own internal operations. *See Cherokee III*, 543 U.S. at 641-42.

2. Negotiating the formation of a self-determination contract.

When a tribe submits a self-determination contract proposal, the ISDA directs that the proposal be handled in a very precise way that leaves little room for the exercise of discretion by the IHS during negotiations. First, a federal agency must approve and award a contract within 90 days after receipt of the contract proposal, unless the proposal is subject to declination pursuant to one of five narrowly-defined grounds for declination or unless the tribal applicant voluntarily agrees to an extension of the 90-day period. § 450f(a)(2). Second, in order to decline a contract proposal, the Secretary must make "a specific finding that clearly demonstrates . . . or is supported by a controlling legal authority" that the proposal is subject to declination based on one of the five declination grounds. § 450f(a)(2)(A)-(E). However, before declining to enter into a contract, the Secretary is required to provide assistance to the tribe to overcome the Secretary's objections. § 450f(b)(2). Third, if any part of the proposal is severable from the portion that the Secretary intends to decline, then the Secretary may only partially decline the contract proposal and must enter into that part of the contract that is not lawfully subject to one of the five grounds for declination. § 450f(a)(4).

3. Calculating the "Secretarial amount".

Similarly, Congress has also precisely defined how contract funding amounts are to be determined. The federal agency is required to pay the tribe the same amount the federal agency would have otherwise expended to administer those programs or services for which the Tribe is proposing to assume responsibility. § 450j-1(a)(1); *Cherokee Nation of Oklahoma v. Thompson*, 311 F.3d 1054, 1056 (10th Cir. 2002) (*Cherokee I*),

overruled on other grounds by Cherokee III, 543 U.S. 631. This funding amount is often called either the "Secretarial amount" or the "106(a)(1) amount."

4. Calculating contract support costs.

Congress recognized that, due to the structure of the executive branch of government, there are some costs involved in the operation of a federal program that are not directly borne by the agency, such as the costs of personnel administration. § 450j-1(a)(2),(3). If a self-determination contract provided funding only for the Secretarial amount, tribes would be in the position of having to divert direct services funds to cover such administrative costs. Consequently, in addition to the Secretarial amount, "the ISDA [also] directs the Secretary to provide contract support costs (CSC) to cover the direct and indirect expenses associated with operating the programs." *Cherokee I*, 311 F.3d at 1056. The ISDA explicitly requires inclusion of CSC in a self-determination contract. Section 450j-1(a)(2) provides: "There shall be added to [the Secretarial amount] contract support costs." Inclusion of CSC in a self-determination contract and payment of those amounts ensures that tribes "do not suffer a reduction in funding for those programs simply because they assume direct operation of them," *Cherokee I*, 311 F.3d at 1055.[3]

[3] A survey of the relevant case law reveals that the IHS has repeatedly attempted to wrongfully limit its obligations to pay CSC. *See, e.g.*, *Cherokee III*, 543 U.S. 631; and *Shoshone-Bannock Tribes of Fort Hall Reservation v. Leavitt*, 408 F. Supp. 2d 1073 (D. Or. 2005). The Bureau of Indian Affairs has engaged in similar conduct. *See, e.g.*, *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996), and *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997).

The Act specifies the level of CSC required to be included in a self-determination contract. CSC "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 . . . ." § 450j-1(a)(2); *see also* § 450j-1(a)(3) (further defining the requisite level of CSC funding).

5. "Availability of appropriations" limitation

The Act explicitly states that the actual payment of funds to a self-determination contractor "is subject to the availability of appropriations." § 450j-1(b). The result of this clause is that the IHS does not have to pay CSC to a Tribe if Congress has not appropriated sufficient money. However, if Congress has not made a CSC appropriation, the tribe is placed in a queue so that the Tribe can be paid if funding becomes available, such as when Congress appropriates additional funding. In those cases, the tribes in the queue are paid in accordance with their CSC needs as reflected in their AFAs. By limiting the discretion of the Secretary through ISDA provisions that direct that the full amount of funding that a tribe requires be calculated under the ISDA, by repeating that amount in all contract documents, and then including the "availability of appropriations" language, Congress, alone – and not the IHS – decided that CSC would be included in the AFA, the amount of CSC to be included, and then, through the appropriations process, whether the agency would be excused from paying the full contract requirement at the performance stage.

6. The self-determination contract "model agreement".

As a further means of addressing agency misconduct in the implementation of the ISDA, Congress standardized self-determination contracts through a mechanism known as the "model agreement". "The ISDA requires that every self-determination contract incorporate the terms of a model agreement, which is provided [in the Act]," or such other terms as are agreed to by both parties. *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075, 1082 (Fed. Cir. 2003) (*Cherokee II*), *aff'd*, *Cherokee III*, 543 U.S. 631; *see also* § 450*l*(a) ("Each self-determination contract … shall contain . . . the provisions of the model agreement . . . , and contain such other provisions as are agreed to by the parties."). Consequently, the IHS cannot unilaterally force the inclusion of language in a self-determination contract that is not a part of the model agreement. The model agreement reiterates that funding is subject to the availability of appropriations, 25 U.S.C. § 450*l*(c) (model agreement § 1(b)(4)); *Cherokee I*, 311 F.3d at 1057; and references the AFA, specifically requiring that the AFA shall include the funding amounts (the Secretarial amount and contract support costs) calculated pursuant to § 450j-1(a). § 450*l*(c) (model agreement § 1(b)(4), 1(c), 1(f)(2)).

7. The "annual funding agreement".

The AFA is subject to annual negotiation after execution of the self-determination contract. It is incorporated into the contract and specifies the exact amount of funding to which a tribe is entitled in a particular year. 25 U.S.C. § 450*l*(c) (model agreement § 1(c)(2), 1(f)(2)). The model agreement states that the AFA must include language specifying the CSC amount and that the amount of CSC stated in the AFA "shall not be

less than the applicable amount determined pursuant to section 106(a) [25 U.S.C. § 450j-1(a)(2)]." § 450*l*(c) (model agreement § 1(b)(4)). However, Congress recognized that once performance of a self-determination contract begins, the amount stated in the AFA is conditional and, although the AFA must specify the full amount of CSC, depending upon the availability of appropriations, a tribe may or may not be paid that full amount of funding specified in the AFA. *Id*.

According to the IHS's own policy, "the AFA shall set out the information required by § 1(f)(2) of the Model Agreement and any other provisions to which the parties agree." DOI/HHS Internal Agency Procedures Workgroup, Department of Interior and Department of Health and Human Services, *Internal Agency Procedures Handbook for Non-Construction Contracting under Title I of the Indian Self-Determination and Education Assistance Act* 5-12 (1999) [hereinafter IAPH].[4] This policy prohibits the IHS from unilaterally adding AFA provisions that contradict the ISDA or the model agreement, or which are not agreed to by both parties, including changes to the CSC funding amount, which must be included in the AFA and which must state the full amount of CSC funding calculated pursuant to § 106(a)(2) [§ 450j-1(a)(2)].

8. Remedies for federal violation of the ISDA.

Congress amended the ISDA to include additional remedies to enable tribes to ensure federal agency compliance with these narrowly crafted rules. Congress gave the United States district courts jurisdiction to hear tribal claims against the Secretary for

[4] *Available at* http://www.ihs.gov/PublicInfo/Publications/IHSManual/Part6/Part%206_Chapter%201/pageone.htm.

secretarial actions taken contrary to the ISDA, and power to provide remedies against the Secretary, including various forms of equitable relief. However, the district courts' equity jurisdiction was defined as including only

> injunctive relief against any action by an officer of the United States or any agency thereof contrary to this Act 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 Act or regulations promulgated thereunder (including immediate injunctive relief to reverse a declination finding under section 102(a)(2) [25 U.S.C. § 450f(a)(2)] or to compel the Secretary to award and fund an approved self-determination contract).

§ 450m-1(a). This amendment provided tribes with remedies to be used against federal agencies that had shown a repeated willingness to disregard the intent and instruction of the ISDA.

C. Factual Background

The Southern Ute Health Clinic provides primary health care to the Tribe's members and other local Indians on the Southern Ute Indian Reservation. Until recently, the Clinic was an IHS facility. When the Tribe decided to utilize the ISDA to assume responsibility for the Clinic, the Tribe submitted a proposed self-determination contract application pursuant to § 450f(a) for the management and operation of the Clinic. App. at 55-102. The Tribe submitted its initial proposal on January 25, 2005.

The IHS had 90 days to review and accept or decline the contract proposal in whole or in part. § 450f(a)(2). During the IHS's initial 90-day review period, the Tribe received only two communications from IHS. App. at 103-106, 115. The first requested that the Tribe clarify its contract proposal, which the Tribe promptly did. App. at 107-

114. The second asked the Tribe to voluntarily extend the 90-day review period, which the Tribe also did. App. at 115, 116-17, 118-21, 122-123.

Four months after the contract proposal was submitted, the Tribe and the IHS met for the first time to discuss the proposal. App. at 125-28. Although the IHS had a duty to review and identify declination issues within the first 90-day period, during the initial discussion it became clear that the IHS had still not reviewed the proposal. App. at 125-26. After that meeting, the IHS stated that no declination issues existed, App. at 126, but nonetheless requested one additional extension. The Tribe granted the request based on the IHS's representation that no declination issues existed. App. at 129.

After a second meeting, the IHS informed the Tribe of a new internal IHS policy, issued immediately following publication of the *Cherokee III* decision in March 2005, pursuant to which the IHS required that all new self-determination contracts include a statement that the IHS would not pay, or promise to pay, any CSC for the duration of the contract. App. at 145-48, 191-93. The new CSC-waiver policy, stated in a memorandum from the IHS Director, appeared to be an effort to insulate the IHS from *Cherokee*-type Contract Disputes Act damage claims. The IHS then informed the Tribe of its intent to decline the Tribe's entire contract proposal if the Tribe refused to include this additional language in its self-determination contract. App. at 127, 149. The Tribe responded that declining the contract proposal for refusing to include the new CSC-waiver language would violate the ISDA's command to award a verbatim mandatory contract utilizing the model agreement in the ISDA. App. at 150-54; *see also* § 450j-1(a)(2)-(3) (establishing a statutory duty to provide CSC); *and see* § 450*l*(a) ("Each self-determination contract …

shall contain . . . the provisions of the model agreement . . . , and contain such other provisions as are agreed to by the parties.").

In July 2005, the Tribe submitted a final revised contract proposal stating a contract start date of October 1, 2005 and budget proposals, including specific Secretarial and CSC amounts, premised on that effective date. App. at 156-90. At the parties' final negotiation meeting, the IHS acknowledged that the only outstanding issue was the Tribe's refusal to add the new CSC-waiver language to its contract. App. at 126-27. The Tribe stated that it would waive neither its statutory right to a self-determination contract containing only the model agreement provisions, nor its right to CSC funding subject only to the availability of appropriations, and thus would not agree to include the HIS's proposed CSC-waiver language. App. at 127, 130-34, 194-95; *see also* § 450j-1(a)(2)-(3) (establishing a statutory duty to provide CSC); *and see* § 450*l*(a) ("Each self-determination contract … shall contain . . . the provisions of the model agreement . . . , and contain such other provisions as are agreed to by the parties.").

On August 15, 2005, the IHS declined the Tribe's entire self-determination contract proposal (despite the fact that there was no dispute as to the Secretarial amount and a partial declination of the Tribe's CSC proposal would have been the most appropriate course of action, pursuant to § 450f(a)(4)), citing as grounds the Tribe's rejection of the IHS's CSC-waiver language. App. at 200-04. This lawsuit followed.

D. Nature of Proceedings and Disposition Below

On September 15, 2005, the Tribe filed a complaint in the United States District Court for the District of New Mexico seeking, *inter alia*, immediate injunctive relief

pursuant to § 450m-1(a) to reverse the IHS's declination of the Tribe's self-determination contract proposal. App. at 12, 26. The IHS subsequently moved for summary judgment. App. at 212, 255. The District Court suggested consolidation of the motion for preliminary injunction with the merits of the case, and the parties agreed. App. at 293, 294, 301, 307. The District Court accordingly treated the parties' motions as cross-motions for summary judgment. App. at 316.

On June 15, 2007, the District Court issued its First Order, finding that the IHS wrongfully declined the Tribe's contract. App. at 307, 319-26. The District Court concluded that the IHS could not decline a contract based upon the Tribe's refusal to include the IHS's new CSC-waiver language because the refusal did not fall within the scope of one of the five declination criteria allowed by the ISDA. *Id.*; *see also* § 450f(a)(2)(A)-(E). The District Court held that the IHS did not have discretion to condition approval of the Tribe's self-determination contract on inclusion of contract language that differed from the language of the ISDA model agreement, nor did the IHS have discretion to condition approval on the Tribe's waiver of its statutory right to the inclusion of CSC funding in the form specifically provided by the ISDA. App. at 325. The District Court issued summary judgment and injunctive relief in the Tribe's favor, reversing the declination, and directing the Tribe to prepare a form of order for injunctive relief, submit it to the IHS for approval, and then submit it to the District Court. *Id.*

In preparing the form of order, the parties reached an impasse over two issues: the contract language relating to CSC and the contract start date. Contrary to the First Order and the rights established by § 450j-1(a)(2), § 450*l*(c) (model agreement § 1(b)(4)) and

25 C.F.R. § 900.19, the IHS continued to insist that the contract include language limiting the Tribe's right to CSC. App. at 345-47. With regard to the contract start date, instead of agreeing that the District Court's reversal of the declination had the effect of approving the original contract proposal by operation of law, including the Tribe's proposed start date (i.e. October 1, 2005), the IHS insisted that the start date should be the date on which the Tribe would actually begin operation of the Clinic. App. at 349-52. Unable to reach agreement on the form of the order, the Tribe filed a Motion to Set Presentment Hearing and the IHS filed a Motion for Clarification. App. at 327, 385.

On October 18, 2007, after a hearing on the matter, App. at 400-55, the District Court issued its Second Order, favoring the IHS and essentially reversing important elements of the First Order. App. at 456-66. The District Court directed that the Tribe include the following CSC language in the AFA:

> [IHS] currently owe[s] the Tribe $0 in CSC (on the basis that the Tribe has not incurred any costs, and because no funds are available to be dispersed [sic]); that the CSC amount reflecting [the Tribe's] required CSC will be calculated; but in view of the congressional earmark for CSC, the amount will be placed on the shortfall list for payment if and when funding becomes available.

App. at 461, 466. Furthermore, the District Court concluded that the appropriate contract start date would be the date on which the Tribe began operating the Clinic. App. at 461, 465.

The Second Order then directed the parties to: (1) "meet and resume negotiations for entering into a self-determination contract which includes a start date of the date the Tribe undertakes operation of the . . . Clinic," (2) "include Defendants' version of the

annual funding agreement language," which entitled the Tribe to $0 in current CSC funding, and (3) within six weeks of the filing of the Order, "complete negotiations and submit a form of order for injunctive relief to the Court." App. at 465-466.

By dictating the two terms of the contract on which the parties had previously disagreed, the Second Order did not leave any unresolved issues for the parties to "negotiate," thus putting the Tribe in the untenable position of either accepting a contract with terms that violated the ISDA or facing contempt sanctions for refusing to accept those terms. Accordingly, the Tribe filed a Notice of Appeal and Motion to Stay Pending Appeal. This Court directed the parties to brief the issue of whether the Court had jurisdiction, and then reserved decision and directed the parties to brief the merits. The parties submitted oral argument, as well as briefs on the merits, and in May 2009, this Court, while not addressing the merits, found that it did not have jurisdiction, and dismissed the appeal.

The parties returned to the District Court, and entered into a contract and AFA complying with the terms ordered by the District Court in its Second Order. App. at 467, 470-79, 480-560. The new contract gave responsibility to the Tribe to assume management of the Clinic as of October 1, 2009 and preserved the parties' right to appeal. App. at 470-71. At present, the Tribe is responsible for management of the Southern Ute Health Clinic, and the Tribe and IHS are parties to a self-determination contract. However, the issues that initially led to appeal (whether the District Court could direct that the AFA include language providing for $0 in current AFA funding) have not yet been resolved, and the parties have agreed that the terms of the contract are subject to

appeal. *Id.* The Final Order, which incorporated the AFA, directed the parties to agree to a CSC term stating that "the Secretary currently owes the Tribe $0 in CSC funds for new or expanded PSFAs under this AFA." App. at 481, 562. Accordingly, the Tribe filed the instant appeal. App. at 564.

STANDARD OF REVIEW

Because the issues in this case are purely legal, the de novo standard of review applies. *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002).

SUMMARY OF THE ARGUMENT

The Tribe appeals the District Court's decision in its Second Order, which was incorporated into the Final Order, regarding CSC language and the contract start date. The District Court required use of the IHS's proposed CSC-limiting contract language, which violates the clear and unambiguous statutory funding requirements and contract formation language of the ISDA, subverts congressional intent and purpose, and violates the IHS's own policies. The District Court's reversal of the contract declination had the effect of approving the Tribe's original contract proposal, including the contract start date, by operation of law, therefore requiring that the contract start date should be the date stated in the Tribe's contract proposal. In addition, issuance of an order granting relief to the IHS exceeded the limited equity jurisdiction granted to the District Court by § 450m-1(a). By dictating the terms of the AFA, a collateral document not before the court, the District Court exceeded its authority by considering issues outside the scope of whether IHS's declination of the Tribe's contract was unlawful.

ARGUMENT

A. THE IHS'S POSITION, AS ADOPTED BY THE DISTRICT COURT, MISINTERPRETS THE ISDA AND REQUIRES THE TRIBE TO ACCEPT CONTRACT TERMS THAT VIOLATE THE ISDA.

In the First Order, the District Court stated:

> only the legislative branch and not the executive branch of government may make ultimate decisions regarding public funds. The IHS may not unilaterally amend the [ISDA] by altering the declination [or contract] criteria in the [ISDA], *eliminating an element of the funding scheme for Self-Determination contracts, or developing new contract language that contradicts the statutory model language developed by Congress.*

App. at 323 (emphasis supplied). One element of that funding scheme is CSC funding, which, along with the Secretarial amount, shall be added in full to an approved contract, § 450j-1(g), with payment thereafter subject only to the "availability of appropriations." §§ 450j-1(b), 450*l*(c) (model agreement § 1(b)(4)). In an about-face, the Second Order authorized the IHS's unilateral amendment of the ISDA by requiring new language in the AFA, which eliminates an element of the ISDA's funding scheme (CSC) and contradicts the model agreement. App. at 461, 464, 466. Specifically, the Second Order required that the Tribe's current CSC funding amount be stated as $0 in the AFA and that the Tribe would be placed on the IHS's shortfall list and eventually paid CSC "if and when" funding became available. *Id.* This turned the ISDA's statutory funding scheme upside down.

1. The IHS's CSC language violates the ISDA's mandatory language for self-determination contract funding provisions.

The terms proffered by the IHS and required by the District Court limit the Tribe's entitlement to CSC and contradict the ISDA's plain language. By requiring the

Tribe to insert $0 in the AFA as the level of current CSC funding, the IHS convinced the District Court to countermand the ISDA's provisions that: (1) require the parties to add CSC to the amount of the contract, § 450j-1(a)(2) ("[t]here shall be added . . . contract support costs . . . "); (2) require that CSC "shall consist of an amount for the reasonable costs for activities which must be carried on by the [Tribe]," *id.*; (3) require that "[u]pon 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 [25 U.S.C. § 450j-1(a)]," § 450j-1(g); and (4) require that the AFA state the full amount of CSC, § 450*l*(c) (model agreement § 1(b)(4)). The provisions in the ISDA regarding CSC and "the full amount of funds to which the contractor are entitled" are clear and unambiguous—self-determination contracts shall include CSC—and, as such, "the plain meaning of the statute controls," *Manning v. Astrue*, 510 F.3d 1246, 1249 (10th Cir. 2007) (internal citation omitted). Accordingly, the IHS's interpretation of the ISDA, as adopted by the District Court, is erroneous.[5]

[5] This "plain meaning" rule of statutory construction is bolstered by the Indian canon of construction, which the ISDA incorporates and which this Court has expressly and repeatedly applied in interpreting the ISDA. *See* § 450*l*(c) (model agreement § 1(a)(2)) ("Each provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor [*i.e.*, the Tribe] to transfer the funding . . . from the Federal Government to the Contractor."); *see also N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1190 (10th Cir. 2002) ("[a]mbiguities in federal law have been construed generously in order to comport with . . . tribal notions of sovereignty and with the federal policy of encouraging tribal independence.") (Internal citation omitted).

2. The IHS's CSC language undermines the explicit scheme devised by Congress for the formation of contracts, as well as for the resolution of contract disputes during performance.

The IHS argued, and the District Court agreed, that current CSC should be set at $0 in the AFA, because to do otherwise would force the IHS to enter into a contract that it would immediately have to breach, as a consequence (according to the IHS) of Congress not appropriating sufficient funds to pay CSC. App. at 464. That interpretation again turns the statutory scheme upside down. Under the Act, the full statutory amount, including CSC, is added to the contract and payment is excused only if appropriations are subsequently found not to be legally available. Thus, the ISDA provides that "[n]otwithstanding any other provision in this Act, the provision of funds under this Act is subject to the availability of appropriations . . . ." § 450j-1(b). "The language of § 450j-1(b) is clear and unambiguous[.]" *Babbitt v. Oglala Sioux Tribal Pub. Safety Dept.*, 194 F.3d 1374, 1378 (Fed. Cir. 1999). This precise scheme is repeated in the model agreement at § 1(b)(4), which commands that the AFA specify CSC as "not less than the applicable amount [from § 450j-1]," (which here would not be $0) and also stating that the Secretary is to "make available" this amount in full, "[s]ubject to the availability of appropriations."

The IHS's insistence that the availability issue be addressed first—at the contract formation stage—through an IHS-mandated, prospective agreement that CSC funding is unavailable and the amount of current CSC in the AFA then specified accordingly as $0, is precisely the opposite of what the Act commands.

3. The District Court's adoption of the IHS's approach ignores Congressional intent to constrain agency discretion.

IHS's approach also permits the agency to make a self-serving judgment about its obligation to pay some or all of a tribe's statutorily-mandated funding requirement—here, according to IHS, nothing—and then to award a contract restating that self-serving sum, thereby avoiding any future contest about whether IHS's legal judgment is, in fact, correct. This, too, is contrary to Congress's scheme, in which Congress anticipated—and expressly directed—that a contract would state the full amounts required by the Act (*see* discussion *infra* section B (3), (4), and (7)), so that any subsequent disagreement over the "availability of appropriations" to pay that contract would be resolved in a contested proceeding brought under the Contract Disputes Act (CDA), all as contemplated in the ISDA's remedial provisions, *see* §§ 450m-1(a), (c).

That scheme is critical to the integrity of the ISDA, for, as the Supreme Court demonstrated in *Cherokee III*, IHS's self-serving judgments about the "availability of [its] appropriations" to pay the amounts Congress instructed the agency to pay have to date been universally proven wrong. 543 U.S. at 643-645 (reversing IHS's conclusion that its appropriations over a four-year period were not legally available to pay two tribal contractors); *Shoshone-Bannock Tribes v. Leavitt*, 408 F. Supp. 2d 1073, 1081 (D. Or. 2005) (opinion subsequently withdrawn following settlement); *Application for Attorney Fees of Seldovia Village Tribe*, IBCA No. 3862F-97, 2005 WL 1805664 (I.B.C.A. July 26, 2005). As other courts have observed, if Congress intended to accomplish anything through its various ISDA amendments, it was to eliminate entirely any such agency

discretion over all contract funding matters—especially those involving CSC. *Ramah Navajo Sch. Bd.*, 87 F.3d at 1344-1345; *see* discussion *infra* n.3.

4. The alternative CSC language is improper because the language does not comply with the ISDA's requirements for contract formation.

In section 450*l*(a), the ISDA provides two options, during contract formation, for the content of a self-determination contract: the parties must either use the exact terms of the model agreement or *both* parties must agree to additional terms. The IHS's own rules explicitly protect tribes from being forced to accept unfavorable or objectionable terms that are not included in the ISDA's model agreement. IAPH, *supra*, at 5-12. Additionally, IHS is prohibited from forcing non-conforming language into the AFA without the consent of the Tribe. § 450*l*(c) (model agreement § 1(f)(2)(A)(ii)). The IHS's additional CSC language cannot be added to a self-determination contract or accompanying AFA unless the language complies with the terms of the model agreement or the Tribe agrees to its inclusion.

a. The additional language unilaterally modifies the contract terms.

Language that deviates from the model agreement can be included in a self-determination contract if, and only if, both parties agree to its inclusion. § 450*l*(a)(2); IAPH, *supra*, at 5-12. The Tribe consistently and repeatedly objected to the IHS's attempts to include language limiting the agency's statutory CSC obligations. App. at 127, 130, 131, 133, 134, 152, 194-95. Nevertheless, the Second Order requires inclusion of contract language incorporating the very limitation that the Tribe opposed. App. at 465-66. Mandating that the IHS's CSC-limiting language be included in the Tribe's

contract therefore defies the express intent of Congress in the ISDA, § 450*l*(a), the agency's own rules (i.e. that the AFA shall only contain provisions from the model agreement or that are agreed to by the parties), IAPH, *supra*, at 5-12, and basic premises of contract law requiring both parties to agree to contract modifications. *See In re Woodcock*, 45 F.3d 363, 367 (10th Cir. 1995); *Central Coast Const. v. Lincoln-Way Corp.*, 404 F.2d 1039, 1045 (10th Cir. 1968).

Indeed, beyond simply including language that the Tribe consistently opposed, the addition of the IHS's language expressly negated the parties' prior agreement. During negotiation of the Tribe's contract, both parties had agreed upon all terms of the contract, including the funding amounts for the contract. *See infra* Factual Background. The only issue outstanding at the conclusion of those negotiations was the disagreement over the inclusion of the IHS's proposed CSC language. *Id.* Therefore, beyond violating the ISDA by requiring contract terms on which the parties did not agree, the addition of the IHS's CSC-waiver language to the AFA, stating that the Tribe is entitled to $0 in current CSC funds, ignores and negates the parties' prior agreement on funding amounts, including CSC funding.

b. The alternative CSC language added to the AFA is not consistent with the ISDA's model agreement "time and method of payment" provision.

As discussed above, the IHS's language ignores the ISDA's funding provisions, § 450j-1(g) and § 450*l*(c) (model agreement § 1(b)(4)), which command that the AFA specify the <u>full</u> Secretarial and CSC amounts, with payment of that contracted amount subject to the availability of appropriations. IHS's language violates those funding

provisions, which are incorporated into the model agreement in a manner which eliminates current CSC funding. Consequently, the alternative CSC language is inconsistent with the model agreement and violates the ISDA.

In addition, however, the language cannot be included in the AFA because it contradicts the model agreement's description of what is to be included in the AFA. The model agreement requires that the AFA "shall only contain . . . terms that identify . . . the funds to be provided, and the time and method of payment[.]" 450*l*(c) (model agreement § 1(f)(2)(A)(i)). The IHS's language does not "identify" "the funds to be provided"; that is, those current CSC funds calculated pursuant to § 450j-1(a)(2) of the ISDA. Rather, it identifies the funds only as $0. Nor does it identify the "time and method of payment." The implied "method of payment," here was that the Tribe not be paid at all and instead be placed on the IHS's shortfall list, which does not correlate with the obvious meaning of the term "method of payment."

The meaning of "time and method of payment" is plain from the "payment" provision of the model agreement, which in subsection (B), is titled "[q]uarterly, semiannual, lump-sum, and other methods of payment." § 450*l*(c) (model agreement § 1(b)(6)(B)). This provision does not include or even anticipate that "placement on the shortfall list" could be considered as an additional, unstated "method of payment." *Id.* The IHS's proposed language improperly expands the unambiguous meaning of "the funds to be provided, and the time and method of payment" to include a provision stating that the Tribe is not to be currently paid any CSC (but may perhaps be paid at some point in the future), rather than following the plain meaning of these terms, which includes

whether the Tribe will be paid annually or quarterly, by check or direct deposit. The IHS's proposed "method of payment" does not comply with the ISDA's model agreement and cannot be justified.

B. THE START DATE OF THE CONTRACT SHOULD BE THE DATE THAT THE CONTRACT WOULD HAVE BEGUN IF NOT FOR THE IHS'S ILLEGAL DECLINATION.

Upon the District Court's reversal of the IHS's wrongful declination, the Tribe's self-determination contract was approved by operation of law. *Crownpoint Inst. of Tech. v. Norton*, Civ. No. 04-531 JP/DJS, Findings of Fact and Conclusions of Law, 25 (D.N.M. Sept. 19, 2005)); *Crownpoint Inst. of Tech. v. Norton*, Civ. No. 04-531 JP/DJS, Declaratory Judgment and Writ of Mandamus, 1 (D.N.M. Sept. 19, 2005)); *accord Cheyenne River Sioux Tribe v. Kempthorne*, 496 F. Supp. 2d 1059, 1068 (D.S.D. 2007) ("[g]iven the Secretary's failure to comply with the declination statutes and regulations . . . the contract and successor AFA . . . are deemed approved by operation of law."). Accordingly, the contract start date is the date designated in the Tribe's amended contract proposal (October 1, 2005), upon which the parties agreed during contract negotiations, and not the date on which the Tribe began operation of the Clinic.[6]

[6] This does not mean that the Tribe is claiming damages in the form of operational or other expenses that it never incurred. Although the Tribe may have other damages arising from the unlawful declination of its self-determination contract proposal, it agrees, and indeed stated to the District Court, that a claim for operational expenses during a period when it was not actually operating the Clinic would be "moron[ic]". App. at 450.

1. To Require the Contract Start Date be the Date the Tribe Began Operation of the Clinic Undermines the Intent and Policy of the ISDA.

As this Court has noted, "[t]he Act was intended to assure maximum participation by tribes in the planning and administration of federal services, programs, and activities for Indian communities." *Ramah Navajo Chapter*, 112 F.3d at 1456-57; *see also Babbitt*, 194 F.3d at 1376; 25 U.S.C. § 450a; 25 C.F.R. § 900.3(b)(7). Denying the Tribe's lawful right to a contract beginning on October 1, 2005, therefore frustrates the "basic idea behind the ISDA" by subjecting tribal contractors to potentially reduced funding and privileges, as well as to additional rounds of review, negotiation, and declination, solely because the IHS illegally declined an initial contract proposal. *Cherokee I*, 311 F.3d at 1055. This result undermines the intent of Congress when it approved and amended the ISDA with the goal of developing procedures that encourage and streamline self-determination contracting by removing agency blockades. *See Pascua Yaqui Tribe of Arizona*, Docket No. A-99-20, 2, 6 (HHS Appeals Bd. Jan. 12, 1999) ("The contrary interpretation proposed by IHS on the other hand would be inherently unfair to tribes that had exercised their appeal rights under the ISDA . . . The appeals process authorized by Congress for self-determination contracts would be undercut if an appellant could not receive an approval of its contract proposal that relates back to the declination that is under appeal. If appellant prevails on the merits of its proposed contract, it should therefore be entitled to the same contract as if IHS had properly approved its contract in the first instance.") The result promoted in this case by the IHS rewards the agency for its unlawful acts, punishes tribes for seeking to enforce their rights, and creates an

incentive for additional improper agency treatment of tribes of the kind that Congress specifically sought to curtail in the ISDA's 1994 amendment. Pub. L. 103-413, 108 Stat. 4250 (1994).

2. The Court's Contract Start Date Decision Eliminated the Tribe's Ability to Present Evidence of Damages.

But for the IHS's insistence on CSC contract language that violated the ISDA, App. at 325, the Tribe would have entered a self-determination contract as it proposed on October 1, 2005. Without an October 2005 start date, the Tribe is prevented from collecting other sums, which could include interest on the § 450j-1(a) amounts it would have been paid to operate the Clinic and collections from third parties (*see* 25 U.S.C. § 1621f(a)) that it would have received since October 1, 2005, among other funds. An October 2005 start date would ensure that the IHS's illegal declination of the Tribe's proposal does not wrongfully eliminate the Tribe's rights to pursue damage claims to which it should have been entitled. The District Court was apparently convinced that the Tribe's only concern with the contract start date was preserving a "windfall" damages claim. The IHS and the District Court, without any specific evidence requested or presented on damages, clearly overstated the potential for such claims.

The Tribe maintains that, rather than dismiss its arguments on the merits[7] based on speculative concerns over damages, the proper forum to determine whether the Tribe may be entitled to any damages flowing from the IHS's unlawful declination of its contract proposal would be a subsequent trial on damages before the District Court.

[7] In the Final Order, the District Court denied the Tribe's request for damages. App. at 562.

Such a trial would allow the Tribe, like any other aggrieved plaintiff, to pursue such damages as it can show resulted from the IHS's unlawful declination as is clearly contemplated by the ISDA. § 450m-1(a) ("the district courts may order appropriate relief including money damages . . . ."); *see Ramah Navajo Chapter*, 112 F.3d at 1464 ("nothing in the Act entitles a tribe to a windfall . . . ."). Indeed, allowing the IHS to illegally decline ISDA contract proposals without any redress for the tribal contractor, effectively grants the IHS a "windfall" by excusing the agency from fulfilling its statutory obligations.

C. THE DISTRICT COURT EXCEEDED ITS AUTHORITY BY DICTATING THE TERMS OF THE AFA.

The Tribe began this lawsuit to obtain review of the IHS's unlawful declination of the Tribe's contract proposal. App. at 12. In reviewing the Tribe's challenge to the declination, the District Court had authority pursuant to § 450m-1(a) only to reverse the declination, enter mandamus directing the IHS to award and fund the contract, and award money damages to the Tribe. The District Court's review authority pursuant to § 450m-1(a) was narrowly limited to assessing the legality of the declination and reversing the effects of an unlawful declination.

The District Court, however, went further, exceeding its statutory authority by reaching into the AFA to dictate its substance. The AFA is a separate document that identifies annual funding levels and related matters. *See* § 450*l*(c) (model agreement § 1(c)(2), 1(f)(2)(B)). The AFA must contain the information required by the model agreement and only such other terms to which both parties agree. *Id.*; IAPH, *supra* at 5-

12. The IHS demanded AFA terms that contradict the model agreement, that is, $0 in current CSC funding, which the Tribe rejected. However, the present litigation was limited to a very narrow review of contract formation issues, only challenging the IHS's illegal declination of the Tribe's self-determination contract proposal. The Second Order exceeded the court's authority by extending its review to a part of the relationship between the parties—the language of the AFA—not at issue in this case.

D. THE DISTRICT COURT EXCEEDED THE LIMITED EQUITY JURISDICTION CONFERRED BY THE ISDA BY GRANTING RELIEF IN FAVOR OF THE IHS AND AGAINST THE TRIBE.

The district courts are courts of limited jurisdiction and possess only such power as is authorized by the Constitution and statute. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Consequently, it is essential to determine the scope of a court's equity powers with regard to claims that are created by statute to ascertain whether those powers are general and unlimited or restricted.

This analysis in the Tenth Circuit begins with the question of whether a statute has granted the district courts general equity jurisdiction. *United States v. RX Depot*, 438 F. 3d 1052 (10th Cir. 2006). Congress makes such a statutory grant through the use of language empowering the courts to "restrain violations" of a statute or by authorizing "any other order" necessary to enforce the statute. *Id.* at 1055, 1058. If a statute contains this language conveying general equity jurisdiction, then the district courts may be able to "utilize any equitable remedy [necessary] to further the purposes of the statute . . . ." *Id.* at 1055, 1057, 1059.

Locating this language in a statute does not end the analysis. Even where a statute contains language making a grant of general equity jurisdiction, a statute may have "particular characteristics [that] preclude application" of some forms of equitable relief. *Id.* at 1057. The Tenth Circuit has held that "a clear legislative command or [a] necessary and inescapable inference restricting the remedies available" would limit the district courts' authority, even where Congress had initially conveyed general equity jurisdiction. *Id.* at 1055.

In reaching the decision in *RX Depot*, the Tenth Circuit stated that a statute would be interpreted to convey "broader and more flexible" equitable powers when the statute is one providing for suits in the public interest. *RX Depot*, 438 F.3d at 1057. Similarly, the Indian canons of construction, requiring that federal statutes for the benefit of Indians must be construed in their favor, see *infra* discussion n.5, should be applied to the interpretation of § 450m-1(a), either narrowing or expanding the scope of the district courts' equity jurisdiction in whatever manner favors the interests of Indian self-determination contractors. *See Ramah Navajo Chapter*, 112 F.3d at 1461.

Applying the *RX Depot* analysis to the present case, and in light of the Indian canons of construction, it is clear that Congress did not confer general equity jurisdiction upon the district courts through § 450m-1(a). This section conveys to the district courts only the authority to grant:

> injunctive relief against any action by an officer of the United States or any agency thereof contrary to this Act 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 Act or regulations promulgated thereunder (including immediate injunctive relief to reverse a

> declination finding under section 102(a)(2) [§ 450f(a)(2)] or to compel the Secretary to award and fund an approved self- determination contract).

This section does not contain any language conferring authority to "restrain violations" or to grant "any other order" necessary to enforce the ISDA. Nothing in this provision can be seen to grant the district courts general equity jurisdiction in a dispute over self-determination contract formation.

Even if § 450m-1(a) were interpreted as conveying general equity jurisdiction, the ISDA contains language and has a legislative history that would require this court to conclude that there is "a clear legislative command or [a] necessary and inescapable inference restricting the remedies available." Examination of this language and legislative history supports the Tribe's position that the District Court was without authority to order the Tribe to enter into a contract with terms that the Tribe had consistently opposed.

First, as noted above, the equity jurisdiction granted by § 450m-1(a) is explicitly limited to forms of relief against officers, agencies, or employees of the United States to compel them to perform their duties under the ISDA, to reverse an unlawful declination, to reverse an unlawful declination or to award damages to a tribe caused by the unlawful acts of the federal agency. This clear legislative command precludes the award of relief against a tribe and in favor of the federal agency.

In addition, the District Court's authority is limited by necessary inference: the legislative history of the remedial provision of the ISDA was unquestionably designed to provide a remedy for tribes, and not for the federal agencies, in order to address

systematic violation of the ISDA by the federal agencies. The Senate report for section 450m-1(a) states:

> the amendments made by section 110 [§ 450m-1(a)] are ***necessary to give self-determination contractors viable remedies for compelling BIA and IHS compliance with the Self-Determination Act. The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs. Existing law affords such contractors no effective remedy for redressing such violations. Tribal contractors are denied access to injunctive relief to compel agency compliance with the law*** where the effect of any court order would be to require the Federal government to add funds to the plaintiff's contract. Furthermore, tribal contractors are unable to recover legal fees under the Equal Access to Justice Act even when they prevail on contract disputes in agency administrative proceedings. Tribal contractors are obliged to utilize their limited indirect cost funds to pay for legal fees rather than to cover other essential administrative costs.

S.Rep. No. 100-274, 100th Cong.1st Sess. 37 (1987) (Emphasis supplied). The legislative history also reflects that the purpose of section 450m-1(a) is to "provide[] ***parties aggrieved by federal agency violations of the Self-Determination Act*** the right to seek injunctive relief in the United States District Courts." S.Rep. No. 100-274, 100th Cong.1st Sess. 34 (1987) (Emphasis supplied). In short, the only authority that Congress intended to convey to the district courts was authority to grant injunctive relief against officers, agencies or employees of the United States, and specifically the BIA and IHS, to compel compliance with the ISDA. There is no statement in the legislative history that evidences Congressional intent to confer general equity jurisdiction to the district courts

or confer authority to enter relief against tribes who sue under § 450m-1(a).[8] In fact, just the opposite is true.

Nonetheless, the District Court in this case entered relief against the Tribe. The Second Order required the Tribe to enter into a self-determination contract and AFA that contained language mandating that the Tribe would be paid $0 in current contract support costs. App. at 461, 464, 466. The Final Order, which incorporated the AFA, directed the parties to agree to a CSC term stating that "the Secretary currently owes the Tribe $0 in CSC funds for new or expanded PSFAs under this AFA." App. at 481. Such an order was not an appropriate exercise of the highly constrained equity jurisdiction actually conveyed by Congress in § 450m-1(a) because, by requiring the Tribe to surrender its statutory right to withhold consent from any self-determination contract or AFA that did not state the full amount of CSC calculated pursuant to § 450j-1(a) and instead requiring the Tribe to enter into a contract in which it was ordered to agree to accept $0 in current CSC funding, it resulted in a remedy against the Tribe. The District Court's authority was limited to requiring IHS "officers, agencies or employees" to enter into a self-determination contract stating the CSC amounts calculated pursuant to § 450j-1(a)(2).

CONCLUSION

The ISDA's plain language dictates the result in this case. The Tribe is entitled to a contract that designates the full amount of CSC calculated in the manner directed by the mandatory procedures of the statute. This amount must be included in the AFA, without

[8] To be clear, the Tribe's position is not that the District Court was without discretion to find in favor of the United States and uphold the IHS's declination; rather, the Tribe's position is that the District Court was without authority to order relief against the Tribe.

being subject to any additional language insulating the IHS from its statutory obligations, with the sole exception of statutorily-required language stating that payment of the amount is subject to the availability of appropriations. Consequently, the Tribe is entitled to a self-determination contract and annual funding agreement stating the full amount of contract support costs due under § 450j-1(a) and deleting language from the AFA stating that IHS currently owes $0 in CSC.

Disputes regarding contract performance are simply not at issue in this case. If, after the contract has been executed, the Tribe and IHS disagree about the availability of appropriations, a claim pursuant to the Contract Disputes Act would be the appropriate mechanism to address such disputes. Neither IHS nor the District Court can short-circuit the process created by Congress in an effort to preemptively insulate IHS from such claims by forcing the addition of self-determination contract language that eliminates a tribe's rights in violation of the clear directives of the ISDA.

Therefore, for the reasons described herein, this Court must reverse the District Court's Second Order, and the Final Order.

Due to the complexity of this issue and the compelling policy considerations involved, the Tribe requests oral argument.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Section 1. Word count

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 8,766 words.

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by: /s/ Suzanne P. Singley
Legal Assistant

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I hereby certify that a copy of the foregoing APPELLANT'S OPENING BRIEF, as submitted in Digital Form is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Symnantec AntiVirus Corporate Edition version 10.1.4.4000, Virus Definition File Dated: 10/13/2010 Rev. 9, and, according to the program, is free of viruses.

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CERTIFICATE OF SERVICE

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

SOUTHERN UTE INDIAN TRIBE,

Plaintiff,

v. Civil No. 05-988 WJ/LAM

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

Defendants.

MEMORANDUM OPINION AND ORDER FOLLOWING PRESENTMENT HEARING

THIS MATTER comes before the Court following hearing and oral argument on the following two motions: Plaintiff's Motion to Set Presentment Hearing for Writ of Mandamus, filed July 2, 2007 **(Doc. 51)**, and Defendants' Motion for Clarification, filed July 25, 2007 **(Doc. 58)**. Parties have applied to the Court for resolution of certain issues which have impeded their ability to comply with the Court's previous Order granting injunctive relief to Plaintiff.

BACKGROUND

Plaintiff, Southern Ute Indian Tribe, is a federally recognized Indian tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934 (codified at 25 U.S.C. § 476). In a Memorandum, Opinion and Order entered on June 15, 2007 (Doc. 50), the Court decided the purely legal issue whether the Defendants had discretion under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 through 458bbb-2 ("ISDA"), to decline to enter into a contract with the Plaintiff Tribe ("Tribe") to assume control over and management of the programs, functions services and activities of the Southern Ute Health Center. I granted

Plaintiff's Motion for Preliminary Injunction, and denied Defendants' Motion for Summary Judgment:[1]

> Plaintiff is entitled to summary judgment on this issue and its first and second causes of action in its Complaint and is entitled to injunctive relief in accordance with 25 U.S.C. § 440m-1(a). Plaintiff is directed to prepare a form of order for injunctive relief, submit it to Defendants for approval as to form, and then submit it to the Court through the email address indicated on my web page for proposed orders. . . . If parties are unable to reach agreement as to the form of an order, Plaintiff shall file a motion for a presentment hearing.

Doc. 50 at 19.

Plaintiff requested a presentment hearing because the parties have been able to only partially agree on a form of order for injunctive relief. Specifically, parties have agreed to enter into a self-determination contract in the form of the model contract codified in 25 U.S.C. § 450l(c) without modification. However, the parties are unable to agree as to the starting date of the contract, the amount of contract support costs required to be paid under the contract, or the terminology concerning payment of contract support costs ("CSC"). Defendants request clarification as to the amount and terms of payment, which they contend are inseparable from the issue of whether Defendants were required to enter into a contract.

DISCUSSION

I. Beginning Date of Contract

Plaintiff argues that the "beginning date" or "start date" of the proposed contract should be the date that was originally proposed as a start date: October 1, 2005. Defendants urge the Court to find that the start date for the new proposed contract should be the date on which Plaintiff begins operating the Clinic. They contend that an earlier start date would result in a windfall to the Tribe because the Indian Health Service ("IHS"), and not the Tribe, was

[1] The preliminary injunction was consolidated with the merits of the case. See, Docs. 37, 38 and 39.

expending program funds to operate the Clinic from that time. Plaintiff stated that if the original start date is not used, it gets punished for filing an appeal. Plaintiff concedes, however, that it is not entitled to operational expenses and support costs it has not incurred, but claims there are other damages to which it may be entitled.[2]

Section § 450m-1(a) of the ISDA provides for injunctive relief "to compel the Secretary to award and fund an approved self-determination contract." However, the statute offers no guidance on appropriate beginning dates for declined contracts which are reversed on appeal. The cases cited by Plaintiff suggest a beginning date which mirrors the original proposed start date for the contract, but I find these cases not to be persuasive because they are categorically different from this case.

For example, in Pascua Yaqui Tribe of Arizona, Docket No. A-99-20 (HHS Appeals Bd. Jan. 12, 1999), the agency declined certain parts of a proposed self-determination contract in October 1997. At the same time, the agency approved the tribe's request for CSC, and placed the request in a "queue" or waiting list with other fiscal year 1998 program "starts" with a request date of July 21, 1997.

The issue in Pascua was whether section 328 of an appropriations bill passed by Congress in 1998 ("Section 328") prohibiting the use of fiscal year 1999 appropriations to enter into "new or expanded" self-determination contracts had an effect on the proposed self-determination contract which was declined by the agency in 1997. On the administrative level, the tribe's request for a hearing on the partial declination was dismissed on the ground that it was rendered moot by Section 328. The Appeals Board decided that Section 328 did not bar the use

[2] Such damages, as described by Plaintiff, are: pre-award and start-up costs for buying equipment and moving furniture; interest from lump sum payments; and third party reimbursements.

of fiscal year 1999 appropriations to fund the contract. It concluded that "any contract approved on appeal should not be viewed as a new fiscal year 1999 contract within the meaning of the appropriations bill but rather as a prior year contract that was unlawfully declined on October 20, 1997." The Appeals Board also noted that the tribe would still be entitled to "the same contract as if IHS had properly approved its contract in the first instance." As a result, the proposed contract was placed on the waiting list as of July 21, 1997, the date on which the agency had already obligated itself from that time to provide CSC for the approved portions of the proposed contract.

In another case cited by Plaintiff, Crownpoint Institute of Technology v. Norton, Civil No. 04-531 JP/DJS (D.N.M. Sept. 19, 2005) ("Crownpoint"), U.S. District Judge James A. Parker entered an order requiring the Bureau of Indian Affairs ("BIA") to enter into a series of contracts which the Court found had been wrongfully declined.[3] Crownpoint provided post-secondary education programs, including vocational-technical programs. Judge Parker ordered that the declinations be reversed, and that the contracts be deemed approved a certain number of days after the contracts' submissions to the contracting officer.

Both Crownpoint and Pascua are similar in that they involved contracts or programs which had already been partially approved, or had been operating under other funds. The educational program in Crownpoint was running under grant funds, thereby forcing the tribe to incur the costs and expenses of running the program. A "deemed" approval date assured that the agency would be reimbursing the CSC and continuing to fund the program. Similarly, in Pascua, IHS had already obligated itself to provided CSC for the proposed contract.

[3] The Court's Findings of Fact and Conclusions of Law, and the Declaratory Judgment and Writ of Mandamus in the Crownpoint case are attached as exhibits to Defendants' response, Doc. 57.

In yet another case cited by Plaintiff, Cheyenne River Sioux Tribe v. Kempthorne, Civ. 06-3015 (D.S.D. July 10, 2007), the United States District Court for South Dakota deemed "approved by operation of law" a self-determination contract proposal to run an educational program, which was found to be unlawfully declined by the BIA. However, the court did not select a particular date, or mention whether the start date should relate back to a specific period of time.

In the instant case, the Tribe has not been operating the Clinic, nor has there been partial approval of portions of the contract such that the agency would have already been obligated to provide funding for CSC from October 1, 2005. See, Compl., ¶ 42 (stating that the Tribe's proposed contract was declined "in its entirety"). Crownpoint and Pascua are not similar enough to this case to convince the Court that a bright-line standard should be applied to the selection of a start date for the proposed contract. What is clear is that the sole purpose in imposing a start date of October 1, 2005 would be to preserve Plaintiff's ability to continue to allege damages which the Court considers largely speculative – a view with which Plaintiff's counsel does not entirely disagree.[4]

Defendants reject the notion that Plaintiff is entitled to any "damages" for a reversal of a declination under the ISDA, other than an award of the proposed contract. In Samish Indian Nation v. U.S., the Federal Circuit found that the ISDA showed no congressional intent to allow the Samish Tribe to seek damages for CSC which were never incurred, on contracts never created, based on a wrongful refusal to accord federal recognition. 419 F.3d 1355, 1367 (Fed.Cir. 2005) ("Such a damage remedy, if available, would provide them nothing but a windfall").

I find that the Tribe would not be prejudiced nor punished for appealing (as Plaintiff

[4] The parties have not conducted any discovery on the damages issue.

contends) if the contract were to become effective when the Tribe takes over the Clinic's operation. Plaintiff would still be awarded the same contract as if it had not been declined, subject to a reconfiguring of the proposed numbers to conform to present day accounting – an exercise which Defendants represent is handled by computer. Defendants also represent that the Tribe would be placed immediately on the waiting list (or "shortfall list"), and prioritized on the basis of need, and not according to waiting time.[5]

Accordingly, the Court finds that the starting date for the proposed contract which has been the subject of this lawsuit will be the date on which the Tribe begins the operation of the Clinic.

II. Contract Language

The parties also cannot agree on certain language as part of the contract. Defendants' version of the contract language would reflect that Defendants currently owe the Tribe $0 in CSC (on the basis that the Tribe has not incurred any costs, and because no funds are available to be dispersed); that the CSC amount reflecting Plaintiff's required CSC will be calculated; but in view of the congressional earmark for CSC, the amount will be placed on the shortfall list for payment if and when funding becomes available. Plaintiff contends that this language is not authorized by the model agreement language which is set out in the ISDA, and that it contradicts this Court's mandate in its June 15, 2007 Memorandum, Opinion and Order. Neither argument has merit.

Based upon my review of the statute, including the model agreement language included at 25 U.S.C. § 450l(c), I find that the language which Defendants propose is additional language which is envisioned by, and inherently complies with, the model agreement language in the

[5] Defendants will be held to adhere to this representation.

ISDA. The model agreement requires that:

> The *annual funding agreement* under this Contract shall only contain. . . *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*.

25 USC § 450l(c) (model agreement § (f)(2)(A)(i)(emphasis added). The annual funding agreement is "incorporated in its entirety" and must be attached to the proposed self-determination contract. 25 USC § 450l(c) (model agreement § (f)(2)(B)). The model agreement also states:

> *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 [25 U.S.C. § 450j-1][6] (emphasis added).

25 U.S.C. § 450l(c) (model agreement § (b)(4)).

It is apparent that the annual funding agreement is part of the framework of the model agreement. Thus, language which is inserted into the contract as part of the "terms" describing the "time and method of payment" cannot be characterized as additional language which contradicts the model agreement. I agree with Defendants that the Government cannot enter into a self-determination contract listing only the amount it must pay, under §§450j-1(a)(1) and (a)(2). The agency must also describe *how* that amount will be paid, under the express requirements of the ISDA and the model agreement.

Plaintiff's version of the proposed contract refers to the annual funding agreement, but merely tracks the generic language of the model agreement, containing no specific terms for "time and method of payment." Doc. 51, Mot. to Set Presentment Hrg. for Writ of Mandamus Ex. 3 (Self-Determination Contract) at 9, Article VI. Plaintiff's version also allows for a method

[6] Sections 450j-1(a)(1) and (a)(2) describe, respectively, the amount of funds which should be provided for the operational expenses and contract support costs.

of quarterly payment "[i]f quarterly payments are specified in the annual funding agreement. . . ." Ex. 3, Section 6 ("Payment"). Thus, Plaintiff's own draft of the proposed contract envisions the need for specific terms for time and method of payment to be included within the annual funding agreement. Ironically, while the Tribe argues that language regarding time and method of payment is not part of model agreement language, it simultaneously attempts to dictate its own terms for payment of a nebulous amount of money which it alleges it is owed. Plaintiff's draft of the Writ of Mandamus states:

> By no later than 60 days after entry of this Writ, the defendants are directed to pay the Southern Ute Indian Tribe any amounts due for FY 2006, FY 2007 and FY 2008 and to transfer operation of the Southern Ute Health Clinic to the Tribe. . . .

Doc. 51, Ex. 1, ¶ 5 (Writ of Mandamus).

The Tribe recognizes that the agency cannot breach a contract where Congress has not appropriated sufficient funds to cover the terms of the contract.[7] Plaintiff has previously stated:

> [n]othing in the ISDA and nothing discussed during the negotiations between Plaintiff and Defendants would require Defendants to pay funds that have not been appropriated . . . the lack of sufficient appropriations from Congress would only support a refusal of the agency to pay CSC under the terms of an existing contract.

Doc. 25 (Pltff's Resp. to Mot. for Sum.J.), at 6. Thus, there is common sense to Defendants' position that, if Plaintiff acknowledges that IHS' contractual obligation to pay contract support costs is unenforceable (based on the model agreement's "subject to the availability of appropriations" language), then Plaintiff's refusal to waive immediate payment of CSC is illogical. See, Doc. 29 at 5 (Defts' Reply in Supp. of Mot. for Sum.J.).

Plaintiff should have no objection to the inclusion of terms in the annual funding

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[7] The United States Supreme Court's decision in Cherokee Nation of Okla v. Leavitt, 543 U.S. 631 (2005) suggests, as this Court has noted, that "the Government's obligation to pay CSC may be different when there are no unrestricted funds available to pay them." Doc. 50 (Mem.Op. & Order).

agreement which reflect the practical ramifications of the current statutory cap on available appropriations. On the other hand, if such language is omitted, it is abundantly clear that the Government will be forced to enter a contract which it must breach up front, but which it will ultimately be allowed to breach. Ruling in favor of Plaintiff on this issue is not only contrary to ISDA provisions, it would prove to be an exercise in futility by opening the door to unwinnable – and perhaps frivolous – breach of contract claims.

Defendants' version of the terms for the annual funding agreement is not prohibited under the ISDA. Plaintiff would not be waiving any of the funding provided under 25 USC § 450j-1(a)(1) and (a)(2) for operating expenses and CSC, but only waiving immediate payment of CSC. Plaintiff would be paid $0 now, and would be placed on Defendants' "shortfall list," and CSC amounts would be paid if and when funds become available.

Inclusion of the language also does not contradict the Court's previous mandate to the agency. In its June 15, 2007 decision, the Court stated that the IHS:

> . . . may not unilaterally amend the ISDEA by altering the declination criteria in the ISDEA, eliminating an element of the funding scheme for Self-Determination contracts, or developing new contract language that contradicts the statutory model language developed by Congress.

Doc. 50 (Mem.Op. & Order, at 17). The Court also concluded that:

> Defendants did not have discretion to decline Plaintiff's proposal on the basis of insufficient Congressional appropriations to pay CSC and did not have discretion to condition approval of Plaintiff's proposal on new contract language contradicting statutory model language or on Plaintiff's waiver of funding specifically provided under the ISDEA.

Mem.Op.& Order, at 19. Those findings concerned ISDA language only as it related to *declination* of the proposed contract. Further, I have determined that the "additional language" Defendants wish to add does not contradict the model agreement language in the ISDA.

This Court has already ruled in favor of Plaintiff in that the agency is required to enter

into a self-determination contract with the Tribe. However, the Tribe is not entitled to full and immediate payment of all costs and expenses, as a matter of law. The language Defendants wish to include within the annual funding agreement is consistent with the statutory requirements of the ISDA or the model agreement language.

CONCLUSION

I find in favor of Defendants on both issues raised in the pleadings. Neither the ISDA nor the case law cited by Plaintiff requires a start of date for the self-determination contract Plaintiff of October 1, 2005. The Tribe will not be prejudiced by an effective date for the contract as the date the Tribe begins to operate the Clinic, because the Tribe will be placed immediately on the agency's shortfall list.

I also conclude that the annual funding agreement requires the addition of language describing the terms for time and method of payment. Therefore, the language which Defendants seek to insert into the annual funding agreement does not contradict the ISDA or the model agreement language, nor is it inconsistent with this Court's previous rulings.

THEREFORE,

IT IS ORDERED that Plaintiff's Motion to Set Presentment Hearing for Writ of Mandamus **(Doc. 51)** is hereby DENIED for reasons described above;

IT IS FURTHER ORDERED that Defendants' Motion for Clarification **(Doc. 58)** is hereby GRANTED for reasons described above;

IT IS FURTHER ORDERED that the following shall occur regarding the self-determination contract at issue:

(1) parties shall meet and resume negotiations for entering into a self-determination contact which includes a start date of the date the Tribe undertakes operation of the Southern Ute Health Clinic;

(2) the contract will include Defendants' version of the annual funding agreement language which is described within this Memorandum Opinion;

(3) the Southern Ute Indian Tribe will be placed immediately on Defendants' shortfall list, which Defendants have represented it will do, and which Defendants represent allows payment on the basis of need;

(4) within six **(6)** weeks of the date this Memorandum, Opinion and Order is entered, parties shall complete negotiations and submit a form of order for injunctive relief to the Court, through the email address indicated on the Court's web page for proposed orders. The proposed order must be submitted in WordPerfect or Rich Text format. Parties are directed to advise the Court upon either party's failure to comply with the above requirements;

IT IS FINALLY ORDERED that, within the six week period allowed for renegotiating the self-determination contract, parties shall advise the Court regarding the status of Plaintiff's Third Count in the Complaint, alleging a violation of the Administrative Procedures Act.[8]

UNITED STATES DISTRICT JUDGE

[8] At oral argument, Defendants represented that Plaintiff's Third Count has become moot, but there is nothing of record to substantiate this.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

SOUTHERN UTE INDIAN TRIBE,

Plaintiff,

v. Civ. No. 05-988 WPJ/LAM

KATHLEEN SEBELIUS, et al.,

Defendants.

ORDER

In accordance with the June 15, 2007 Memorandum Opinion and Order on Plaintiff's Motion for Preliminary Injunction and Defendant's Motion for Summary Judgment (Docket #50), and the October 18, 2007 the Memorandum Opinion and Order Following Presentment Hearing (Docket #66), and the parties having completed negotiations for a self-determination contract and annual funding agreement, attached hereto as Exhibit A, in accordance with the aforesaid orders, it is hereby

ORDERED that the parties shall execute and enter into the attached self-determination contract and annual funding agreement ("AFA"), and it is further

ORDERED that plaintiff's contract support cost need associated with the self-determination contract and AFA will be placed on defendants' shortfall list in accordance with the AFA, and it is further

ORDERED that plaintiff's request for alleged damages resulting from defendants' declination of plaintiff's self-determination contract proposal is hereby DENIED, and it is further

ORDERED that the Third Count of the Complaint, alleging a violation of the Administrative Procedure Act, is hereby DISMISSED.

UNITED STATES DISTRICT JUDGE

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