ORAL ARGUMENT IS REQUESTED

Nos. 09-2281 & 09-2291

In The United States Court of Appeals for the Tenth Circuit

SOUTHERN UTE INDIAN TRIBE,

Plaintiff-Appellant/Cross-Appellee,

v.

KATHLEEN SEBELIUS, Secretary of Health and Human Services, *et al.*,

Defendants-Appellees/Cross-Appellants.

ON APPEAL AND CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
The Honorable William P. Johnson, District Judge

PRINCIPAL BRIEF FOR THE CROSS-APPELLANTS; RESPONSE BRIEF FOR THE APPELLEES

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STATEMENT OF PRIOR OR RELATED APPEALS

Pursuant to Circuit R. 28.2(C)(1), counsel for the Appellees/Cross-Appellants state that *Southern Ute Indian Tribe v. Leavitt*, 564 F.3d 1198 (10th Cir. 2009) (dismissing appeal for lack of jurisdiction), is a prior related appeal in this Court. *Ramah Navajo Chapter v. Salazar*, No. 08-2262 (10th Cir. argued Nov. 16, 2009) (involving whether Interior Department is liable for payment of additional contract support costs over and beyond congressionally capped appropriations for contracts entered in fiscal years 1994 to the present), is a related appeal pending in this Court.

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JURISDICTIONAL STATEMENT

The Southern Ute Indian Tribe (Southern Ute or Tribe) invoked the jurisdiction of the district court pursuant to the Indian Self-Determination and Education Assistance Act (ISDA or Act), 25 U.S.C. § 450m-1(a), in a complaint seeking injunctive relief to compel the Department of Health and Human Services, Indian Health Service, to reverse its decision declining to enter into a self-determination

contract with the Tribe. Doc. 1 (J.A. Vol. I, at 12). In two interlocutory orders, entered on June 15, 2007, and October 18, 2007, respectively, the district court determined: (1) that the Indian Health Service did not have discretion to decline the Tribe's contract proposal or to force language into the statutory model contract on the basis of insufficient congressional appropriations to pay contract support costs; but (2) that language proposed by the Indian Health Service to govern funding of contract support costs and the contract start date was consistent with the ISDA and the annual funding agreement contemplated by the ISDA's statutory model contract. Doc. 50 at 19 (J.A. Vol. I at 325) (June Order);[1] Doc. 66 at 10-11 (J.A. Vol. II 465-66) (October Order). The district court's final order, incorporating the June and October 2007 Orders, was entered on September 16, 2009. Doc. 91 (J.A. Vol. II 562). Southern Ute's notice of appeal, filed on November 4, 2009, (Doc. 94, J.A. Vol. II at 564), was therefore timely. *See* Fed. R. App. P. 4(a)(1)(B). The government's notice of appeal, filed on November 11, 2009, Doc. 95, J.A. Vol. II at 567, was also timely. Fed. R. App. P. 4(a)(1)(B), (3). This Court has jurisdiction over these appeals under 28 U.S.C. § 1291.

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[1] The district court's interlocutory June Order is officially published at *Southern Ute Indian Tribe v. Leavitt*, 497 F. Supp. 2d 1245 (D.N.M. 2007).

STATEMENT OF THE ISSUES

The Indian Self-Determination and Education Assistance Act of 1975 (ISDA or Act), as amended, 25 U.S.C. §§ 450-450n, provides a mechanism for the Secretary of Health and Human Services (Secretary or HHS) to contract with Indian tribes to assume the administration of programs that the Secretary would otherwise operate on behalf of Indians. The Act provides that an amount for "contract support costs," which are certain reasonable and necessary costs related to contract administration, shall be provided under such contracts. The provision authorizing ISDA contracts, however, makes all contract payments "subject to the availability of appropriations," and declares that the Secretary "is not required to reduce funding for programs, projects or activities" serving non-contracting tribes "to make funds available" for tribal contractors. 25 U.S.C. §450j-1(b). The issues presented are:

1. Whether the district court erred in holding that the Secretary has no discretion under the ISDA to decline to enter into a contract when a tribe demands that the Secretary promise to pay contract support costs in excess of Congress's statutorily restricted appropriations for such costs.

2. If the Secretary was required enter a contract, whether the district court acted within its authority and correctly held that, due to a lack of appropriations for

contract support cost funding at the time of contract negotiation, the parties could, consistent with the ISDA, enter a model self-determination contract with an annual funding agreement that states the Secretary "currently owes the Tribe $0" in contract support costs funds; but that if and when funds become available, the Tribe will be paid contract support costs in accordance with Indian Health Service policy.

3. If the Secretary was required to enter a contract with the Tribe, whether the district court correctly held that the start date of the self-determination contract negotiated by the parties would be the date upon which the Tribe began performance of the contract.

4. Whether 25 U.S.C.§ 450m-1 restricts the district court's authority to only granting relief in favor of a tribe.

STATEMENT OF THE CASE

A. Nature Of The Case.

This is the second time that this case has been before this Court,[2] and involves the Secretary's first effort to discern the parameters of her statutory obligations in negotiating an ISDA contract in the wake of *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). In *Cherokee*, the Supreme Court held that the government is bound by its promise to pay contract support costs when it has entered into an ISDA contract with a tribe, and there are sufficient *unrestricted* appropriated funds available to pay. *Cherokee*, however, did not address the question of the government's obligation to *enter* a contract in the first instance when there is a "capped" appropriation for the total amount of funds that can be spent on all ISDA contracts. In this case, Southern Ute submitted a contract proposal to assume operation of the Southern Ute Health Center in fiscal year (FY) 2005, at a time when Congress had capped the amount of funds within the Indian Health Services's lump-sum appropriation that the agency could spend on contract support costs. As a result, the Indian Health Services's appropriation for FY 2005 contract support costs was insufficient to fund both

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[2] *See Southern Ute Indian Tribe v. Leavitt*, 564 F.3d 1198 (10th Cir. 2009) (dismissing Tribe's premature appeal for lack of jurisdiction).

existing and new contracts. In view of *Cherokee* and the lack of appropriations for contract support costs, the agency determined that it could not enter into a contract promising to make payments from funds that Congress did not appropriate. The Secretary thus declined Southern Ute's proposed contract on grounds that the amount of funds proposed under the contract (*i.e*. for contract support costs) was in excess of the applicable funding level for the contract. *See* 25 U.S.C. § 450f(a)(2)(D).

The Tribe then brought this suit for injunctive relief against the Secretary, various other HHS officials,[3] and the Indian Health Service (collectively, IHS), alleging that the declination decision violated the ISDA. In an interlocutory decision issued on June 15, 2007, the district court held that the Secretary had no discretion to decline the Tribe's contract proposal based on insufficient appropriations to pay CSC and the Tribe's refusal to agree to contract language that differed from the ISDA's model contract. Doc. 50 at 19 (J.A. Vol. I at 325). The court concluded that the Tribe was entitled to injunctive relief in accordance with ISDA § 450m-1(a), and

[3] Pursuant to Fed. R. App. P. 43(c)(2), Kathleen Sebelius is automatically substituted in these proceedings for former Secretary of HHS Michael O. Leavitt; Regina Benjamin is substituted for former Surgeon General of the United States, Richard Carmona; Yvette Roubideaux is substituted for Charles W. Grim, former Director, IHS; and Leonard D. Thomas is substituted for James L. Toya, former Director, IHS Albuquerque Area Office.

directed the parties to confer on a draft proposed order for injunctive relief to submit to the court. *Id.* After the parties could not agree upon two issues concerning the form of order for injunctive relief – annual funding agreement (AFA) terms proposed by IHS regarding the specific dollar amount of contract support costs to be stated in the contract, and the start date of the contract – the Tribe moved for a presentment hearing. In a second interlocutory order issued on October 18, 2007, the court ruled that the contract support cost funding terms proposed by IHS did not violate the ISDA, and that the start date of the proposed contract should be the date that the Tribe actually assumed operation of the Southern Ute Health Center. Doc. 66 at 6, 9 (J.A. Vol. II at 461, 464). The court directed the parties to complete negotiations for entering into a self-determination contract on those terms and to then "submit a form of the order for injunctive relief to the Court." *Id*. at 11 (J.A. Vol. II at 466).

The Tribe instead appealed the October Order to this Court. This Court dismissed the appeal in a decision issued on May 4, 2009, holding that the order was not a final judgment on the merits. *Southern Ute Indian Tribe v. Leavitt*, 564 F.3d 1198, 1210 (10th Cir. 2009).

Upon return of the case to the district court, the parties reserved their respective appeal rights and agreed to the terms of a self-determination contract and annual

funding agreement which recites, *inter alia*, that "[t]he Secretary currently owes the Tribe $0 in [contract support costs]." Doc. 100-4 at 2 (J.A. Vol. II at 481). The district court entered a final order in accordance with the June and October 2007 Orders on September 16, 2009. Doc. 91 (J.A. Vol. II at 562). Both sides now appeal.

B. Statutory And Regulatory Scheme.

The Indian Self-Determination and Education Assistance Act of 1975 (ISDA), Pub. L. No. 93-638, 88 Stat. 2203, was enacted to promote "effective and meaningful participation by the Indian people in the planning, conduct, and administration" of federal programs and services for Indians. 25 U.S.C. § 450a(b). Before that time, federal programs and services for Indians were primarily administered directly by the federal government. *See* S. Rep. No. 274, 100th Cong., 1st Sess. 2-3 (1987). Under the ISDA, tribes may elect to enter into "self-determination contracts" with the Secretary of the Interior or the Secretary of HHS to assume operation of services for Indians otherwise administered directly by those Departments. 25 U.S.C. § 450f. By 1998, about half of the Departments' combined appropriations for Indian programs was administered by tribes pursuant to self-determination contracts. GAO, Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to Be

Addressed at 5 (1999).

Each Secretary has delegated authority to enter into self-determination contracts to the agency within the respective Department responsible for administration of Indian programs: the Bureau of Indian Affairs (BIA) in the Department of the Interior, and IHS, an agency within the Public Health Service in the Department of HHS. The contract at issue in this case is with IHS. IHS is responsible for providing primary health care for American Indians and Alaska Natives throughout the United States, either directly under the Snyder Act and the Indian Health Care Improvement Act, *see* 25 U.S.C. § 13; 25 U.S.C. § 1601; 42 U.S.C. § 2001(a), through contracts and grants with Indian organizations that operate health programs for urban Indians, 25 U.S.C. §§1651–1660d, or by providing funding and support to tribes and tribal organizations under ISDA contracts.

1. *The ISDA Contracting Process*.

The ISDA directs the Secretary, "upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract" to "plan, conduct, and administer programs or portions thereof." 25 U.S.C. § 450f(a)(1). In other words, the Act effectively entitles a tribe to step into the shoes of a federal agency in receiving federal funds and administering government services. Thus, a tribe that elects to

enter into a self-determination contract under the ISDA does not commit to supply a specific level of services in exchange for an agreed-upon payment. Instead, the tribe, like the federal agency before it, undertakes to deliver federal services within the limits of funds awarded to it and has no obligation to "continue performance that requires an expenditure of funds in excess of the amount of funds awarded." 25 U.S.C. § 450l(c) (Model agreement § 1(b)(5)).

With respect to the amount of funds provided to a tribe that elects to assume operation of a federal program, the ISDA, as originally enacted, provided for transferring the amount that the Secretary would have allocated to the program if she were still administering it directly. 25 U.S.C. § 450j-1(a)(1) ("amount of funds provided . . . shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs"); *see* Pub. L. No. 93-638, § 106(h), 88 Stat. 2211. That base amount of funding is sometimes referred to as the "Secretarial amount."

In 1988, Congress amended the ISDA to require that there be added to the Secretarial amount an amount for "contract support costs" (CSC), "which shall consist of an amount for the reasonable costs" of certain direct and indirect costs that would not have been incurred if IHS operated a program. 25 U.S.C. § 450j-1(a)(2).

By definition, therefore, funding for CSC is over and above what the Secretary would require to operate the same program directly. CSC can divided into four categories: (1) direct CSC, *i.e.*, administrative costs of the contracted-for program, such as unemployment taxes or workers' compensation insurance, §450j-1(a)(3)(A)(I); (2) "startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis" in the first year that a contract is in effect, § 450j-1(a)(5); (3) pre-award costs incurred before the initial year of the contract that the tribe advised the Secretary of, in writing, prior to incurring the costs, § 450j-1(a)(6); and (4) indirect CSC, which comprise an allocable share of general overhead expenses incurred by a tribe across its various activities and programs, except insofar as such expenses are already accounted for in funds for ordinary administrative activities that are transferred to the tribe as part of the Secretarial amount, §§ 450j-1(a)(3)(A)(ii), 450b(f).

At the same time that it provided for funding of CSC in the 1988 amendments, Congress also prescribed an overarching limitation on the Secretary's obligation to provide funds to a tribe under a self-determination contract. Pub. L. No. 100-472, § 205, 101 Stat. 2293 (codified as amended at 25 U.S.C. § 450j-1(b)). That provision declares:

> 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) (emphasis added); *see also id*. § 450j(c)(1).

A tribe or tribal organization that wishes to assume responsibility for the planning, conduct or administration of programs or services otherwise provided by IHS may submit a self-determination contract proposal to the Secretary. 25 U.S.C. § 450f(a)(2). The proposal must specify (among other things) the amount of funding requested for the contract. 25 C.F.R. § 900.8(h).

Once a tribe submits a proposal, the parties negotiate the terms of the contract and the annual funding agreement, although many of the provisions are incorporated directly from a statutorily-prescribed model agreement. 25 U.S.C. § 450*l*(a). A self-determination contract has three components: (1) the contract itself, (2) modifications or amendments to the contract, and (3) an annual funding agreement (AFA). 25 U.S.C. § 450*l* (providing for a model contract); *id.* § 450*l*(c) (Model agreement §1(e)(2)) (providing for written modifications to the contract); *id*. § 450*l*(c) (Model agreement §1 (b)(4)) (providing for an AFA). The funding levels for an ISDA contract are generally described in an AFA. *Id*. § 450*l*(c) (Model agreement

§1(f)(2)).[4]

Tribal contractors must submit AFA proposals annually, although many self-determination contracts are multi-year. The proposals are then subject to individualized negotiations between the Secretary and the contractor. 25 U.S.C. § 450j-1(a)(3)(B); 25 C.F.R.§ 900.12. The ISDA does not contain specific formulas or funding amounts. The Act requires, however, with a few exceptions such as when there has been a reduction in appropriations, that the funding level for existing contracts shall not be less than in previous years. 25 U.S.C.§ 450j-1(b)(2); *see also* 25 C.F.R. § 900.32.

The Secretary is required to approve a tribe's proposed self-determination contract within 90 days, unless the Secretary issues a written finding that the proposal is deficient according to certain statutorily-specified declination criteria. 25 U.S.C. § 450f(a)(2). As is relevant here, the ISDA authorizes the Secretary to decline a contract proposal if "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract." *Id*. § 450f(a)(2)(D). If the Secretary

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[4] After the parties' execution of a self-determination contract and accompanying AFA, all disputes arising under the agreement are subject to the Contract Disputes Act. *See* 25 U.S.C. § 450m-1(a), (d), 41 U.S.C. §§ 601-613.

issues a contract "declination" or a "partial declination,"[5] a tribe may pursue an administrative appeals process (§ 450f(b); 25 C.F.R.§ 900.31), or, as Southern Ute did here, "exercise the option" to proceed directly in federal district court. *Id.* § 450m-1(a).

2. *Congressional Appropriations For CSC And Current IHS Policy*.

Beginning with the appropriations act for FY 1998, Congress has imposed an explicit "not to exceed" cap on the amount of funds available for the payment of CSC by IHS.[6] As is relevant here, for FY 2005, Congress provided that "not to exceed $267,398,000 shall be for payments to tribes and tribal organizations for [CSC] associated with contracts . . . or annual funding agreements between [IHS] and a tribe or tribal organization . . . of which not to exceed $2,500,000 may be used for [CSC]

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[5] The Secretary may also partially decline a contract proposal that "proposes a level of funding that is in excess of the applicable funding level," and "approve any severable portion that does not support a declination finding." 25 U.S.C. § 450f(a)(4)(B).

[6] *See* Consolidated Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1583 (1997) ("Not to exceed $168,702,000 shall be for payments to tribes . . . for [CSC] associated with ongoing contracts or grants or compacts entered into with the [IHS] prior to fiscal year 1998, as authorized by the Indian Self-Determination Act of 1975, as amended."). It is generally understood in appropriations law that Congress's use of restrictive language such as "not to exceed" in a statute limits the purposes for which particular funds may be spent. *See, e.g., Lincoln v. Vigil*, 508 U.S. 182, 185 (1993).

associated with new or expanded self-determination contracts . . . or annual funding agreements." Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 3084 (2004). After rescissions, IHS received a net appropriation of $263,683,179 for CSC payments for FY 2005. *See* Doc. No. 15-2 at ¶ 9 (J.A. Vol. I at 235-36). This amount represented no increase from FY 2004, and the appropriation left IHS with a substantial shortfall in funds to pay CSC under existing contracts. *Id*. ¶ 8 (J.A. Vol. I at 235). Absent certain circumstances, IHS cannot reduce funding to Tribes with ongoing contracts, 25 U.S.C. §§ 450j-1(b)(2), 450j(I). Given this statutory language, IHS determined to allocate the entire FY 2005 CSC appropriation to its existing contracts. *Id*.; *see* 25 C.F.R. § 900.32. As of October 1, 2005, IHS had obligated all but $1.00 of its CSC appropriation. Doc. 15-2 at ¶ 9 (J.A. Vol. I at 236). The agency thus had no money to undertake additional obligations by entering into new self-determination contracts requiring payment of CSC. *Id*.

Under the current IHS policy,[7] IHS divides its CSC funding among three pools.

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[7] Just as it did in the district court (*see* Tr. 27, J.A. Vol. II at 426), Southern Ute continues to mistakenly refer (Br. 7) to IHS's CSC distribution policy as the "queue" system, which, in fact, the agency long-ago abandoned. Under the prior queue system, which was in effect during FYs 1992-1998, IHS placed all CSC requests in a queue or priority list based on date of receipt. Approved requests for CSC would be 100% funded on a first-come first-served basis. ISDM 92-2 (1992), *superceded by* IHS Circular No. 96-04 (1996). IHS Circular 2000-01, adopted in January 2000,

Pool 1 is the Indian Self-Determination (ISD) Fund, which funds requests for CSC from tribes that assume operation of programs, functions, services or activities (PFSAs). When a tribe assumes operation of PFSAs, the tribe submits a request to IHS for CSC, called an ISD Request. The tribe's request is the total negotiated CSC need associated with the new or expanded programs. The funding is based on the total amount of CSC associated with the PFSA awarded from the date of assumption through the end of the AFA performance period, not to exceed twelve months. ISD Requests are funded with the ISD Fund, if appropriations are made for that purpose, by paying first the full startup and pre-award cost requirement negotiated under each ISD Request. If the ISD Fund is not sufficient to fully fund the total startup/pre-award costs of all ISD Requests negotiated, the amount available will be divided against the total negotiated startup and pre-award costs of all negotiated requests. New or expanded contracts are funded at the average "Level of Need Funded" paid to all existing, ongoing contracts. If there are not enough ISD funds in IHS's appropriation to support all new or expanded contracts at the average CSC

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eliminated the queue system of funding CSC for new and expanded programs and instituted the more equitable "bottom up" approach described in the text, under which CSC funding is prioritized on the basis of a tribe's need, and not according to waiting time in a queue. IHS continues this approach under Indian Health Manual, Part 6, Chapter 3 – Contract Support Costs, adopted on April 6, 2007.

Level of Need Funded paid to all ongoing contracts, then IHS will allocate a percentage to each tribe with an approved ISD Request until the funding is exhausted. The remaining unpaid direct CSC and indirect CSC in the tribe's ISD Request will be recorded as part of the overall CSC shortfall, which is used in the allocation of Pool 3.[8] If IHS has no ISD Fund in the current FY to pay ISD Requests, all unfunded requests will be considered part of the overall CSC shortfall for funding under Pool 3 in the current year and will not be considered ISD funds in the subsequent FY. Under Pool 3, additional funds that become available to fund ongoing CSC shortfalls are allocated as follows: IHS will allocate 50% of the Pool 3 funds among the tribes with the greatest CSC shortfalls using a bottom-up allocation methodology. The remaining 50% of the Pool 3 funds will be allocated proportionately to all tribes with a CSC shortfall. *See* IHS Manual, Part 6, Chapter 3, Section 6-3.3, and Manual Ex. 6-3-E.[9]

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[8] As provided in 25 U.S.C. § 450j-1(c)(2), IHS annually compiles a report in which deficiencies in funds needed to provide required CSC for both new and ongoing programs to tribal contractors for the fiscal year are identified. This report is known as the"shortfall report."

[9] These IHS Manual provisions are available on the agency's website at: http:// www.ihs.gov/PublicInfo/Publications/IHSManual/Part6/part6chapter3/med.htm; http://www.ihs.gov/PublicInfo/Publications/IHSManual/Part6/part6chapter3/mee.htm.

C. Statement Of Facts.

On January 25, 2005, Southern Ute submitted a proposal to the IHS, Albuquerque Area, to enter into a new self-determination contract to assume operation of the Southern Ute Health Center, with a start date of May 1, 2005.[10] J.A. Vol. I at 55, 62. In a February 28, 2005 response, IHS requested clarification of some details of the Tribe's proposal and advised Southern Ute that the agency was still reviewing the Tribe's proposal for CSC. In the meantime, IHS stated that it was "important to point out" that Congress had failed to appropriate sufficient funds to pay CSC for new contracts in FY 2005, "and therefore it is very unlikely that any pre-award or startup costs will be paid for FY 2005 program assumptions." J.A. Vol. I at 105-06. IHS further advised the Tribe that "the payment of any amounts ultimately negotiated for . . . CSC . . . will also be subject to the availability of funding at some future time." *Id*. at 106. Contract negotiations between the parties continued for several months,[11] with the unavailability of funds to pay the Tribe's new CSC

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[10] On July 13, 2005, the Tribe submitted an amended contract proposal that contained a start date of October 1, 2005. J.A. Vol. I at 156, 161.

[11] At IHS's request, the Tribe consented to several extensions of the statutory 90-day contract action deadline. IHS requested the extensions due to internal delays caused by the restructuring of the Albuquerque Area Office's ISDA contract proposal review and award process. *See* J.A. Vol. I at 115-120, 122-23, 129, 130, 133.

remaining an issue. IHS informed the Tribe that it would decline the proposal absent an agreement that IHS was under no current or future obligation to pay CSC. J.A. Vol. I at 127, 194-95. The Tribe refused to enter into such an agreement, and IHS ultimately declined the contract proposal pursuant to 25 U.S.C. § 450f(a)(2)(D). J.A. Vol. I at 201. The IHS explained that due to a lack of appropriated funds, "[t]he IHS is not able to add CSC to the [§ 450j-1(a)(1)] amount as required by [§ 450j-1(a)(2)] and is therefore not able to award the PFSAs identified" under the proposal. *Id*.

Southern Ute then initiated this action in district court, seeking injunctive relief ordering IHS to reverse its declination decision and enter into a contract with the Tribe. Doc. 1 (J.A. Vol. I at 26); Doc. 3 (J.A. Vol. I at 28). The complaint alleged that: (1) the unavailability of CSC funding was not a basis for declination under ISDA; (2) in the alternative, IHS should have only partially declined the proposed contract with respect to CSC funding; and (3) the CSC language proposed by IHS violated the publication requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553. Doc. 1 at ¶¶ 49, 52, 55-56, 58 (J.A. Vol. I at 24-26).

In response, IHS filed a motion for summary judgment and an opposition to the Tribe's request for a preliminary injunction. Doc. 14, 15 (J.A. Vol. I at 212, 215). The agency argued that, due to the lack of appropriations, it was not obligated under

the ISDA to enter the contract as proposed by the Tribe. Doc. 15 at 9-14 (J.A. Vol. I at 223-28); Doc. 16 at 2-4 (J.A. Vol. I at 256-58).

D. Course Of Proceedings And Disposition Below.

1. *The District Court's June 2007 Order.*

In a June 15, 2007 memorandum opinion and order, the district court held that IHS had no discretion to decline the Tribe's proposal to enter a self-determination contract based on a lack of sufficient congressional CSC appropriations or the Tribe's refusal to agree to language not contained in the statutory model contract. Doc. 50 at 19 (J.A. Vol. I at 325). The court thus held that Southern Ute was entitled to summary judgment on those issues, and that the Tribe was entitled to injunctive relief in accordance with § 450m-1(a) of the ISDA. *Id.* The court directed the parties to consult together on a form of order for injunctive relief and to come back to the court if they could not reach consensus. *Id.*[12]

The parties were able to reach only partial agreement as to the proposed order. The Tribe and IHS agreed to enter into a self-determination contract in the form of the statutory model contract, 25 U.S.C. § 450*l*(c). They disagreed, however, about

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[12] The court also noted that there were remaining issues concerning the Tribe's cause of action under the APA and "any issue of damages." Doc. 50 at 20 (J.A. Vol. I at 326).

two terms of the AFA: (1) the effective date of the proposed contract; and (2) language concerning the specific amount of CSC to be paid under the contract. The Tribe then filed a motion to set a presentment hearing, Doc. 51 (J.A. Vol. II at 327), along with a proposed writ of mandamus. Doc. 51-2 (J.A. Vol. II at 332). IHS filed a partial opposition to the proposed writ of mandamus and a motion for clarification of the court's June Order. Doc. 57 (J.A. Vol. II at 348 *et seq.*).

2. *The District Court's October 2007 Order*.

Following a hearing on the motions, the district court issued an order on October 18, 2007, in which it agreed with IHS that the starting date of the proposed contract "will be the date on which the Tribe begins the operation of the Clinic," rather than the October 1, 2005 start date proposed by the Tribe. Doc. 66 at 6 (J.A. Vol. II at 461). The court also determined that the IHS was not required to enter into a contract it must necessarily and immediately breach for lack of funding. *Id*. at 9 (J.A. Vol. II at 464). Accordingly, the court approved the CSC payment language proposed by IHS for the AFA: the Tribe would be paid $0 at the time of contracting but would be paid an amount for CSC if and when funds became available, in accordance with IHS's CSC policy. *Id*. The district court therefore ordered the parties to resume and complete negotiations for entering into a self-determination

contract within six weeks and to "submit a form of the order for injunctive relief to the Court." *Id*. at 11 (J.A. Vol. II at 466).

The Tribe refused to resume negotiations with IHS, however, and appealed to this Court. This Court dismissed the Tribe's appeal for lack of jurisdiction on May 4, 2009, *Southern Ute Indian Tribe v. Leavitt*, *supra*, and the matter was returned to the district court for further proceedings.

3. *The District Court's Final Order*.

Upon return of the case to the district court, IHS and the Tribe engaged in several weeks of negotiations to work out the logistics for the transfer of operation of the health center from IHS to the Tribe, and they ultimately agreed to enter into a self-determination contract and AFA with an effective date of October 1, 2009. The AFA recites that "[t]he Secretary currently owes the Tribe $0 in CSC funds for new or expanded [PFSAs] under this AFA." Doc. 100-4 at § 4, ¶ B (J.A. Vol. II at 481). The AFA also states that the parties have calculated the Tribe's annual CSC related to the new and expanded programs to be $1,262,562, and that "IHS will place the amount on the annual Shortfall report." *Id*. The agreement, however, expressly reserved the right of both parties to appeal "any final order . . . affecting the terms of this Contract," and stated that the parties "shall abide by the terms of the Contract"

pending final resolution of any appeal. Doc. 100-4 at 1 (J.A. Vol. II at 480).

On September 16, 2009, the district court entered a final order in accordance with the June 15, 2007 and October 18, 2007 Orders, in which it directed the parties to enter into the above-described self-determination contract and AFA and ordered that the Tribe's CSC need to be placed on IHS's shortfall report in accordance with the AFA. Doc. 91 (J.A. Vol. II at 562). The court also denied plaintiff's request for "alleged damages resulting from defendants' declination of plaintiff's self-determination contract proposal," and dismissed plaintiff's claim alleging a violation of the APA. *Id*. at 1, 2 (J.A. Vol. II st 562, 563).

STANDARD OF REVIEW

Statutory construction is a purely legal question, *see United States v. Diaz*, 989 F.2d 391, 392 (10th Cir. 1993); thus, the district court's construction of the ISDA is subject to *de novo* review by this Court, *Haynes v. Williams*, 88 F.3d 898, 899 (10th Cir. 1996). However "where Congress affords equitable discretion to the district court," an appellate court "traditionally limit[s]" itself to reviewing only for "'abuse' of that discretion." *Garcia v. Board of Educ.*, 520 F.3d 1116, 1128 (10th Cir. 2008). Thus, to the extent that Southern Ute alleges the district court exceeded its equitable authority under 25 U.S.C.§ 450m-1(a), the district court's ruling is reviewable for abuse of discretion. *Id*.

SUMMARY OF ARGUMENT

The central question at issue in this case concerns the limits of IHS's statutory obligations when negotiating with a tribe to enter a new self-determination contract, where IHS does not have sufficient appropriations due to a statutory cap. The district court issued two orders that are under scrutiny here. In the first order, issued in June 2007, the district court determined that IHS's declination was unlawful because the agency did not have discretion to decline the Tribe's contract proposal or to force language into the statutory model contract on the basis of insufficient congressional appropriations. In a subsequent October 2007 Order, however, the court agreed that language proposed by IHS as to the specific amount of CSC ($0) to be identified in the model contract's annual funding agreement, and as to the start date of the contract, were consistent with the ISDA. The district court's ultimate ruling thus adopted IHS's approach to resolve the CSC funding language and contract start date issues, and permitted IHS to avoid making promises it could not keep. In its appeal, the Tribe challenges the October Order, arguing that the ISDA not only required IHS to award its contract proposal with a retroactive start date to October 2005, but also that IHS had a statutory obligation to include a promise to pay immediate, full CSC funding to the Tribe, despite the absence of appropriated funds to pay CSC.

IHS's cross-appeal, however, focuses on the more fundamental issue of whether the ISDA authorizes IHS to decline to enter a contract in the first instance when a tribal contractor demands that IHS promise to pay contract support costs in excess of Congress's statutorily restricted appropriations for such costs. In other words, what are the government's legal options when a tribe refuses during contract negotiations to accept less than full CSC funding? Disputes between the federal government and tribal contractors concerning the government's obligation to fully fund self-determination contracts in the face of historically insufficient congressional appropriations have been frequently litigated; but the precise question presented in this case is one of first impression in the courts of appeals. A definitive resolution of this issue by this Court is important not only to the parties in this case, but would provide beneficial guidance to the government and tribal contractors in future negotiations.

1. As we demonstrate below, IHS's declination decision was authorized by the ISDA itself, the Anti-Deficiency Act, and the Appropriations Clause of the Constitution.

a. The requirement that the Secretary enter into self-determination contracts is qualified by five-statutorily defined criteria. 25 U.S.C.§ 450f(a)(2)(A)-(E). As is

relevant here, IHS may decline approval of a contract proposal based on a finding demonstrating that "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under [25 U.S.C. § 450j-1(a)]." 25 U.S.C. § 450f(a)(2)(D). Although the ISDA requires that if a self-determination contract is entered into, IHS must provide base funding (the Secretarial amount), *id*. §450j-1(a), plus an amount for CSC, *id*. § 450j-1(a)(2), the "applicable funding level" for the contract is restricted to the amount Congress has appropriated. *Id*. § 450j-1(b) ("Nothwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations."). At the time Southern Ute submitted its contract proposal in mid-FY 2005, there were simply no remaining unrestricted appropriations from which IHS could agree to pay new CSC to the Tribe. IHS thus had discretion to decline the Tribe's proposal.

b. IHS's declination decision was further supported by the constraints placed upon federal agencies by the Anti-Deficiency Act. 31 U.S.C. §1341. As we discuss, that statute bars a federal employee or official from making or authorizing an expenditure or obligation "exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). Because of the

congressional cap on CSC funding, the amount for CSC sought by the Tribe exceeded the amount available "for the expenditure or obligation." *Id*. IHS therefore could not make a commitment that it could not lawfully keep.

c. Moreover, a promise by IHS to pay CSC as proposed by the Tribe would violate the Appropriations Clause. That Clause declares that: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ." Art. I, § 9, Cl. 7. Thus, as we further show, IHS's declination decision was consistent with the commands of the Constitution.

For all these reasons, the district court erred in holding that IHS's declination determination was unlawful. If this Court agrees with our arguments that, when faced with insufficient congressional appropriations, IHS is not required to enter into a self-determination contract with a Tribe that demands from IHS a promise to pay CSC funds that it does not have, the Court need not address the arguments raised in the Tribe's appeal concerning the contract's specifics.

2. On the other hand, if the Court agrees with the district court that IHS was required to enter into a contract with the Tribe, then, as we discuss below, the Court should uphold the district court's construction of the ISDA contract funding provisions at issue here. As we discuss, the ISDA states in clear, unambiguous

language that "notwithstanding any other provision" of the Act, the requirement of funding of all aspects of self-determination contracts is "subject to the availability of appropriations." 25 U.S.C. § 450j-1(a)(2) & (b). Each self-determination contract entered into under the Act must contain or incorporate by reference the provisions of a statutorily-prescribed model agreement. 25 U.S.C. § 450*l*(a). In particular, the model agreement mandates that the annual funding agreement component of a self-determination contract "shall . . . contain terms that identify . . . the funds to be provided, and the time and method of payment . . . ." *Id*. § 450*l*(c) (Model agreement Sec.1(f)2)(A)(i)). When Southern Ute submitted its contract proposal in January 2005, requesting a May 1, 2005, effective date, Congress had already enacted IHS's appropriation, which restricted the amount of funds available for CSC, and IHS thus knew that it had insufficient CSC funds available for both existing and new contracts. Further, IHS was mindful of the Supreme Court's warning in *Cherokee* that the agency should avoid making contractual promises that it cannot pay.

Thus, as we show below, the district court was correct in holding that the CSC contract terms proposed by IHS – providing that $0 would be paid at the time, but that the Tribe would be placed on IHS's shortfall report and paid CSC if and when funds become available – are consistent with the Act's model agreement. The approved

terms rightly do not require immediate payment, but instead reflect that funding shall be "subject to the availability of appropriations." Hence, the "funds to be provided" (or, the amount of CSC designated in the AFA) was set at $0, which is the amount available to be provided to Southern Ute from IHS's restricted appropriations. Further, the term stating that the Tribe will be placed on the shortfall report for payment in accordance with IHS policy if and when funds become available identifies the "time and method of payment." Therefore, as the district court aptly reasoned, the Tribe's demand for immediate payment of CSC was "illogical," and not mandated by the ISDA. Doc. 66 at 8 (J.A. Vol. II at 463).

3. As we demonstrate further, if this Court upholds the district court's determination that IHS was required to enter into a contract with the Tribe, then the district court correctly rejected the Tribe's argument that the contract negotiated by the parties should have a retroactive effective date of October 1, 2005, the date requested in the Tribe's July 2005 amended contract proposal. Because the Tribe had not assumed operation of the Southern Ute Health Center, it had incurred no costs whatsoever. Thus, giving the contract an October 1, 2005 start date would in effect award windfall damages to the Tribe. But payment of damages for services that were never provided is neither authorized nor permitted by the ISDA. *See Samish Indian*

Nation v. United States, 419 F.3d 1355, 1365 (Fed. Cir. 2005). The district court therefore correctly held that the effective date of the self-determination contract should be the date on which the Tribe actually assumed operation of the health center, which was October 1, 2009.

4. Finally, we demonstrate that there is no merit to Southern Ute's argument that the district court exceeded its jurisdiction by ordering relief *against* the Tribe. Contrary to the Tribe's contention, 25 U.S.C. § 450m-1(a) does not restrict the district court's equitable powers to only ordering injunctive relief or mandamus against a federal employee or official. As that provision plainly states, in an action brought under the ISDA, "the district courts may order appropriate relief," (*id.*), which has to include ruling in the government's favor when the facts and law so require. In any event, the district court in fact awarded Southern Ute injunctive relief, enjoining IHS to enter into a self-determination contract with the Tribe. The fact that the district court did not also adopt the CSC funding language and contract start date proposed by the Tribe did not thereby convert the court's ruling into a ruling ordering a remedy *against* the Tribe.

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In sum, this Court should reverse the district court's holding that IHS had no discretion to decline the Tribe's contract proposal. If, however, the Court disagrees

with the government's arguments on this point, we believe that the district court's October Order reaches an acceptable result for both sides. The Tribe was awarded the self-determination contract that it sought, and the CSC funding provision – stating that IHS currently owes Southern Ute $0 in CSC, but that the Tribe's CSC need will be placed on the agency's shortfall report and, if and when additional funding becomes available, it will be paid an amount for CSC in accordance with IHS's CSC policy – permitted IHS to enter the contract without being forced to make promises that it would immediately breach. The outcome also assures the Tribe that it will receive CSC if and when appropriations for such costs become available. If the Court rejects the government's arguments on all issues, it should nevertheless provide some guidance as to what IHS's response should be when faced with the same situation in the future, *i.e.*, where a tribe refuses during contract negotiations to agree on CSC funding, despite the lack of congressional appropriations for CSC.

ARGUMENT

I. THE DISTRICT COURT ERRED BY HOLDING IN ITS JUNE 2007 ORDER THAT IHS LACKS DISCRETION UNDER THE ISDA TO BASE ITS DECLINATION OF A CONTRACT ON A LACK OF APPROPRIATIONS.[13]

A. The ISDA Does Not Require IHS To Enter A Self-Determination Contract With A Promise To Pay CSC Where Funds Are Lacking.

The ISDA places several limitations on the Secretary's obligation to award and fund a self-determination contract. For instance, as discussed earlier, all funding under the ISDA is "subject to the availability of appropriations." 25 U.S.C. § 450j-1 (b); *see also id*. § 450j(c) ("The amounts of [self-determination] contracts shall be subject to the availability of appropriations."). The Act also limits funding to any particular tribal contractor by requiring the Secretary to consider the health care needs of all Indian Tribes when making contracting decisions under the ISDA. *See*, *e.g.*, 25 U.S.C. §§ 450j(g), (I). *See also id*. § 450j-l(b) ("the Secretary is not required to reduce funding for programs . . . serving a tribe to make funds available to another tribe or tribal organization"). Thus, while the ISDA requires the Secretary to provide direct program costs as well as an amount for CSC in support of a contracted

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[13] The issue on cross-appeal was raised in the district court by IHS in the government's opposition to the Tribe's motion for a preliminary injunction (Doc. 15 at 9-17, J.A. Vol. I at 223-31) and memorandum in support of its motion summary judgment (Doc. 16 at 2-4, J.A. Vol. I at 256-58). The district court ruled against IHS on the issue in its June Order. Doc. 50 at 19 (J.A. Vol. I at 325) .

program, the Act expressly restricts the applicable funding level to available appropriations. 25 U.S.C. § 450j-1(b).

Moreover, the ISDA qualifies the requirement that the Secretary enter into self-determination contracts with tribes by specifically authorizing the Secretary to decline a tribe's proposal if one of five statutory declination criteria is satisfied. 25 U.S.C. § 450f(a)(2)(A)-(E). As is pertinent here, § 450f(a)(2)(D) provides that the Secretary may decline a tribe's proposal to contract if "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." 25 U.S.C. § 450f(a)(2)(D). In turn, the applicable level of funding under § 450j-1(a) is "subject to the availability of appropriations." *See id*. § 450j-1(b). Thus, in a scenario where, as here, a tribe demands during contract negotiations a promise from IHS to pay a specific amount of CSC, despite the unavailability of *any* congressional appropriations for that purpose, the ISDA permits the agency to decline the contract proposal. *See Cherokee*, 543 U.S. at 642 ("the law normally expects the Government to avoid . . . [breaching contracts] by refraining from making . . . contractual commitments" it cannot fulfill).

In its June 2007 Order rejecting IHS's argument that the ISDA did not require it to enter the contract proposed by the Tribe, the district court reasoned that because

the amount of funds to be provided under an ISDA contract requires the addition of an amount for CSC (§450j-1(a)(2)), "the fact that Plaintiff's proposal included CSC was not a proposal for funds in 'excess of the applicable funding level,' and Section 450(f)(a)(D) cannot provide the basis for the Government's declination of the contract." Doc. 50 at 14 (J.A. Vol. I at 320). The district court also dismissed IHS's reliance on § 450j-1(b), stating that the subject-to-the-availability-of-appropriations language did not apply because "[t]his subsection is not cross-referenced in the declination criteria." *Id*. The district court's ruling in this regard was error, however, because it improperly limits § 450j-1(b)'s scope.

As explained previously (*supra*, at 11-12), when Congress added the provision for CSC funding in the 1988 ISDA amendments, it also added § 450j-1(b), which declares in all-embracing terms that "[n]othwithstanding any other provisions of this subchapter," the provision of funds for self-determination contracts is subject to the availability of appropriations. 25 U.S.C.§ 450j-1(b). "[T]his subchapter" refers to Subchapter II (Indian Self-Determination and Education Assistance), of Title 25 (Indians), under which the contracting funding provision (§450j-1(a)), the reduction clause (§450j-1(b)) and the declination provision (§ 450f(a)(2)) all fall. Thus, it was not necessary for the subject-to-the-availability-of-appropriations language to be cross-referenced in the declination criteria in order for the clause to apply. The district

court therefore erred in holding that IHS had no discretion to decline the Tribe's proposed contract in this case.

B. The Anti-Deficiency Act Prohibits Agencies From Authorizing An Obligation That Exceeds Appropriations For The Obligation.

IHS also properly declined the Tribe's proposal because promising to pay a specific amount for CSC when there were no appropriations available for such payments would have violated the Anti-Deficiency Act, 31 U.S.C. §1341. The Act provides that no federal government officer or employee "may make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." *Id*. §1341(a)(1)(A). *See Cherokee*, 543 U.S. at 643 (the Anti-Deficiency Act provides that without special statutory authority, "a contracting officer cannot bind the Government in the absence of an appropriation"). Hence, if a statute imposes a statutory cap, payments in excess of the cap would violate the Act. *See Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1171 (Fed. Cir.), *cert. denied*, 516 U.S. 820 (1995); *cf. Star-Glo Assocs. LP v. United States*, 59 Fed. Cl. 724 (2004) (citrus growers' claims were barred where federal funding to compensate owners of groves destroyed by citrus canker was subject to statutory cap, and available funds were exhausted before suit was commenced), *aff'd on other grounds*, 414 F.3d 1349 (Fed. Cir. 2005), *cert. denied*, 547 U.S. 1147 (2006).

During the fiscal year at issue (2005), congressional appropriations earmarked for CSC payments were insufficient to fund both existing (ongoing) contracts and new contract proposals. Because all of IHS's appropriations for CSC had been obligated to pay recurring CSC under ongoing contracts with other tribes, no money was available to incur new obligations and pay CSC under a new contract with plaintiff. Doc. 15-2 at ¶ 9 (J.A. Vol. I at 235-36). The Anti-Deficiency Act thus precluded IHS from committing the agency to pay new CSC that far exceeded available appropriations.

The district court opined, nevertheless, that because the ISDA "statutory scheme . . . does not give the Secretary discretion to decline a proposal on the basis of underfunding in Congressional appropriations, the executive branch officers and employees will not be in violation of the Anti-Deficiency Act by carrying out their statutory obligations to approve Plaintiff's proposal." Doc. 50 at 16 (J.A. Vol. I at 322). The district court's holding was based on faulty analysis however, and should be reversed.

As our discussion above demonstrated, it was error for the district court to hold that IHS lacks discretion to decline a contract proposal where a tribe insists upon including CSC, despite the absence of any appropriations to pay such costs. The court compounded that error by relying on its earlier conclusion to hold that the Anti-

Deficiency Act would not be violated if IHS agreed to pay monies that Congress had not appropriated.

C. The Appropriations Clause Bars Federal Officials From Committing Federal Funds In Advance Of Appropriations For Such Purposes.

Not only is IHS's position – *i.e.*, that the agency may consider the availability of appropriations when reviewing a tribe's contract proposal – supported by the ISDA and the constraints of the Anti-Deficiency Act, but the agency's position also has a constitutional basis. The Constitution vests Congress, and Congress alone, with the power to direct the expenditure of funds from the Treasury. Art. I, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ."). *OPM v. Richmond*, 496 U.S. 414, 416 (1990) ("payments of money from the Federal Treasury are limited to those authorized by statute"). Adherence to this requirement "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Richmond*, 496 U.S. at 428.

Congress has historically failed to appropriate sufficient funds to IHS for the payment of CSC under its existing self-determination contracts. Doc. 15-2 at ¶ 8 (J.A. Vol. I at 235). This chronic underfunding left IHS with annual shortfalls of millions of dollars. *Id*. At the time the Tribe submitted its contract proposal in mid-

FY 2005, IHS had already allocated its entire CSC appropriation to fulfill its pre-existing contractual obligations to other tribes. *Id*. Consequently, IHS had no money to undertake new financial obligations in a new self-determination contract with Southern Ute. Such a contract would commit IHS to pay money that had not been appropriated by Congress, in violation of the Appropriations Clause.

The district court rejected IHS's reliance on the Appropriations Clause, however, stating that the agency was in essence asserting that the appropriations law amended or repealed the substantive provisions of the ISDA. Doc. 50 at 16 (J.A. Vol. I. at 322). But that was not IHS's argument. Rather, IHS argued that in view of: (1) ISDA §450j-1(b)'s conditioning of the funding of all aspects of a self-determination contract on the availability of appropriations; (2) Congress's express cap on the amount of funds that could be used to fund CSC; and (3) the complete absence of any appropriations for new CSC at the time Southern Ute's submitted its contract proposal, IHS could not commit to pay CSC in a new self-determination contract without violating the Appropriations Clause.

Because the Tribe demanded that CSC be included in the proposed contract despite the unavailability of appropriations for new CSC, "the amount of the funds proposed under the contract [was] in excess of the applicable funding level for the contract," 25 U.S.C. § 450f(2)(D), and IHS properly declined the proposal. The

Appropriations Clause offers further support for the soundness of IHS's decision. The district court therefore erred in rejecting IHS's reliance on the Appropriations Clause as authority for declining Southern Ute's contract proposal demanding immediate and full CSC funding.

To reiterate, there are three strong statutory and constitutional bases that support IHS's initial declination decision. First, the ISDA (§ 450f(2)(D)) provides that IHS may decline to enter a contract if the amount of funds proposed in it exceeds the applicable funding level for the contracted for program. Second, the Anti-Deficiency Act prohibits the government from committing federal monies without an appropriation for specific expenditure. Finally, the Appropriations Clause bars expenditure without appropriate appropriations.

If this Court nevertheless agrees with the district court that the IHS had a statutory obligation to contract with the Tribe, then as we discuss below, the district court reached the correct result in adopting IHS's approach with respect to the CSC funding language in the AFA and the contract start date.

II. IF THE SECRETARY WAS REQUIRED TO ENTER A CONTRACT, THEN THE AFA TERMS APPROVED BY THE DISTRICT COURT'S OCTOBER 2007 ORDER ARE CONSISTENT WITH THE ISDA'S CSC FUNDING REQUIREMENTS.[14]

Statutory construction begins with the plain language of the statute under scrutiny. *Ardestani v. INS*, 502 U.S. 129, 135 (1991); *Cannon v. University of Chicago*, 441 U.S. 677, 689 (1979); *Colorado High Sch. Activities Ass'n v. National Football League*, 711 F.2d 943, 945 (10th Cir. 1983). Thus, "[i]n the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'" *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) (citation omitted); *see NISH v. Rumsfeld*, 348 F.3d 1263, 1268 (10th Cir. 2003).

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[14] We dispute the Tribe's characterization (Br. 1 n.1) of the October Order as involving a "relitigat[ion]" of the issues decided in the June Order. In its June Order, the district court held that IHS did not have discretion to decline the Tribe's proposal on the basis of insufficient congressional appropriations to pay CSC and did not have discretion to condition contract approval upon the Tribe's agreement to modify the language of the statutory model contract. Doc. 50 at 19 (J.A. Vol. I at 325). The court's ruling thus concerned ISDA's language "only as it related to declination of the proposed contract." Doc. 66 at 9 (J.A. Vol. II at 464). Having decided in the June Order that IHS could neither decline to contract nor impose a change to the statutory language of the model contract, the October Order clarified that although IHS was required to enter into a self-determination contract with the Tribe, the AFA required the parties to identify the funds to be provided and the time and method of payment and the Tribe could not force IHS to agree to terms that included a promise to provide immediate, full CSC funding. *See* Doc. 66 at 6-10 (J.A. Vol. II at 461-65).

A. The ISDA States In Clear, Unambiguous Language That IHS's Obligation To Fund CSC Is "Subject To The Availability of Appropriations."

The Tribe argues that the district court's decision holding that the CSC funding provision advanced by IHS is permissible "misinterprets the ISDA and requires the Tribe to accept contract terms that violate the ISDA." Appellant's Br. 17. It is the Tribe, however, that misinterprets the statute. As discussed previously, in authorizing funding for a self-determination contract, the ISDA requires the Secretary to provide direct program costs of not less than she would have otherwise provided if IHS directly operated the contracted program (the Secretarial amount), as well as an amount for the reasonable costs for certain administrative expenses associated with operation of the program – *i.e.*, CSC. 25 U.S.C. § 450j-1(a)(1) & (2). However, the ISDA restricts the applicable funding level for a self-determination contract, including funding for CSC. The Act explicitly states: "Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter *is subject to the availability of appropriations* . . . ." *Id.* § 450j-1(b); *see also id.* § 450j(c) ("The amounts of [self-determination] contracts shall be *subject to the availability of appropriations*.") (emphasis added); *see Shoshone-Bannock Tribes v. Secretary of HHS*, 279 F.3d 660, 667 (9th Cir. 2002) ("The phrase 'subject to the availability of appropriations' is 'clear and unambiguous . . . .'") (citation omitted); *Babbitt v.*

Oglala Sioux Tribal Pubic Safety Dep't, 194 F.3d 1374, 1378 (Fed. Cir. 1999) (same), *cert. denied*, 530 U.S. 1203 (2000); *Ramah Navajo Sch. Bd. v. Babbitt* 87 F.3d 1338, 1345 (D. C. Cir. 1996) (same). Further, "the Secretary is not required to reduce the funding for programs, projects, or activities" serving non-contracting tribes in order to fully fund self-determination contracts. 25 U.S.C. § 450j-1(b). Moreover, absent certain circumstances, the ISDA prohibits IHS from reducing the amount of funds provided to tribal contractors with existing contracts. *Id*. § 450j-1(b)(2) ("The amount of funds required [under ongoing self-determination contracts] shall not be reduced by the Secretary in subsequent years . . .").

During the fiscal year at issue, congressional appropriations earmarked for CSC payments were insufficient to fund both existing contracts and new contract proposals. Thus, IHS could spend only as much money as Congress specifically appropriated for that purpose. *See Lincoln v. Vigil*, 508 U.S. at 193 ("[A]n agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes . . . ."); *Oglala*, 194 F.3d at 1378 ("[I]n the face of congressional under-funding [of CSC], . . . [the] agency can only spend as much money as has been appropriated for a particular program."); *Ramah Navajo Sch. Bd.*, 87 F.3d at 1345 (D.C. Cir. 1996) (Congress "clearly" included the "subject to availability of

appropriations" proviso of § 450j-1(b) "to make evident that the Secretary is not required to distribute money if Congress does not allocate that money to him under the Act."). *See also Cherokee*, 543 U.S. at 643 (The phrase "'subject to the availability of appropriations' . . . makes clear that a Government contracting officer lacks any special statutory authority needed to bind the Government without regard to the availability of appropriations.").[15]

[15] Contrary to the Tribe's suggestion (Br. 18 n.5), this case presents no opportunity for application of the Indian canon of construction. The overarching limitation on ISDA funding contained in 25 U.S.C. § 450j-1(b) ("[n]otwithstanding any other provision in this subchapter," the funding of self-determination contracts is "subject to the availability of appropriations") is clear and unambiguous. *See Shoshone-Bannock Tribes v. Thompson*, 269 F.3d 948, 955 (9th Cir. 2001) (declining to apply rule interpreting ambiguities in favor of Indians because "the phrase 'subject to the availability of appropriations' [in 25 U.S.C. § 450j-1(b)] is 'clear and unambiguous'"), *amended by*, *Shoshone -Bannock Tribes v. Secretary of HHS*, 279 F.3d 660 (2002); *Oglala*, 194 F.3d at 1378 (same); *see also Chickasaw Nation v. United States*, 208 F.3d 871, 880 (10th Cir. 2000) (declining to apply canon favoring Indians where statute was unambiguous), *aff'd* 534 U.S. 84 (2001).

1. *The amount of CSC designated in the contract is properly $0, which is the amount available to be provided to Southern Ute from IHS's restricted appropriations.*

The Tribe itself agrees that "[t]he result of this [subject to the availability of appropriations] clause is that the IHS does not have to pay CSC to a Tribe if Congress has not appropriated sufficient money." Appellant's Br. 7. It follows, then, that the ISDA certainly does not require IHS to make a contractual promise "which it must breach up front." *See* Doc. No. 66 at 9 (J.A. Vol. II at 464). The district court, therefore, correctly determined that the contract terms proposed by IHS, providing that the Tribe would be paid $0 in CSC, but that the Tribe would be placed on IHS's shortfall report and later paid an amount for CSC if and when funds became available, according to IHS's CSC policy, is permissible under the Act. The Tribe insists, however, that the district court's construction of the Act "turned the ISDA's statutory funding scheme upside down," (Br. 17), because the full statutory funding amount, including CSC, must be added to the contract and "is excused only if appropriations are subsequently found not to be legally available." *Id*. at 19. Thus, the Tribe asserts, addressing the "availability issue. . . first . . . is precisely the opposite of what the Act commands." Br. 19. The Tribe again misconstrues the statutory scheme.

As discussed previously, a self-determination contract is composed of three parts: (1) the contract itself, (2) modifications or amendments to the contract, and (3)

annual funding agreements. 25 U.S.C. § 450*l* (providing for a model contract); *id.* § 450*l*(c) (Model agreement §1 (e)(2) (providing for written modifications to the contract); *id*. § 450*l*(c) (Model agreement §1 (b)(4) (providing for an AFA). Although the ISDA provides that "[t]here shall be added to the [Secretarial] amount . . . contract support costs," § 450j-1(a)(2), Southern Ute wrongly suggests (Br. 6, 7) that this provision mandates a statutory formula for calculation of CSC. Rather, CSC funding levels are the result of annual negotiations between IHS and a tribe, and are reflected in an AFA.

Here, in their negotiations following the district court's June 2007 ruling that IHS could not decline to enter into a self-determination contract based on the Tribe's refusal to agree to language outside of the model contract, the parties agreed to include the contract language contained in the Act's model agreement. *See* 25 U.S.C. § 450*l*(c). However, the model agreement requires that "[t]he annual funding agreement under this Contract shall . . . contain terms that identify . . . *the funds to be provided*, and the time and method of payment." *Id*. ((Model agreement §1(f)(2)) (emphasis added). Because the AFA is an integral and inseparable component of the ISDA contract, any contract must necessarily include a term identifying the amount of CSC funding to be provided.

As the district court correctly determined on this point, in the face of a

congressionally-capped appropriation that had already been obligated, the agency could not lawfully agree to the Tribe's demand that IHS promise to immediately pay the Tribe the full amount of its CSC need. *Cf. Star-Glo Assocs. LP v. United States*, 59 Fed. Cl. 724 (2004) (citrus growers' claims were barred where federal funding to compensate owners of groves destroyed by citrus canker was subject to statutory cap and available funds were exhausted before suit was commenced), *aff'd on other grounds*, 414 F.3d 1349 (Fed. Cir. 2005), *cert. denied* 547 U.S. 1147 (2006); *accord Greenlee County v. United States*, 487 F.3d 871, 878-79 (Fed. Cir. 2007); *see also Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1171 (Fed. Cir.) (If a statute imposes a statutory cap, payments in excess of the cap would violate the Anti-Deficiency Act, 31 U.S.C.§ 1341(a)(1)(A)), *cert. denied*, 516 U.S. 820 (1995). Rather, the agency could properly agree to a provision that the Tribe would be paid $0 for CSC at the time of contract execution, but that the Tribe would be placed on IHS's CSC shortfall report, and its CSC shortfall would be paid according to IHS's CSC policy with all other shortfalls, under Pool 3 (discussed above), if and when funds become available.

Thus, as the district court observed, given the Tribe's concession that "[n]othing in the ISDA . . . would require [IHS] to pay funds that have not been

appropriated,"[16] its "refusal to waive immediate payment of CSC is illogical." Doc. 66 at 8 (J.A. Vol. II at 463). The district court further opined:

> [The Tribe] should have no objection to the inclusion of terms in the annual funding 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.

Id. at 8-9 (J.A. Vol. II at 463-64). As the court aptly concluded, ruling in favor of the Tribe on this issue would not only have been "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." Doc. 66 at 9 (J.A. Vol. II at 464).

2. *The Supreme Court did not hold in Cherokee that tribes have a statutory right to immediate, full CSC funding without regard to the availability of appropriations*.

Nor is there any merit to Southern Ute's suggestion (Br. 20) that the Supreme Court's decision in *Cherokee* supports its contention that the Tribe has a statutory entitlement to immediate, full CSC funding, regardless of the availability of

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[16] *See* Doc. No. 25 at 6 (J.A. Vol. I at 266). Further, during the hearing that preceded the district court's October 2007 Order, counsel for the Tribe candidly acknowledged that "if there are no unrestricted funds in the agency's budget to pay the amounts under the contract, then the tribe is out of luck, because that's what the law says. . . . Again, if Congress hasn't appropriated unrestricted funds, then the tribe will be out of luck." Tr. 50 (J.A. Vol. II at 449).

appropriations for that purpose. In *Cherokee*, the Supreme Court addressed the question of the government's obligation to pay when it had already entered into a self-determination contract that included an AFA containing the government's promise to pay CSC to a tribe. The Court characterized the government's argument to be that "it is legally bound by its promises if, and only if, Congress appropriated sufficient funds, and that, in this instance, Congress failed to do so." *Cherokee*, 543 U.S. at 636. In rejecting the government's arguments, the Court noted that Congress had appropriated "far more" than the amounts at issue and that "[t]hese appropriations . . . contained no relevant statutory restriction." *Id*. at 637. Importantly, the *Cherokee* Court also explained that the subject-to-the-availability-of-appropriations proviso "makes clear that a Government contracting officer lacks any special statutory authority needed to bind the Government without regard to the availability of appropriations." *Id*. at 643. The Court concluded that the proviso did not support the government's position in *Cherokee* because Congress had in fact appropriated unrestricted funds that were adequate to pay the Tribe.

In contrast here, the dispute arose pre-contract, at the negotiation stage, CSC funding was subject to an express statutory cap, and the lack of adequate funding was a known fact at the time that the Tribe submitted its contract proposal.[17] Thus,

[17] Although the district court here rejected the government's argument that it could decline to enter an ISDA contract due to insufficient appropriations, the court

Cherokee stands for the proposition that the government is bound by its *contractual* promises to pay CSC under ISDA where there are unrestricted appropriations available. The Tribe's protestations to the contrary notwithstanding, *Cherokee* simply does not stand for the proposition that IHS has a *statutory* obligation to promise to pay CSC, without regard to the availability of appropriations, at the time of awarding the contract.

Southern Ute also cites several other cases in support of its assertions that IHS has no discretion under ISDA "over . . . contract funding matters" and that the agency's past "judgments about the 'availability of [its] appropriations' to pay" CSC "have to date been universally proven wrong." Appellant's Br. 20-21 (citing *Ramah Navajo Sch. Bd.*, 87 F.3d at 1344-45; *Shoshone-Bannock Tribes v. Leavitt*, 408 F. Supp. 2d 1073 (D. Or. 2005), *vacated and superceded by amended final order and judgment* (Jan. 18, 2007) (unpublished); *Application for Attorney Fees of Seldovia*

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recognized that "the Supreme Court [in *Cherokee*] did not decide what the Government's obligations to pay CSC would be if Congress explicitly prohibited the use of unrestricted funds to meet these obligations. Furthermore, the Supreme Court hinted that the Government's obligations to pay CSC might be different if Congress did not appropriate adequate unrestricted funds." Doc. No. 50 at 18 (J.A. Vol. I at 324). *Id*. Finally, the court noted "that the funding for FY 2005 specified that the money earmarked for CSC was the only money to be used to pay for CSC." *Id.* at 18-19 (J.A. Vol. I at 324-25). *See also Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1103 (D. N.M. 2006) ("[I]t is doubtful that the [Supreme Court's] holding in *Cherokee Nation* would have an effect on ISDA contract disputes for contracts during statutory cap years . . . .").

Village, IBCA No. 3862F-97, 2005 WL 1805664 (IBCA July 26, 2005)). But those cases, each of which involved funding disputes that arose after an ISDA contract had been executed, are not helpful to the Tribe's claim of an unfettered statutory entitlement to a promise of CSC funding at the time of the contract award. Indeed in *Ramah Navajo Sch. Bd.*, the D.C. Circuit, while rejecting the BIA's contract support funding allocation scheme, recognized that the subject-to-the-availability-of-appropriations clause means "if the money is not available, it need not be provided, despite a Tribe's claim that the ISDA 'entitles' it to the funds." 87 F.3d at 1345. Further, the non-precedential decisions in *Shoshone-Bannock* and *Seldovia Village* were based on facts similar to those at issue in *Cherokee*, and therefore the tribunals concluded that the Supreme Court's decision was controlling. As discussed above, however, *Cherokee* did not address the issue of a tribe's statutory right to CSC funding or the obligation of IHS to promise to pay that amount at the time of the contract award, without regard to the availability of appropriations.

3. *The CSC terms approved by the district court are consistent with the ISDA's model contract and the intent and purpose of the statute*.

The Tribe's scattergun arguments regarding the ISDA's contract formation requirements miss the mark. *See* Appellant's Br. 21-22. IHS did not attempt to force the Tribe to agree to terms that violate the statute. Rather, after suing IHS and

securing a ruling that the agency was required to contract with the Tribe, the Tribe proposed one version of CSC funding language, and IHS proposed different terms. The Tribe then returned to the district court and asked it to decide whether IHS's proposed terms violated the ISDA. The district court correctly held that they did not. It was the Tribe, therefore, that attempted to force the agency to enter into a self-determination contract containing terms that are inconsistent with the statutory scheme, terms that IHS would necessarily breach immediately upon its execution.

Moreover, contrary to Southern Ute's argument (Br. 22-23) the contract terms approved by the district court do not eliminate CSC funding. The CSC provision ultimately agreed to by the parties in the annual funding agreement states:

> Contract Support Costs: The Secretary currently owes the Tribe $0 in CSC funds for new or expanded [PFSAs] under this AFA. The parties have calculated [the Tribe's] annual CSC related to the new and expanded PFSAs to be $1,262,562.00 (including $323,919.00 in direct CSC and $938,643.00 in indirect CSC). IHS will place the amount on the annual Shortfall Report. If and when Congress appropriates additional funding, IHS will amend the AFA to add funding according to IHS's policy, which is currently to place all tribes on a shortfall list and to fund all tribes on the shortfall list to bring them up to the same amount of funding proportionate to their need."

Doc. 100-4 at §4 B (J.A. Vol. II at 481). Thus, the provision stating that the Tribe be placed on IHS's shortfall report for payment in accordance with IHS policy if and when funds become available identifies "the time and method of payment," § 450*l*(c) (Model agreement §§ 1(b)(4) & (f)(2)(A)(I)), and does not condition approval of the

contract upon Southern Ute's agreement to language outside of the model contract. Under the AFA, the Tribe is due to receive its first shortfall payment in March 2010. *See id*. at § 4G (J.A. Vol. II at 482).

B. The District Court Acted Properly In Approving The CSC Funding Provision In The AFA.

The Tribe's arguments (Br. 27-28) that the district court exceeded its authority in this case by "dictating" the terms of the proposed AFA are internally inconsistent and totally lack merit. The Tribe contends (Br. 8, 28) that the terms of the AFA were not at issue in this case because the AFA comes into play only after the execution of a self-determination contract. This is a rather astonishing claim, given the fact that the Tribe expressly invited the district court to "reach[] into the AFA to dictate its substance," (Br. 27), when it requested a presentment hearing. The Tribe's "DRAFT" writ of mandamus proposed, in pertinent part:

> IT IS ORDERED THAT
> . . . .
>
> 2. The defendants are directed to enter into annual funding agreements with the Southern Ute Indian Tribe for Fiscal Years 2006 and 2007, and immediately begin negotiations for the FY 2008 annual funding agreement.
>
> 3. The defendants are directed to use the funding amounts contained in the Application as the funding to be contained in the annual funding agreement for FY 2006. . . .

Doc. 51-2 at 2 (J.A. Vol. II at 333). Apparently, because the district court rejected

the Tribe's proposed language in favor of the CSC terms proposed by IHS, the Tribe now argues that the issue was not properly before the court. But the Tribe cannot have it both ways.

In any event, Southern Ute concedes (Br. 8), as it must, that the AFA is part of the model agreement. Thus, as the district court reasoned, because the "annual funding agreement is part of the framework of the model agreement[,] . . . 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." Doc. 66 at 7 (J.A. Vol. II at 462). The model agreement states that:

> 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).

25 U.S.C. § 450*l*(c) (Model agreement §(b)(4)). In turn, subsection (f)(2) of the model agreement states that the AFA "is incorporated in its entirety" in the contract and must be attached to the contract. § 450*l*(c) (Model agreement §(f)(2)(B)). In light of the foregoing, the Tribe cannot seriously argue that the language of the AFA was not properly before the district court.

III. IF THE SECRETARY WAS REQUIRED TO ENTER INTO A CONTRACT, THEN THE DISTRICT COURT CORRECTLY HELD THAT THE START DATE OF THE CONTRACT SHOULD BE THE DATE UPON WHICH THE TRIBE ACTUALLY BEGAN PERFORMANCE.

Pursuant to the self-determination contract ultimately agreed to by the parties, Southern Ute assumed operation of the Southern Ute Health Center effective October 1, 2009. Doc. 100-3 at 2 (J.A. Vol. II at 471). The Tribe argues (Br. 24), however, that its self-determination contract was "approved by operation of law" when the district court held in its June Order that IHS could not refuse to contract based on the declination criteria relied upon by the agency. Thus, according to the Tribe, the starting date of the contract should be made retroactive to October 1, 2005, the start date contained in its amended contract proposal submitted in July 2005. *Id*. This argument is specious.

Before October 1, 2009, the Tribe had never assumed operation of the health center and therefore had incurred no expenses either in the form of money for operating programs (the Secretarial amount), § 450j-1(a)(1), or CSC for administrative activities conducted by the Tribe as an ISDA contractor. *Id*. § 450j-1(a)(2). Instead, IHS continuously operated the health center. Thus the program funds that would have been available under a self-determination contract were expended by IHS in its operation of the health facility. Significantly, the Tribe

concedes that it is not claiming damages for operating or other expenses it did not incur, and admits that "a claim for operational expenses during a period when it was not actually operating the Clinic would be 'moron[ic].'" Appellant's Br. 24 n.6.

The Tribe's insistence upon a retroactive October 1, 2005 contract start date is therefore puzzling if preservation of a damages claim is not its goal. Indeed, the district court was also skeptical of the Tribe's argument, stating: "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." Doc. 66 at 5 (J.A. Vol. II at 460). In any event, payment of damages for services that were never provided is neither authorized nor permitted by the ISDA. *See Samish Indian Nation v. United States*, 419 F.3d 1355, 1365 (Fed. Cir. 2005).

A. The Authorities Relied Upon By The Tribe Are Distinguishable.

Further, as the district court here found, the Tribe misplaces its reliance on *Crownpoint Inst. of Tech. v. Norton*, No. 04-531 (D.N.M. Sept. 19, 2005). In *Crownpoint*, the plaintiff tribal organization had been operating the program in question through grant funds at the time it sought CSC. Thus, the plaintiff actually incurred the CSC that were eventually awarded after the court determined that the self-determination contract should have been approved. Because the plaintiff had

already been operating the program, the court "deemed" that the contract had been approved as of the date of the proposal to assure that plaintiff would receive the CSC that had already been incurred. *In re Pascua Yaqui Tribe of Arizona*, No. A-99-61, Decision No. 1692 (HHS Appeals Bd. Jan. 12, 1999), is also distinguishable. There, the agency partially declined plaintiff's proposed self-determination contract and at the same time approved the Tribe's CSC request and placed the request on the agency's waiting list for FY 1997. At issue was whether a FY 1999 appropriations bill barring expenditures for "new" self-determination contracts applied to the self-determination contract partially declined by the agency in 1997. The Departmental Appeals Board held 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" in 1997. *Pascua*, slip op. 5-6. The Board therefore concluded that treating the contract as relating back to the date of the partial declination "[wa]s consistent with IHS's commitment in the partial declination letter to place [the Tribe's] proposal [on the waiting list] for contract support costs with other fiscal year 1998 program starts with a request date of July 21, 1997." *Id*. at 6.

B. A Start Date Reflecting The Actual Date The Tribe Began Operation Of The Health Center Is Consistent With The ISDA's Intent And Policy.

The Tribe grasps at straws when it argues (Br. 25-26) that a provision setting the contract's effective date as the date that the contractor actually begins performance is somehow inconsistent with the ISDA's goal of assuring maximum participation by tribes in the planning and administration of programs and activities serving Indian communities. Indeed, Southern Ute's contention (Br. 25) that a requirement that its contract's effective date reflect the date the Tribe actually assumes operation of the health center would frustrate the Act's purposes "by subjecting tribal contractors to potentially reduced funding and privileges, as well as to additional rounds of review, negotiation and declination,"[18] is unfounded. Contrary to the Tribe's assertions, the Tribe would suffer no prejudice or punishment

[18] The Tribe's assertion that denying a retroactive contract start date could subject it to "potentially reduced funding" appears to stem from its misunderstanding of how IHS's CSC policy operates. As noted earlier (*supra* at 15-16, n.6), the Tribe labors under the mistaken impression that the queue system, abandoned in FY 1999, is still in effect. During the presentment hearing, the Tribe's counsel argued that it was important to use the October 2005 start date because "they've actually got something called a queue, . . . and they determine some of these funding issues based on the seniority, based on where – your place in the queue. . . . So if the contract, the original proposal isn't approved by operation of law with that FY 2006 start date, we end up in a different place in the queue much more junior than we would have been." Tr. 27 (J.A. Vol. II at 426). As discussed earlier, IHS's current CSC policy prioritizes funding on the basis of a tribe's need, and not upon waiting time in a queue.

for appealing the declination decision because, as the district court found, the Tribe would be awarded the same contract as if it had not been declined, subject to recalculation of the amount of need as of the starting date of the contract. Doc. No. 66 at 6 (App. Vol. II at 394).

Southern Ute has suffered no prejudice here. As the self-determination contract and incorporated AFA executed by the parties reflects, the Tribe's CSC need was recalculated in the amount of $1,262,562.00, and the Tribe's CSC need was immediately placed on IHS's shortfall report. Doc. 100-4 at § 4B (J.A. Vol. II at 481). Under the terms of the AFA, Southern Ute is scheduled to receive its first shortfall payment in March 2010. *See id*. § 4G (J.A. Vol. II at 482).

C. The Tribe Was Not Deprived Of An Opportunity To Present Evidence Of Damages.

The Tribe next maintains (Br. 26) that the district court's ruling on the contract start date denied it the opportunity to argue damages. In fact, however, the Tribe's counsel addressed possible damages theories at some length during the October 2007 presentment hearing. *See* Tr. 11-21 (J.A. Vol. II at 410-420). When asked by the district court "what is it going to take to have a damages trial?," the Tribe's counsel responded, "[t]hat's something we want to talk to you about at the tail end of this proceeding." Tr. 20 (J.A. Vol. II at 419). Then, returning to the damages issue near

the end of the proceeding, counsel for the Tribe conceded the speculative nature of its damages theories, stating:

> I mean, to the extent that there are damages claims, some of them may need further development. I agree that some of them are speculative at this point concerning the Indian Health Care Improvement Act claims and so on. Those are going to require some additional discovery and some additional development, and we may decide at some point not to pursue them. *They don't have anything to do with the nature of the contract that needs to go into effect now*.

Tr. 51 (J.A. Vol. II at 450) (emphasis added).

It would appear, therefore, that the Tribe, recognizing that its speculative damage claims had nothing to do with the proposed self-determination contract, simply " decide[d] at some point not to pursue them." *Id.*

IV. 25 U.S.C. § 450m-1(a) AUTHORIZES THE AWARD OF "APPROPRIATE RELIEF" BY THE DISTRICT COURTS.

Throughout its brief (*see*, *e.g.*, Br. at 2-3,15-16), Southern Ute has attempted to portray the district court's final decision as an improper judgment that ordered relief against the Tribe, when in fact the Court enjoined IHS to award the self-determination contract that it sought – albeit the incorporated AFA does not contain all the terms the Tribe wanted. Expanding on this theme, the Tribe argues (Br. 28) that the district court exceeded the limited equity jurisdiction conferred upon it by the ISDA by granting relief in favor of the government and against the Tribe.

It is true that the "[t]he district courts of the United States . . . are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Exxon Mobil Corp. v. Allapattah Servs*., 545 U.S. 546, 125 (2005) (internal quotation marks omitted). Through the ISDA, Congress conferred on the district courts "original jurisdiction over any civil action or claim against the appropriate Secretary arising under [the Act]." 25 U.S.C. § 450m-1(a). But according to Southern Ute, the district court's authority under § 450m-1(a) "was limited to requiring IHS . . . to enter into a self-determination contract stating the CSC amounts calculated pursuant to § 450j-1(a)(2)." *Id*. at 32. In support of this argument, the Tribe states:

> [S]ection [450m-1(a)] 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 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).

Appellant's Br. 29-30 (emphasis added). The Tribe's argument is misleading and without merit.

Significantly, the Tribe omits critical language preceding the excerpted text.

The omitted language provides:

> In an action brought under this paragraph, the district courts *may order appropriate relief* including . . . injunctive relief . . . .

25 U.S.C. § 450m-1(a). As the plain language of the above-quoted passage makes clear, district courts may order "appropriate relief," which could, of course, include ruling in the Secretary's favor. The Tribe concedes as much. Appellant's Br. 32 n.8. *Cf. Garcia v. Board of Educ.*, 520 F.3d at 1128 (opining, in an Individuals with Disabilities Education Act case, "a district [court] may also choose to withhold relief despite a demonstrated (or, in this case, assumed) statutory violation if it has a valid basis in equity for doing so"); *see also Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("[a] grant of jurisdiction to issue [equitable relief] hardly suggests an absolute duty to do so under any and all circumstances."). The Tribe is therefore dead wrong in contending that "[n]othing in [§ 450m-1(a)] can be seen to grant the district courts general equity jurisdiction in a dispute over self-determination contract formation," and that the district court was limited to only ordering injunctive relief or mandamus against IHS.

In any event, the district court did in fact award relief *in favor of* the Tribe. Southern Ute sought injunctive relief ordering IHS to reverse its declination decision and to award the Tribe's contract proposal to assume operation of the Southern Ute

Health Center. In its June Order, the district court concluded that IHS "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." Doc. 50 at 19 (J.A. Vol. I at 325). Accordingly, the district court held that the Tribe was "entitled to summary judgment on [the contract declination] issue and . . . to injunctive relief in accordance with 25 U.S.C. § [450m-1(a)]." *Id*. When the parties could not agree on the form of an order for injunctive relief as had been directed by the court, the Tribe requested a presentment hearing and submitted a proposed writ of mandamus. After briefing and oral argument, the district court determined that certain terms proposed by IHS pertaining to CSC funding and the contract start date were consistent with the ISDA and therefore could be included in the model agreement's AFA. The district court's actions in this respect were appropriate, and entirely consistent with the requirements of Fed. R. Civ. P. 65(d)(1)(B)-(C) ("Every order granting an injunction. . . must: . . . state its terms specifically; and . . . describe in reasonable detail . . . the acts or acts restrained or required."). The fact that the relief awarded Southern Ute by the district court did not require the parties' agreement to parrot the terms proposed by the Tribe does not, despite the Tribes insistence, translate into an order entering "relief against the

Tribe." Appellant's Br. 32 (n.8). Evidently under the Tribe's theory, an injunction under the ISDA may only contain terms favorable to tribes. But that clearly is not the law.

Nor is there any support in the case law for Southern Ute's novel construction of the district court's authority under 25 U.S.C. § 450m-1(a). The Tribe does not cite, and our research has not uncovered, a single decision holding that the district court's authority under § 450m-1(a) is restricted to only ordering injunctive relief or mandamus against governmental officials. Further, the Tribe misplaces its reliance on this Circuit's decision in *United States v. RX Depot*, 438 F.3d 1052 (10th Cir. 2006), in reasoning that § 450m-1(a) does not convey general equity jurisdiction because it "does not contain any language conferring authority to 'restrain violations' or to grant any other order' necessary to enforce the ISDA." Appellant's Br. 30. *RX Depot* arose in the very different context of a government enforcement action alleging violations of the Federal Food, Drug and Cosmetic Act (FDCA), where this Court addressed the issue of whether the FDCA's grant of jurisdiction, providing that district courts "shall have jurisdiction, for cause shown to restrain violations of the [FDCA]," 21 U.S.C. § 332(a), permits district courts to order disgorgement in appropriate cases. 438 F.3d at 1054. The Tribe seizes upon the *RX Depot* Court's observation that "'equitable powers assume an even broader and more flexible

character' in suits involving the public interest," 438 F.3d at 1057 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)), and argues that "the RX Depot analysis," combined with the "Indian canons of construction, make it clear that Congress "did not confer general equity jurisdiction upon the district courts through § 450m-1(a)." Appellant's Br. 29. This argument is flawed for at least two reasons.

First, as noted earlier, *RX Depot* was a government enforcement action. When read in proper context, the quoted language supports the recognition that district courts may exercise broader equitable powers when the United States seeks remedies for violations of a federal regulatory statute. The quote does not, however, support the opposite conclusion that a district court's authority is limited to only ordering injunctive relief or mandamus against a government official when a Tribe invokes the court's jurisdiction pursuant to § 450m-1(a). Second, as noted previously (*supra* at 44, n.14), the Indian canon of statutory construction "appl[ies] only where the statute at issue is ambiguous." *Chickasaw*, 208 F.3d at 880; *accord Fort Peck Housing Auth. v. HUD*, Nos. 06-1425 & 06-1447 slip op. at 17 (10th Cir. Feb. 19, 2010) (unpublished). Section 450m-1(a) is not ambiguous. It states in plain, unmistakable language: that: " In an action brought under this paragraph, the district courts *may order appropriate relief*." 25 U.S.C.§ 450m-1(a). Having determined (contrary to the government's arguments), that IHS was required to enter into a self-determination

contract with Southern Ute, the district court acted well within its statutory authority and did not abuse its discretion in approving the CSC funding and contract start date terms proposed by IHS.

The Tribe's arguments (Br. 30-32) based on the legislative history of § 450m-1(a) are similarly unavailing. While the legislative history cited by the Tribe shows that Congress intended to give tribes a federal court forum for adjudicating disputes with IHS and BIA arising under the ISDA, it simply does not prove the Tribe's contention that "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." Appellant's Br. 31. Plainly, § 450m-1(a) authorizes the district courts to order "appropriate relief including . . . injunctive relief." The Tribe's failure to acknowledge the full text of § 450m-1(a) is therefore fatal to its arguments.

CONCLUSION

For the foregoing reasons, the district court's holding that IHS lacked discretion to decline to enter into a contract based on the unavailability of appropriations should be reversed. If, however, the Court rejects our arguments on this point and agrees with the district court that IHS was required to enter into a self-determination contract as proposed by the Tribe, then the district court's holding approving the CSC funding terms proposed by IHS and the effective date of the self-

determination contract, should be affirmed.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Because of the complexity of the ISDA statutory scheme and the importance of the issues involved, the Appellees/Cross-Appellants believe that oral argument may assist the Court in resolving the dispute in this case.

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 28.1(e)(3) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief was prepared using Corel WordPerfect X4 and complies with the type and volume limitations set forth in Rules 28.1 and 32 of the Federal Rules of Appellate Procedure. I further certify that the font used is 14 point Times New Roman, for text and footnotes, and that the computerized word count for the foregoing brief (excluding exempt material) is 15,513.

/s/Jeffrica Jenkins Lee
Jeffrica Jenkins Lee
Attorney for the Appellees/Cross-Appellants

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that the text of the hard copy of the foregoing "PRINCIPAL BRIEF FOR THE CROSS-APPELLANTS; RESPONSE BRIEF FOR THE APPELLEES" and the text of the digital (PDF) form submitted *via* the Court's ECF system, are identical. A virus check was performed on the electronic document, using Microsoft Forefront Client Security (version 1.77.96.0, last updated February 26, 2010), and no virus was detected. In addition, I certify all required privacy redactions have been made

/s/Jeffrica Jenkins Lee
Jeffrica Jenkins Lee
Attorney for the Appellees/Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February 2010, I filed the foregoing "PRINCIPAL BRIEF FOR THE CROSS-APPELLANTS; RESPONSE BRIEF FOR THE APPELLEES" by causing a digital version to be filed through the Tenth Circuit's electronic service (ECF), and by causing 7 copies to be sent by Federal Express overnight delivery within 2 business days. I also caused a digital version of the brief to be served upon the following counsel by ECF:

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ATTACHMENT

Doc. 50, Mem. Op. & Order on Pls.' Mot. for Prelim. Inj. & Defs.' Mot. for Summ. J., filed 6/15/07

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 ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court pursuant to Plaintiff's Motion for Preliminary Injunction (Doc. 3) and Defendants' Motion for Summary Judgment (Doc. 14). After reviewing the briefs in both parties' motions, I issued an Order to Show Cause why the preliminary injunction should not be consolidated with the merits of the case (Doc. 37). The parties agreed that consolidation was appropriate. Additionally, at a hearing on February 8, 2007, the parties agreed that the legal issues are fully briefed and may be decided without further argument. Accordingly, I decide here 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 ("ISDEA"),to decline to enter into a contract with the Plaintiff Tribe to assume control over and management of the programs, functions services and activities of the Southern Ute Health Center.

INTRODUCTION

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). Congress enacted the ISDEA in recognition of "the Federal government's historical and special legal relationship with, and resulting responsibilities to, American Indian people . . .." 25 U.S.C. § 450. Congress set forth a method within the ISDEA for Indian Tribes to assume control over certain federally provided programs. Relevant to the instant case, the ISDEA directs the Secretary of the United States Department of Health and Human Services ("HHS"), upon request of an Indian tribe, to enter into a contract by which the Tribe assumes direct operation of an HHS federal Indian Health care program. 25 U.S.C. § 450f(a)(1). Under the ISDEA, if an Indian tribe submits a proposal for a self-determination contract, "the Secretary shall, within 90 days after receipt of the proposal, approve the proposal and award the contract . . .." 25 U.S.C. § 450f(a)(2). The secretary has very little discretion to decline to award a contract proposed by an Indian tribe.

On or about January 25, 2005, Plaintiff submitted a proposal pursuant to 25 U.S.C. § 450f to contract for the administration of the Southern Ute Health Center ("Clinic"), a facility of the Indian Health Services ("IHS") that is the primary health care facility for the Plaintiff Tribe's members. By letter dated February 28, 2005, a Contract Proposal Liaison Officer ("CPLO") with IHS notified Plaintiff that some portions of the proposal required further clarification. Pl's. Ex. 2. The letter noted that IHS was continuing to review Plaintiff's proposal for contract support costs ("CSC"), but stated that Congress had not appropriated any new money for CSC and it was unlikely that any start-up costs would be paid.

On March 1, 2005, the United States Supreme Court decided Cherokee Nation of Okla. v Leavitt, 543 U.S. 631 (2005). In that case, the Government had not fully paid CSC to tribes that had existing ISDEA contracts that included an agreement to pay CSC. Id. at 635. While the Government acknowledged its contractual promise to pay the CSC and its failure to fully pay, it argued that it was not legally bound by its promise because Congress had not appropriated sufficient funds to fully pay CSC to all tribes with ISDEA contracts. Id. The Supreme Court found that Congress had appropriated sufficient unrestricted funds to pay CSC for the particular contracts at issue for the Fiscal Years at issue. Id. at 637. The Court held that the Government was bound by its promise to pay CSC. Id. at 647.

For Fiscal Year 2005, Congress appropriated $263,638,000 to IHS to pay contract support costs and stated that money expended for contract support costs was not to exceed this amount. Medrano Dec. (attached to Def's. Mem. in Support of Summary Judgment). This amount does not represent sufficient money to pay contract support costs for any new or expanded program assumption under the ISDEA. Id.

On March 24, 2005, Plaintiff responded to the CPLO's letter with the requested clarifications. Pl's. Ex. 3. Under the ISDEA, IHS had 90 days to approve the proposal or provide written notification of declination of the contract for one of five permissible reasons. However, the 90 day period may be extended with consent of the tribe. 25 U.S.C. § 450f(a)(2). Prior to the expiration of the 90 day period in this case, the IHS Acting Director of the Office of Tribal Support ("Acting Director") sent a letter to Plaintiff requesting a thirty day extension due to restructuring within IHS of the contract proposal review process. Pl's. Ex. 4. Plaintiff responded that it would like some indication that the tribe had adequately addressed the CPLO's

concerns and would also like some details regarding any effect of the restructuring on Plaintiff's particular contract proposal. Pl's. Ex. 5. The Acting Director responded back with some additional detail with regard to portions of Plaintiff's proposal that were not sufficiently clarified. Pl's. Ex. 6. The letter also reiterated a request for Plaintiff's consent to the thirty day extension and stated that, in the absence of an extension, IHS would proceed to approve the contract to the extent the proposal was satisfactory, and provide Plaintiff with a timely partial declination letter to the extent the proposal was not sufficient as indicated. Id.

Plaintiff responded to this latest letter with its interpretation of the statutory requirements for a declination, i.e., that refusing to grant an extension was not a valid reason for declination, that IHS had never provided Plaintiff with a clear explanation of potential declination issues, and that IHS was required to inform Plaintiff within the 90 days of any potential declination issues and provide technical support which it had not done. Pl's. Ex. 7. Plaintiff expressed concern that IHS was not following these rules with respect to Plaintiff's proposal. Id. However, Plaintiff gave its consent to a thirty day extension. Id.

The Acting Director responded by letter agreeing with Plaintiff that refusal to consent to an extension was not grounds for declination. Pl's. Ex. 8. He then proceeded to outline specific areas of potential declination with regard to Plaintiff's proposal and made recommendations for modifications. Id. He stated that,

> The Area[1] has made the decision to decline the tribe's request to contract for the CEO, the Health Center Director, the Clinical Director, the Chief Pharmacist, and the Administrative Officer positions based on 25 U.S.C. [§] 450f(a)(2)(A)-(E) Declination Criteria "The program, function, service or activity (or portion thereof) that is the subject of this proposal is beyond the scope of programs,

[1]Presumably, this refers to the Albuquerque Area Office of the Indian Health Service.

> functions, services or activities under section 102(a)(1) of the ISDEAA because the proposal includes activities that cannot lawfully be carried out by the contractor". More specifically, a Tribal employee cannot by law manage and obligate the services and funding of Federal Programs and Federal employees. By contracting only the decision making and administrative aspects of any service program and not including the p,f,s,a's[2] that go along with each of these positions the tribe is asking the Area to approve an unlawful act. If the Tribe were to modify the proposal to include the p,f,s,a's under the direction of each of these positions the Area would have a proposal that could more easily be approved.

Id. The Acting Director further stated that areas of recommended changes with regard to other concerns could be discussed during the first negotiation and should be easily resolved. The letter concluded with a statement that the dollar amount Plaintiff was requesting "exceeds the Tribal Shares the Tribe has available for the Southern Ute Health Center." Id.

The first negotiation occurred on May 27, 2005. Pl's. Ex. 9. Present were the Acting Director and several representatives for Plaintiff. Plaintiff's counsel explained the details of the Tribe's proposal and pointed out that the proposal did indicate that Plaintiff would be taking over the programs, functions, services and activities ("PFSAs") under the CEO, the Health Center Director, the Clinical Director, the Chief Pharmacist, and the Administrative Officer. Id. At the conclusion of this negotiation, the Acting Director stated that, as far as he could tell, no declination issues existed. Id. Following this negotiation, Plaintiff consented to an additional extension until June 3, 2005. Pl's. Ex. 10. A second negotiation occurred on June 2, 2005. Pl's. Ex. 11. After this negotiation, the Acting Director prepared a summary of the agreement between Plaintiff and IHS which indicated that CSC funding had been discussed as a problem during the negotiation. Id. With regard to CSC, the summary states that,

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[2]The precise meaning of this acronym is not made clear in the letter, but based on the previous statutory reference in the letter, it appears to be short-form for "program, function, service or activities."

> the new CSC language that generally states that there are no Start Up Costs or CSC available for contracting these PFSAs and the tribe will not be able to have the associated CSC dollar amount for this contract placed on the Que[3] was discussed with the tribe. They have requested this decision in writing and will notify the Area of their position following a review. The tribe understands that refusal to include this language will result in a proposal declination.

Pl's. Ex. 11.

On June 3, Plaintiff consented to another extension of time requested by IHS. Pl's. Ex. 10. In its letter of consent, Plaintiff indicated that it was providing the additional time so that IHS could complete the summary of agreement from the June 2, 2005 negotiation and to provide time to resolve issues regarding IHS's position on CSC. Id. The extension was given until June 17, 2005. Id. On June 17, 2005, Plaintiff consented to another extension until June 30, 2005 to resolve issues regarding IHS's new position on CSC. Id. Plaintiff stated it was unwilling at that time to agree to inclusion of new CSC language in its contract. Id.

On June 21, 2005, the Acting Director sent Plaintiff an email with IHS's new required CSC language for contracts involving new or expanded PSFA's. Pl's. Ex. 13. The email included forwarded messages that made clear that contracts must include language that IHS will not pay CSC, does not promise to pay CSC, that the tribes cannot rely on any promise to pay, and tribes cannot report a failure to receive CSC as a shortfall. Id. The IHS policy regarding the CSC language was apparently never formally published or adopted in any formal manner. The email indicates that the Acting Director "assumes" that the attached forwarded messages containing the new CSC language reflect the official position of IHS. Id. One of the forwarded attached messages from an IHS employee in Maryland indicates that Area Offices had received several

[3]There is no indication of the meaning of this term.

versions of the proposed CSC language, and it was not clear what language the Director had approved. Nonetheless, IHS insisted this language be included in Plaintiff's contract. The Acting Director indicated that he would prepare a declination of Plaintiff's proposal. Id.

On June 24, 2005, the Acting Director sent Plaintiff an email indicating that HQ[4] wanted the Area to decline Plaintiff's proposal based on a failure to agree on finances as well as other elements of the proposal. Pl's. Ex. 14. The Area Director indicated he preferred to decline solely on the issue of the CSC language. Id.

On June 29, 2005, Plaintiff granted another extension until July 15, 2005 and reiterated its unwillingness to agree to the new CSC language in its contract. Pl's. Ex. 10. On that same date, Plaintiff sent a letter to Defendant Toya, Director of the Area, stating that the Acting Director had previously hinted at a new IHS policy on CSC but that there was no disclosure to Plaintiff that the new policy might lead to declination of its proposal if it did not agree to contractually waive its statutory rights to CSC. Pl's. Ex. 15. Plaintiff stated that it would not likely have granted additional extensions if it had been aware that the new policy would be retroactively applied to its proposal. Id. Plaintiff stated its belief that the CSC policy could not be raised as a declination issue because the Area did not pursue a timely, good faith review of Plaintiff's proposal and "dragged its feet." Id. Plaintiff urged that it offended "principles of fundamental fairness to now make the Tribe's contract proposal retroactively subject to declination issues which did not exist when it first submitted its contract and only came into play after the Area Office's failure to review the Tribe's contract proposal in a timely manner." Id. Plaintiff further stated that it would

[4]Presumably referring the headquarters, but it is not clear where or whom "headquarters" is, i.e., whether this is a regional headquarters, the Office of the Secretary or some officer between these levels.

not agree to the CSC even if it were not being retroactively applied because "IHS has a statutory duty to provide CSC funds . . .." Id. Plaintiff then stated its position that the declination criteria in the ISDEA do not give IHS discretion to refuse to enter into a contract if a tribe will not give up other rights under the ISDEA. Id. Plaintiff noted that the ISDEA includes a model agreement that provides for CSC, and that published IHS Circulars providing for CSC were not superseded by any subsequently published Circulars. Id. Plaintiff agreed to include the ISDEA model agreement language regarding CSC, but stated that it would challenge a declination based on its refusal to include the new CSC language developed by IHS. Id.

On July 15, 2005, Defendant Toya sent Plaintiff a letter acknowledging receipt of Plaintiff's June 29 letter and indicating that his staff would research the issues raised by Plaintiff and develop a response. Pl's. Ex. 16. Defendant Toya never further responded to these issues.

On July 13, 2005, Plaintiff submitted an amendment to its contract proposal in which it proposed to take over all contractible PFSAs at the Clinic. Pl's. Ex. 17. On July 14, 2005, Plaintiff consented to an extension until August 15, 2005 to negotiate the amended proposal. Pl's. Ex. 10. On July 18, 2005, Defendant Grim, Assistant Surgeon General and Director of IHS, sent a memorandum to all Area Directors stating that the decision of the United States Supreme Court in Cherokee Nation v. Leavitt interpreted ISDEA agreements as binding similar in nature to procurement contracts. Pl's. Ex. 18. He then noted that Congress had placed a cap on the amount of funds that IHS could use for CSC, and the appropriation does not include any funds for new or expanded program assumption by Indian Tribes. Id. Defendant Grim stated that, in light of the Supreme Court decision and the lack of appropriations, IHS would require language in any new or expanded contract indicating that there are no CSC funds available, the Tribe

wishes to contract the new or expanded PFSAs knowing that CSCs are not available, the Tribe is able to carry out the new or expanded PFSAs without added CSC funding, the Tribe agrees that no new need for CSC funding is created under the contract, and there is no promise by IHS to pay CSC. Id.

On August 8, 2005, Plaintiff and Defendants' representatives met for a final negotiation session. Pl's. Ex. 9. At the end of this negotiation, the Acting Director indicated that the only outstanding issue was the disagreement over CSC language and all other potential declination issues had been resolved. Id. On August 11, 2005, Plaintiff's counsel sent the Acting Director a letter indicating his understanding that the only remaining issue was the CSC language and reiterating that the tribe would not agree to the language. Pl's. Ex. 19. The letter specifically stated that Plaintiff was able to implement the proposal without the CSC funding, but would not waive the statutory right to the funding.

On August 15, 2005, Defendant Toya sent a letter to Plaintiff declining the proposal. Pl's. Ex. 21. The letter outlines the five declination criteria from the ISDEA, 25 U.S.C. § 450f(a)(2)(A) through (E), and lists criteria (A), (C), (D), and (E) as the bases for declination. Id. In explaining the declination, Defendant Toya noted that Plaintiff was refusing to recognize in the contract that CSC is not available and that this has the effect of meeting criteria (C), (D) and (E). Id. Toya then concluded that criteria (A) was met because Plaintiff had not shown it would be able to operate and maintain the programs and provide satisfactory services without CSC funds. Id. The letter then lists an additional twelve reasons the proposal would have been declined even if Plaintiff had agreed to the CSC. There is no evidence in the record that any of these twelve issues had been discussed with Plaintiff during negotiations.

On September 2, 2005, Plaintiff sent a letter to Defendant Toya in response to the declination indicating that the declination of the entire proposal on the stated grounds was unlawful. Plaintiff noted that none of the twelve additional criteria had ever been raised during negotiations, but that these grounds were irrelevant because Toya expressly stated they were not the actual grounds for declination. Plaintiff stated that these additional grounds were, however, an indication that IHS had negotiated in bad faith. Plaintiff urged that the declination of the entire proposal was unlawful, that the actual grounds stated for the declination were not factually accurate, and that the grounds were unlawful under the ISDEA.

Pursuant to 25 U.S.C. § 450f(b)(3) and 450m-1(a), Plaintiff filed a Complaint in this Court for damages and injunctive relief on September 15, 2005. Before the Court is the legal issue whether Defendants had discretion to decline Plaintiff's proposal on the basis that Plaintiff refused to include new CSC language developed by IHS in its contract.

LEGAL STANDARD

Plaintiff's Motion for Preliminary Injunction fully briefs the legal issue whether Defendants had discretion to decline Plaintiff's ISDEA proposal on the basis of Plaintiff's refusal to include new CSC language. Defendants' Motion for Summary Judgment also fully briefs this issue. Based on the parties' agreement to consolidate the motion for preliminary injunction with the merits of this case and their representation that the issue is fully briefed and ready for determination, the Court will treat the parties' respective motions as cross motions for summary judgment.

Summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is "material"

if, under the governing law, it could have an effect on the outcome of the lawsuit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Hardy v. S.F. Phosphates Ltd. Co., 185 F.3d 1076, 1079 (10th Cir. 1999). When the parties to an action file cross motions for summary judgment, a court is entitled to assume that no evidence needs to be considered other than that filed by the parties. Atlantic Richfield Co. v Farm Credit Bank of Wichita, 226 F.3d 1138 (10th Cir. 2000). Summary judgment is not appropriate if disputes remain as to material facts. Id.

Under the ISDEA, in any civil action brought pursuant to 25 U.S.C. § 450m-1(a) challenging the declination of a Tribe's contract proposal, the government bears the burden of establishing by clear and convincing evidence the validity of the grounds for declination. 25 U.S.C. § 450f(e)(1).

DISCUSSION

In their motion for summary judgment, Defendants make clear that for Fiscal Year 2005 (FY 2005) Congress capped the amount of appropriations that could be spent on contract support costs under the ISDEA and did not increase the appropriation of such funds to cover CSC for new or expanded self-determination contracts. Defendants argue that entering into new self-determination contracts that require CSC would violate the Appropriations Clause of the United States Constitution, art. I, § 9, cl. 7. They also argue that entering into such contracts would violate the Anti-Deficiency Act, 31 U.S.C. § 1341. Defendants contend that the ISDEA does not require IHS to enter into contracts that exceed available funding because it permits the Secretary to decline a proposal if the amount of funds proposed under the contract exceed the applicable level of funding for the contract.

I. ISDEA STATUTORY SCHEME FOR FUNDING AND DECLINATION

Under the ISDEA, the Secretary[5] "is directed, upon request of any Indian tribe by tribal resolution, to enter into a self-determination contract . . ." 25 U.S.C. § 450f(a)(1). An Indian tribe may submit a proposal for a self-determination contract to the Secretary,

> and 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.

25 U.S.C. § 450f(a)(2).

As both parties note, Section 450f(a)(2)(D) allows the Secretary to decline a proposal if the amount of funds are in excess of the applicable funding level for the contract. However, the meaning of "applicable funding level" is not open to broad interpretation and is specifically defined by cross reference to Section 450j-1(a). Section 450j-1(a) provides that the amount of funds provided under a self-determination contract shall not be less than the Secretary would have provided for the operation of the program, and added to this required amount shall be contract

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[5]Secretary is defined in the ISDEA as the Secretary of Health and Human Services or the Secretary of the Interior. 25 U.S.C. § 450b(i). In this case, the relevant Secretary is the Secretary of Health and Human Services.

support costs. 25 U.S.C. § 450j-1(a)(1) and (2).

The ISDEA provides model contract language in 25 U.S.C. § 450l. Every self-determination contract must contain or incorporate by reference the provisions of the model agreement. 25 U.S.C. § 450l(a)(1). The model agreement terms for funding state:

> 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].

25 U.S.C. § 450l(c)

The government notes that Section 450j-1(b) states in 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 reduced 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).

II. DEFENDANTS DID NOT HAVE DISCRETION UNDER THE ISDEA TO DECLINE PLAINTIFF'S PROPOSAL FOR A SELF-DETERMINATION CONTRACT

The language of 25 U.S.C. § 450f(a)(2) clearly limits the discretion of the Government to decline an Indian Tribe's proposal for a self-determination contract to those specific criteria listed. In this case, the Government relies on Section 450f(a)(2)(D) arguing that the amount of funds proposed by Plaintiff was in excess of the applicable funding level because it included CSC when Congress had not appropriated sufficient funds for CSC for the fiscal year in which the contract was proposed. The Government notes that language in Section 450j-1(b) states that the provision of funds for self-determination contracts is subject to the availability of appropriations.

The basis on which the Government relies for declining Plaintiff's proposal specifically

cross-references Section 450j-1(a) to define "applicable funding level." The language of 450j-1(a)(2) provides that the applicable funding level includes CSC. Thus, the fact that Plaintiff's proposal included CSC was not a proposal for funds "in excess of the applicable funding level," and Section 450f(a)(2)(D) cannot provide the basis for the Government's declination of the contract. The language in Section 450j-1(b) that the provision of funds is subject to the availability of appropriations does not change this result. This subsection is not cross-referenced in the declination criteria and cannot form the basis for declining the Plaintiff's proposal.

III. ENTRY BY THE GOVERNMENT INTO THE ISDEA CONTRACT WILL NOT VIOLATE THE APPROPRIATIONS CLAUSE OR ANTI-DEFICIENCY ACT

Notwithstanding the clear statutory mandate to enter into a self-determination contract unless one of the specific declination criteria applies to a Tribe's proposal, the Government argues that it is prohibited from entering into the contract by the Appropriations Clause of the United States Constitution, art. I, § 9, cl. 7. Similarly, it argues that it is prohibited from entering into the contract by the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A) and (B).

Under the Appropriations Clause, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. In cases cited by the Government decided on the basis of the Appropriations Clause, claimants were seeking payment from the government that had no underlying substantive authorizing statute. For instance, in Flick v. Liberty Mut. Fire Ins. Co., 205 F.3d 386 (9th Cir. 2000), a plaintiff's claim for coverage under a policy of flood insurance issued pursuant to and funded by the National Flood Insurance Act was denied. Federal regulations required that any claim for payment under such policy must be by a sworn proof of loss submitted within 60 days of loss, and the plaintiff

failed to submit a sworn proof of loss within that time period. Id. at 389. In determining that plaintiff was not entitled to payment, the court concluded that the Appropriations Clause precludes payment out of the Treasury in a **manner** not authorized by Congress. Id. at 391 (emphasis added).

In Office of Personnel Management v. Richmond, 496 U.S. 414 (1990), a federal statute concerning eligibility for disability annuity payments to retired federal employees expressly provided that persons who earned more than a certain percentage of their pre-disability pay in any calendar year would lose their disability annuity payments for the following year. An employee of the Office of Personnel Management ("OPM") had incorrectly informed an annuitant that he would keep his payments unless he earned above the percentage in two consecutive years. The annuitant lost his payment for the year following the first year in which he earned above the percentage, and he sued OPM arguing that the Government was estopped from denying his payments. The Supreme Court determined that the annuitant was seeking payment of money that was not authorized by any substantive law and any such payment would violate the Appropriations Clause. Id. at 424. The Court noted that an award in favor of the annuitant "would be in direct contravention of the federal statute upon which his ultimate claim to the funds must rest." Id. The Court referred to any such payment as an "extrastatutory payment." Id. at 430.

The Anti-Deficiency Act prohibits government officers or employees to authorize expenditures or incur obligations in excess of Congressional appropriations. 31 U.S.C. §§ 1341. In Richmond, the Supreme Court noted that allowing the annuitant to recover payment in contravention of the underlying authorizing statute would violate the Anti-Deficiency Act. 496 U.S. at 430.

In Richmond and Flick, the payment sought from the Treasury was not authorized by any substantive statute, and the payment would have violated the Appropriations Clause. In the instant case, Plaintiff seeks a contract that is not only authorized but mandated by statute. Because the contract is not an extrastatutory authorization or obligation, it does not violate the Appropriations Clause.

Because the statutory scheme in the ISDEA does not give the Secretary discretion to decline a proposal on the basis of underfunding in Congressional appropriations, the executive branch officers and employees will not be in violation of the Anti-Deficiency Act by carrying out their statutory obligations to approve Plaintiff's proposal. It is not the executive branch that has obligated the government; rather, it is Congress through the ISDEA that has obligated the Government. Moreover, the Government's concerns with regard to the Anti-Deficiency Act are satisfied by the model contract language within the ISDEA that funding is subject to the availability of appropriations which language Plaintiff agreed should be included in its contract.

The Government's argument that its statutory duty to approve Plaintiff's proposal has been alleviated by the lack of sufficient Congressional appropriations is, in essence, an assertion that the appropriations law amends or repeals the substantive provisions of the ISDEA. "The mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute." Greenlee County, Ariz. v. United States, -- F.3d --, 2007 WL 1391389 *4 (Fed. Cir. 2007); see also Whatley v. District of Columbia, 447 F.3d 814, 819 (D.C. Cir. 2006) (noting the presumption that appropriations acts do not amend substantive law). When appropriations acts conflict with underlying substantive law, their effect must be

narrowly construed. Calloway v. District of Columbia, 216 F.3d 1, 9 (D.C. Cir. 2000). "When two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Highland Falls - Fort Montgomery Central Sch. Dist., 48 F.3d 1166, 1171 (Fed. Cir. 1995) (citing Morton v. Mancari, 417 U.S. 535, 551 (1974)). In this case, the Secretary's obligations to approve proposals under the ISDEA have not been amended or repealed by any heretofore enacted annual appropriations act, and the Secretary's obligation to accept proposals from Indian Tribes remains what it has always been. Additionally, the appropriations acts have not amended the ISDEA by expanding the declination criteria or the Secretary's discretion to decline proposals.

The Government's interpretation of its discretion under the ISDEA in light of annual appropriations is actually contrary to the very purpose of the Appropriations Clause. Under the Appropriations Clause, 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 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.

The Government's reaction to the Supreme Court decision in Cherokee Nation of Okla v. Leavitt, 543 U.S. 631 (2005) is not unreasonable. In Cherokee, the Court made clear that the Government is obligated to pay its contract obligations under the ISDEA even when there are insufficient specific appropriations so long as there are sufficient unrestricted appropriations. Id. at 643. It seems the Government is between a rock and a hard place if it has no discretion to decline contracts, no discretion to pay less than full CSC on all outstanding contracts, and

receives inadequate appropriations to meet its obligations. However, the Supreme Court did not decide what the Government's obligations to pay CSC would be if Congress explicitly prohibited the use of unrestricted funds to meet these obligations. Furthermore, the Supreme Court hinted that the Government's obligation to pay CSC might be different if Congress did not appropriate adequate unrestricted funds. Accordingly, the Government cannot speculate that the Supreme Court will require it to pay obligations for which there are no unrestricted funds available and engage in self-help statutory amendment to avoid the anticipated result of such a decision.

On a final note, the Government argues that the Supreme Court "warned" it that it must refrain from making commitments it cannot fulfill. In Cherokee, the Supreme Court stated:

> We recognize that agencies may sometimes find that they must spend unrestricted appropriated funds to satisfy needs they believe more important than fulfilling a contractual obligation. But the law normally expects the Government to avoid such situations, for example, by refraining from making less essential contractual commitments; or by asking Congress in advance to protect funds needed for more essential purposes with statutory earmarks; or by seeking added funding from Congress; or, if necessary, by using unrestricted funds for the more essential purpose while leaving the contractor free to pursue appropriate legal remedies arising because the Government broke its contractual promise.

543 U.S. at 642. This language is not a warning to the Government not to enter into contracts. Refraining from less essential contractual commitments is merely one of several examples of ways an agency might reserve its unrestricted funds for uses other than paying on contracts. The Court did not address the Government's obligations to enter into contracts under the ISDEA and was not suggesting that the Government attempt to redefine its statutory obligations. Interestingly, one of the Court's suggestions is that the Government seek protection of funds by requesting statutory earmarks. This appears to be another suggestion that the Government's obligation to pay CSC may be different when there are no unrestricted funds available to pay them. I note that

the funding for FY 2005 specified that the money earmarked for CSC was the only money to be used to pay for CSC. See P.L. 108-447, 118 Stat. 2089, 3084.[6]

CONCLUSION

Based on the above analysis, I conclude 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. Accordingly, 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. The proposed order must be submitted in WordPerfect or Rich Text format. If parties are unable to reach agreement as to the form of an order, Plaintiff shall file a motion for a presentment hearing.

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[6]While decided ten years before the decision in Cherokee, the decision in Highland Falls-Fort Montgomery Central Sch. Dist. v. United States, 48 F.3d 1166 (Fed. Cir. 1995), suggests that caps on funds available to pay entitlements results in the Government's obligation to alter its allocation of funds in order to abide by both the substantive law as well as the Anti-Deficiency Act. In that case, the court addressed entitlement payments under the Impact Aid Act ("IAA"). The IAA provided assistance to school districts financially burdened by federal ownership of real property within the school district. Id. at 1168. Congress had not appropriated sufficient funds in fiscal years 1989 through 1993 to fully fund entitlements under the IAA; it had earmarked insufficient funds for that entitlement, and all other appropriations were earmarked for other entitlements. Id. at 1169. The Secretary of Education had allocated funds for the entitlements based on the earmarked appropriations, and the plaintiff school district received less than its full entitlement for those years. Id. The plaintiff school district sought its full entitlement arguing that the Department of Education ("DOE") had erred in concluding that the earmarked appropriations had priority over the formula for entitlements in the underlying authorizing statute. Id. at 1170. The Federal Circuit concluded based in part on the Anti-Deficiency Act that the DOE had not erred in paying its entitlement obligations by allocating from the earmarked funds rather than paying the full amount of entitlements.

The remaining issues are those raised in Plaintiff's third cause of action with regard to the Administrative Procedures Act, and any issue of damages. The Court shall hold a pre-trial conference in the near future to hear from counsel on what type of hearing or trial will be required to resolve the remaining issues.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE