Nos. 02-1472 & 03-853

IN THE

Supreme Court of the United States

CHEROKEE NATION and SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Petitioners,

v.

UNITED STATES OF AMERICA; TOMMY THOMPSON, Secretary of the United States Department of Health and Human Services, *et al.*,
Respondents.

TOMMY G. THOMPSON, Secretary of Health and Human Services,
Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth Circuit and for the Federal Circuit

OPENING BRIEF FOR CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES

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QUESTIONS PRESENTED

The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450-450n, directs the Secretary of Health and Human Services to pay Indian tribal contractors operating federal medical facilities the necessary "contract support costs" required to operate those facilities, and establishes a damages remedy under the Contract Disputes Act for any contract breach. The ISDA further provides that the "provision of funds" under self-determination contracts is "subject to the availability of appropriations," and that in making funds available to contracting Tribes "the Secretary is not required to reduce programs, projects, or activities serving [any other] tribe," 25 U.S.C. 450j-1(b). In order to curb an agency practice of regularly underfunding such contracts, the ISDA also instructs that the contract amount "shall not be reduced" by the Secretary to pay for "Federal functions." *Id.*

1. Whether there were appropriations legally available in fiscal years 1994 to 1997 to fund the contracts here at issue in the amounts mandated by the ISDA, given that each year Congress enacted an unrestricted lump-sum appropriation to carry out the ISDA?

2. Whether a statutory directive that the Secretary is not required to reduce the funding of other tribes in making funds available to ISDA tribal contractors authorizes the Secretary to refuse to pay the contract amount mandated by statute rather than reprogram spending on Federal functions or spend unobligated appropriations?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are set forth in the petitions for writs of certiorari.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 311 F.3d 1054 and reprinted in No. 02-1472 at Pet. 1a. The District Court opinion is reported at 190 F. Supp. 2d 1248 and reprinted at Pet. 24a.

The opinion of the Court of Appeals for the Federal Circuit is reported at 334 F.3d 1075 and reprinted in No. 03-853 at

Pet. 1a. The relevant Interior Board of Contract Appeals (IBCA) opinions are reported at 01-1 B.C.A. (CCH) ¶ 31,349 and 99-2 B.C.A. (CCH) ¶ 30,462, and reprinted at Pet. 43a, 50a.

JURISDICTION

The judgment of the Court of Appeals in *Cherokee* was entered November 26, 2002, a petition for rehearing was denied January 22, 2003, and the petition for certiorari was filed April 3, 2003. The judgment of the Court of Appeals in *Thompson* was entered July 3, 2003, a petition for rehearing was denied September 12, 2003, and the petition for certiorari was filed December 11, 2003. In both cases this Court's jurisdiction is invoked under 28 U.S.C. 1254(1). The petitions were granted March 22, 2004, in an Order consolidating the cases for briefing and argument. 124 S. Ct. 1652.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Indian Self-Determination and Education Assistance Act of 1975 (ISDA), as amended, 25 U.S.C. 450-450n, the relevant Appropriations Acts, the Contract Disputes Act, 41 U.S.C. 601-613 (CDA), the Anti-Deficiency Act, 31 U.S.C. 1341 (ADA), and the Judgment Fund Act, 31 U.S.C. 1304, are reprinted in the Addendum hereto.

INTRODUCTION

In these consolidated cases the Secretary refused to pay two tribal contractors their "contract support costs" of operating Federal medical facilities, even though payment of such costs is a mandatory term of contracts under the amended ISDA "subject to the availability of appropriations," 25 U.S.C. 450j-1(b). As the Federal Circuit properly concluded in *Thompson*, under time-honored principles of Federal contracting and appropriations law there were ample appropriations available in fiscal years 1994 to 1997 to fund the contracts at issue in full. Each year Congress made a lump-sum appropriation that was far in excess of all ISDA

contract obligations: there was no statutory earmark, cap or other limitation specific to ISDA contracts (or contract support costs) that would even arguably render appropriations unavailable. The Secretary's later discretionary spending of each lump-sum appropriation on other items during the course of the fiscal year has nothing to do with "the availability of appropriations" as that term has long been interpreted; even if it did, by the plain terms of the relevant Appropriations Acts necessary amounts fully to support the contracts were obligated immediately upon the effective date of the Acts. Nor did a later appropriations rider passed in 1998, declaring that recommended earmarks in *committee reports* for the FY1994-1997 Appropriations Acts are the total amounts available for contract support costs in those years, have retroactive effect. That rider addresses only the future obligation of unexpended prior appropriations. The rider neither has nor could have retroactive effect because Congress can neither abrogate the Government's own contracts, nor issue an interpretation of prior unamended law that would bind a Federal court in an action for breach of contract under that prior law.

Finally, the Secretary cannot refuse to pay the full contractual amount mandated by statute by invoking the ISDA provision that the funding of self-determination contracts does not require the Secretary to reduce spending on programs serving other tribes: not only is that provision simply a grant of reprogramming discretion, but it provides no refuge for the Government when total Indian Health Service appropriations for each fiscal year are far in excess of the combined total spent on Federal services to Indian tribes and on ISDA contracts.

The Federal Circuit's decision holding the Government bound to its contracts is faithful to, indeed mandated by, the plain language and purpose of the ISDA, which was enacted in present form to cure a decade of abusive practices by the Secretary in negotiating and funding self-determination

contracts. By contrast, the Tenth Circuit's contrary ruling freeing the Government from its contractual obligations to pay contract support costs is irreconcilable with the text, structure, and history of the Act. It also presents a radical and unwarranted departure from established contracts and appropriations law that, if accepted, would ultimately inject untold destabilizing risks into the government contracting process, increase the costs of such contracts, and undermine the foundation of the Government's reliability as a contracting partner, contrary to the foundational principles set forth in *United States v. Winstar Corp.*, 518 U.S. 839 (1996); *Lynch v. United States*, 292 U.S. 571 (1934); and *Murray v. City of Charleston*, 96 U.S. 432 (1877).

STATEMENT OF THE CASE

1. The Indian Self-Determination And Education Assistance Act. Congress in the 1975 Indian Self-Determination and Education Assistance Act committed this Nation to "the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. 450a(b). To carry out this commitment, Congress required the Secretary to enter into contracts whereby Tribes would receive funding to take over the administration of Federal hospitals, clinics and other Federal programs that were otherwise being operated by the Secretary of Health and Human Services (through the Indian Health Service (IHS)), or the Secretary of the Interior (mainly through the Bureau of Indian Affairs (BIA)). 25 U.S.C. 450b(i), 450f(a)(1).

In the wake of the ISDA's enactment, Congress witnessed the "agencies' consistent failures . . . to administer self-determination contracts in conformity with the law," with the BIA and IHS "systematically violat[ing]" contractors' rights.

S. Rep. No. 100-274, at 37 (1987). Far and away "the single most serious problem with implementation of the Indian self-determination policy ha[d] been the failure of the [BIA] and [IHS] to provide funding for the indirect costs associated with self-determination contracts." *Id.* 8. This "practice . . . require[d] tribal contractors to absorb all or part of such indirect costs within the program level of funding, thus reducing the amount available to provide services to Indians as a direct consequence of contracting." *Id.* 33. *See also id.* 9-10 (discussing same). The agencies' failures to pay in full various contract "indirect costs" (later called "contract support costs" (or CSCs)) also resulted in a "tremendous drain on tribal financial resources," *id.* 7, because tribal contractors were compelled to "subsidize" the contracted programs, *id.* 9. Concerned that Tribes would soon "choose . . . to retrocede the contract[s] back to the Federal agency," *id.* 13, the Senate Indian Affairs Committee declared that "[IHS] must cease the practice of requiring tribal contractors to take indirect costs from the direct program costs, which results in decreased amounts of funds for services." *Id.* 12.

By the time of the facts giving rise to these cases, Congress had twice substantially rewritten the Act to constrain as much as possible the Secretary's contracting discretion, and to guarantee full funding of all contract costs, subject to the availability of appropriations. *See* Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285 (1988); Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (1994). Under the amended Act, "[t]he Secretary is directed, upon the request of any Indian tribe . . . to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof . . . [authorized under certain specified laws]." 25 U.S.C. 450f(a)(1). The Act further mandates that contractable functions "shall include administrative [DHHS] functions . . . that support the delivery of services to Indians"

"without regard to the organizational level within the Department that carries out such functions." *Id.* The Act also provides that "the Secretary shall, within ninety days after receipt of [a contracting] proposal, approve the proposal and award the contract unless the Secretary . . . [makes] a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that," certain 'declination' criteria have been triggered. § 450f(a)(2). It establishes as one such criterion any agency claim that "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under [§ 450j-1(a)]." § 450f(a)(2)(D). It establishes remedies to test any declination (§ 450f(b)), and in such proceedings directs that "the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal." § 450f(e)(1). And, it fully exempts ISDA tribal contracts from the federal procurement system. §§ 450b(j), 450j(a)(1).

With respect to contract funding, Congress meticulously provided in § 450j-1(g) that "[u]pon the approval of a self-determination contract, the Secretary *shall add to the contract* the full amount of funds to which the contractor is entitled under [subsection (a)]," and Congress commanded that the contract amount "*shall not be less than* the applicable amount determined pursuant to [subsection (a)]," § 450*l*(c) (sec. 1(b)(4)) (emphasis added). Subsection 450j-1(a), in turn, required that in addition to the "Secretarial amount"[1]—

> (2) There shall be added . . . contract support costs, which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal

[1] The so-called "Secretarial amount" is the amount the Secretary would have spent directly to carry out the program being contracted. *Thompson*, Pet. 4a; *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1341 (D.C. Cir. 1996) ("*RNSB*").

> organization as a contractor to ensure compliance with the terms of the contract and prudent management.

See also §§ 450j-1(a)(2),(3) & (5) (describing the required CSCs that "shall be added" to the contract); 450j-1(d)(2) ("[n]othing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract"). These contract support costs cover:

> (1) a proportionate share of a contractor's total pooled "indirect costs" required to administer and support all of its operations, including its ISDA contract (§§ 450b(f), 450j-1(a)(3)(A)(ii));[2] and
>
> (2) certain unpooled "direct" CSC costs, such as workers' compensation insurance, that specifically support only the ISDA contract (§ 450j-1(a)(3)(A)(i)).

The described CSCs cover the "fixed" overhead costs tribal contractors must incur to carry out these federal contracts, S. Rep. No. 100-274, at 11; *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997), costs which if unreimbursed must either be paid by a contractor or absorbed by

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[2] "Indirect costs" are necessary pooled overhead costs (such as personnel, procurement and financial management systems costs) that benefit all of a contractor's operations, including the ISDA-contracted portion of those operations. Office of Management and Budget (OMB) Circular A-87, 46 Fed. Reg. 9548 (Jan. 28, 1981) (explaining costs and process). Indirect costs are typically expressed as a "rate." *See* 25 U.S.C. 450b(g) (defining "indirect cost rate"). The indirect cost rate is "predetermined" by the contractor's appropriate Federal agency, *Thompson*, Pet. 7a-8a n.2 (discussing OMB Cir. A-87); 53a (explaining process). Such cost allocation systems are a common feature of government contracts. *E.g.*, *Rumsfeld v. United Tech. Corp.*, 315 F.3d 1361 (Fed. Cir. 2003). The Secretary's share of an indirect cost pool associated with an ISDA contract is generally determined by multiplying the contractor's "indirect cost rate" against the ISDA contract's direct cost base (which is to say the "Secretarial amount" for the contracted hospital or clinic). The Government here does not dispute either the indirect cost rates or the resulting indirect CSC amounts.

taking funds away from direct services, *i.e.*, out of the "Secretarial amount." Annually the Secretary is directed to furnish to Congress a mid-year "accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted." § 450j-1(c)(2). By these means, the ISDA is structured to ensure that contracting tribes are not confronted with the Hobson's choice of either subsidizing the necessary overhead costs of running Federal facilities, or diverting funds the Secretary would have paid for patient care (the "Secretarial amount") to pay for overhead.

In order to end a rampant agency practice of funding agency operations at the expense of fully paying ISDA contracts, Congress also devoted a lengthy section of the Act to cataloguing specific funding prohibitions. Thus, Congress specified that "[t]he amount of funds required by [section 450j-1(a)] . . . shall not be reduced to make funding available for contract monitoring or administration by the Secretary," § 450j-1(b)(1); "shall not be reduced by the Secretary in subsequent years" except for five narrow reasons not directly pertinent here, § 450j-1(b)(2); "shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring," § 450j-1(b)(3); and "shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract," § 450j-1(b)(4). "This section protects contract funding levels provided to tribes, and prevents the diversion of tribal contract funds to pay for costs incurred by the Federal Government." S. Rep. No. 100-274, at 30. These and related provisions were necessary because the IHS and BIA repeatedly prioritized using their lump-sum appropriations to fund their own administration over their statutorily-mandated contract obligations, and failed to include in their internal

budgets sufficient funding to pay those obligations in full. *Id.* 8, 12, 30-32 (discussing agency failures).

Congress further made plain that the ISDA involves the execution of an enforceable "contract . . . between a tribal organization and the appropriate Secretary," § 450b(j), using the term "contract" 426 times to connote a "legally binding instrument" (S. Rep. No. 100-274, at 19), and clarifying beyond peradventure their judicial enforceability both through "mandamus" and through the "money damages" remedy available in the "Contract Disputes Act." § 450m-1(a), (d). As the Senate Committee pointedly noted (S. Rep. No. 100-274, at 37):

> [t]he[se] strong remedies . . . are required because of th[e] agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs. Existing law affords such contractors no effective remedy for redressing such violations.

The ISDA also sets forth a statutory model agreement, codified at § 450*l*(c), which includes the mandatory incorporation into the contract of all provisions of the Act, sec. 1(a)(1); a mandatory rule of construction directing that "[e]ach provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor," sec. 1(a)(2); an "effective" date "upon the date of the [parties'] approval and execution," sec. 1(b)(2); a funding provision stating that, "[s]ubject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2) [and] [s]uch amount shall not be less than the applicable amount determined pursuant to section 450j-1(a) of the [ISDA]," sec. 1(b)(4); the incorporation into the contract of an "Annual Funding Agreement" (AFA), sec. 1(f)(2); a pay-

ment provision directing "the Secretary shall make available to the Contractor funds [specified in the AFA] by paying to the Contractor . . . in accordance with such method as may be requested by the Contractor," sec. 1(b)(6)(B)(i); and an exemption from "program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to . . . or otherwise required by law," sec. 1(b)(11).

Finally, and consistent with Congress's retained authority over appropriations, the second sentence of § 450j-1(b) provides: "Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations . . . ." *See also* § 450*l*(c) (sec. 1(b)(4)). In the second half of that sentence Congress also instructed that "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." Congress here recognized that the mandatory payment of CSCs (an item not previously included in the IHS budget) to contracting Tribes would require higher aggregate spending; although this proviso makes clear that the Secretary is not bound to divert funds from other Tribes to pay his mandatory ISDA contract obligations (*i.e.*, he may keep other tribal spending constant), he is fenced in by § 450j-1(b)'s first sentence prohibiting the Secretary from prioritizing expenditures for his Federal functions over his contract obligations.[3]

In sum, Congress "clearly expressed . . . its intent to circumscribe as tightly as possible the discretion of the Secretary." *RNSB*, 87 F.3d at 1344. Indeed, "[p]recisely because the Secretary had consistently failed to behave in a

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[3] Capping these reforms, Congress replaced IHS's general regulatory authority with limited rulemaking in specific areas, none of which includes matters pertaining to contract funding (including CSCs), § 450k(a)(1). *See* S. Rep. No. 103-374, at 14 (1994) ("Beyond the areas specified . . . no further delegated authority is conferred").

reasonable manner . . . Congress elected specifically to cabin the Secretary's discretion under the Act." *Id.* at 1345 n.9.

2. The Relevant Appropriations Acts. These cases involve successive one-year contracts, each to be paid from one of four annual IHS Appropriations Acts. *See* Pub. L. No. 103-138, 107 Stat. 1379, 1408 (1993); Pub. L. No. 103-332, 108 Stat. 2499, 2527 (1994); Pub. L. No. 104-134, 110 Stat. 1321, 1321-189 (1996); Pub. L. No. 104-208, 110 Stat. 3009, 3009-212 (1996). Each of these Acts specified that "funds made available to tribes . . through contracts . . . authorized by the [ISDA], shall be deemed to be obligated at the time of the . . . contract award," *id.*, which is to say well in advance of most other expenditures. (The subject contracts were executed months in advance of the Appropriations Acts, *infra* 14-16.)

Congress in these four Acts appropriated to IHS ever increasing lump-sum amounts of $1.646 billion, $1.713 billion, $1.748 billion and $1.806 billion, respectively, "to carry out . . . the Indian Self-Determination Act." 107 Stat. at 1408; 108 Stat. at 2527; 110 Stat. at 1321-189; 110 Stat. at 3009-212. Of these respective sums, $1.277 billion, $1.331 billion, $1.366 billion and $1.419 billion were entirely unrestricted by any earmarks (the remainder being set aside for specific purposes).[4]

At the start of each year, these sums included approximately $88.1 million, $53.7 million, $35.8 million and $52.3 million, respectively, in unrestricted increases over the preceding year. As IHS later would report, it ended each year

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[4] The amount of the unrestricted appropriation is determined by deducting all funds specifically set aside for designated purposes. For instance, of the total $1,747,842,000 appropriated in FY1996, four earmarks set aside $12,000,000 for catastrophic health needs, $350,564,000 for contract medical care, $11,306,000 for IHS's loan repayment program, and $7,500,000 for the Indian Self-Determination Fund. 110 Stat. 1321-189.

with "actual" "end of year" "unobligated balance[s] available" of $59 million, $55 million, $76 million and $98 million, respectively.[5] The Secretary concedes that during the first three of these four years, at least $1.2 million to $6.8 million in appropriated funds went unspent. *Thompson*, Pet. 33a. Such leftover balances generally remain available for expenditure for five years. 31 U.S.C. 1552(a), 1553(a).

The Appropriations Acts here at issue involve "lump-sum" appropriations. That is, although the relevant committees regularly made non-binding recommendations, Congress in these four Acts never "earmarked" a maximum "not to exceed" amount that IHS could spend for CSCs. In this respect, the IHS portion of each Act differed from the BIA portion of the same Acts, *compare*, *e.g.*, 107 Stat. at 1391 (FY1994), and from the IHS portion of later Acts, *e.g.*, Pub. L. No. 105-83, 111 Stat. 1543, 1583 (FY1998) (1997) (the so-called "cap years").

Congress also recognized the need to accord special flexibility for contractors' "transitional" costs when taking on a new contract (or expanding an existing one) in the course of the year. Thus, each Appropriations Act included a special 'no-year' or "carryover" fund of unlimited duration (*Thompson*, Pet. 25a): "of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts . . . with the [IHS] under the provisions of the [ISDA]." *E.g.*, 110 Stat. at 1321-189 (ISD Fund). This formulation differed from Congress's inclusion of the ISD Fund within an overall "not to

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[5] *See* PRESIDENT'S BUDGET FOR FISCAL YEAR 1996 (Feb. 1995), Budget App. 471 (ident. code 24.40); PRESIDENT'S BUDGET FOR FISCAL YEAR 1997 (Jan. 1996), Budget App. 479; PRESIDENT'S BUDGET FOR FISCAL YEAR 1998 (Jan. 1997), Budget App. 500; PRESIDENT'S BUDGET FOR FISCAL YEAR 1999 (Jan. 1998), Budget App. 404.

exceed" CSC earmark in later Appropriations Acts, *e.g.*, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-182 (FY2000) (1999).

3. IHS's Unauthorized And Non-Binding Procedures. As noted *supra* 10 n.3, IHS's improper conduct led Congress in 1994 to withhold from the Secretary any "delegated authority" over CSC issues, including any authority to promulgate regulations on the topic. *RNSB*, 87 F.3d at 1350 (noting "ISDA's absolute ban on the imposition of [nonregulatory requirements] regarding CSCs"); 25 U.S.C. 450k(a)(1) ("the Secretary . . . may not . . . impose any non-regulatory requirement relating to self-determination contracts"); *see also* 25 C.F.R. § 900.5 (unpublished requirements are not binding). Nonetheless, in the 1990s IHS imposed on tribal contractors an unpublished, non-binding internal "policy" on the issue. Indian Self-Determination Memorandum 92-2, superceded by IHS Circular 96-04. JA 6, 20. The policy recognized two categories of tribal contracts: "ongoing" contracts, and "initial (or 'new') and expanded" contracts. "Ongoing" contracts were contracts (or the portions of contracts) that covered the operation of the same IHS facility that a contractor had been operating in one or more previous years. "Initial or expanded" contracts were either new contracts or the portions of existing contracts that were being expanded to add a facility not previously operated under the contracts. JA 8; *Thompson*, Pet. 22a. IHS placed all the initial or expanded contracts on an IHS list, JA 31, with the oldest ones at the top. Having divided contracts this way, IHS then limited CSC payments to each. First–and notwithstanding the utter silence in the Appropriations Acts– IHS annually limited its total CSC payments for "ongoing" contracts to the amount "recommended" for that purpose in committee reports. *Thompson*, Pet. 8, 19a-20a. Second, IHS annually took the no-year ISD Fund for "transitional costs" and used it to pay all CSC's for a few "initial or expanded" contracts at the top of the IHS list. *Id.* 9a n.3; JA 31. Since $7.5 million did not cover all CSCs for all contracts, by this

device IHS paid *no* CSCs ("transitional" or otherwise) for other contracts lower on the list.[6]

4. Facts Pertaining To *Thompson*, No. 03-853 (FY1994-1996). Since the facts relevant to No. 03-853 arose earlier than those relevant to No. 02-1472, we address them first.

IHS owns various hospitals and clinics in northeastern Oklahoma, including the Sallisaw and Stilwell clinics. It also operates various "contract health care" physician referral programs, community health programs, two hospitals and other facilities, all within the Cherokee Nation's 7,000 square mile jurisdictional area. Since at least 1983 the Cherokee Nation has carried out various ISDA contracts (converted in June 1993 to a "Compact") with the United States to operate increasing portions of these facilities on the Government's behalf. *Thompson*, Pet. 7a; *Cherokee*, Pet. 32a.

By FY1994, the Cherokee Nation and the Secretary had expanded the parties' Annual Funding Agreement (AFA) to include the operation of IHS's new Sallisaw and Stilwell Clinics. (Although operation of the new Sallisaw Clinic was first added in the FY1992 AFA, the Clinic was not fully operational until FY1994.) The FY1995 AFA added to the contract scope of work the IHS "Contract Health Care Out-Patient" (CHC-OP) physician referral program. *Thompson*, Pet. 54a-55a, 79a-80a; JA 161-62. (The FY1996 AFA did not expand the contract scope of work.)

Each AFA at issue in No. 03-853 (covering FY1994-1996) was executed and awarded in the month of June preceding the fiscal year period of performance. JA 240, 259, 277. Each AFA was also incorporated into the parties' master Compact

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[6] Contrary to each Appropriations Act, IHS also did not limit the ISD Fund to contracts that were new or newly-expanded in the year of payment. No. 03-853, 2 C.A. App. 427 (ISD Queue #99-1). More recently, IHS has abandoned the controversial "Queue" Policy, and now pays the annual ISD Fund only to contracts that in the year of payment are, in fact, "new" or "expanded" that year. *See* IHS Cir. 2001-05, at 10.

executed June 30, 1993. *Thompson*, Pet. 7a. The parties executed these documents under the authority of the Tribal Self-Governance Demonstration Project established under the now repealed Title III of the ISDA, added by Pub. L. No. 100-472, § 209, 102 Stat. 2285, 2296 (1988), as amended, 25 U.S.C. 450f note (1988). Under Title III, annual AFAs had to be finalized and presented to Congress 90 days before they went into effect. *Id.* § 303(a)(9).[7]

The three AFAs and the master contract typically required the Secretary to pay in full all amounts due including CSCs "'[s]ubject only to the appropriation of funds by the Congress of the United States,'" *Thompson*, Pet. 8a. Although the relevant Appropriations Acts each year made available ever-growing, unrestricted multi-billion dollar appropriations "to carry out the [ISDA]" that were never fully spent, *supra* 11-12, every year IHS failed to pay the Cherokee Nation its full CSC requirements. Specifically, IHS failed to pay any of the fixed CSCs associated with operating the Sallisaw, Stilwell and CHC-OP portions of the contracts, and in one year also failed to pay in full the fixed CSCs associated with operating the remainder of that year's contract. *Thompson*, Pet. 79a-80a (computing amounts). The parties stipulated that the Cherokee Nation suffered combined damages under

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[7] Self-determination "contracts" are entered into under Title I, §§ 450-450n. Title III incorporated all of Title I's funding and remedial provisions, *see, e.g.*, §§ 303(a)(6), (d), 102 Stat. at 2297-2298. *Thompson*, Pet. 7a ("The [Cherokee] compact . . . incorporated all of the terms of [the] model agreement" which "[t]he ISDA requires . . . every self-determination contract [to] incorporate"); *Cherokee*, Pet. 2a n.1 ("[t]here is no material distinction for purposes of this appeal between an agreement called a 'compact' and an agreement called a 'contract'"). *See also*, 25 U.S.C. 458cc(*l*) (incorporation of Title I provisions into Title III contracts). Since August 2000, "self-governance" agreements are entered into under the authority of Title V, Pub. L. No. 106-260, 114 Stat. 711 (2000), 25 U.S.C. 458aaa *et seq.*

the three contracts of $8.5 million resulting directly from these underpayments. *Id.* 41a.

5. Facts Pertaining To *Cherokee Nation and Shoshone-Paiute Tribes*, No. 02-1472 (FY1996-1997). In FY1997, the Cherokee Nation and the Secretary expanded the parties' AFA to add the "Contract Health Care In-Patient" physician referral program associated with IHS's Hastings Hospital in Tahlequah, Oklahoma. JA 162, 185. In all other respects, including IHS's failure to pay CSCs associated both with this expanded portion of the contract and the Sallisaw, Stilwell and CHS-OP portions of the contract, the facts are materially identical to the facts giving rise to No. 03-853.

With respect to the Shoshone-Paiute Tribes, IHS has long operated the Owyhee Community Hospital on the remote Duck Valley Reservation in northern Nevada, along with a variety of community health programs under tribal contract since the 1980s. *Cherokee*, Pet. 30a. After entering into a Title III Compact in 1994, the parties in June 1995 entered into an expanded AFA for the coming year (FY1996) to include operation of the Owyhee Hospital. *Id.* As with the Cherokee AFA, the Secretary agreed to pay for this expanded undertaking in a single amount at the beginning of the year. *E.g.*, JA 78-9 (requiring "advance lump sum" payment, "unless otherwise provided in [an AFA]" "on or before ten calendar days after the date on which the [OMB] apportions the appropriations for that fiscal year"), 122 (AFA). The AFA required IHS to pay the Tribes $2,035,066 in fixed CSC costs associated with this expanded portion of the contract, *Cherokee*, 8a-9a, 31a-32a. This sum was calculated pursuant to the guidance set forth in ISDM 92-2, to which the parties agreed only "[t]o the extent not inconsistent with [§§ 450j-1(a) & (b)] of the [ISDA]." JA 120 (Sec. 7(b)). IHS never paid this sum. In advance of FY1997, the Tribes contracted to continue the ongoing operation of the Hospital, but once again IHS failed to pay any of the Tribes' CSCs associated with that portion of the contract. Pet. 8a-9a, 31a-32a. As a

result, the Tribes were compelled to severely reduce patient care to cover the shortfall, *id.* 9a; JA 60-61, 67, 71.

All the contract documents in both cases specified that payment by the Secretary was subject solely to one condition, namely *Congressional* action in the follow-on Appropriations Acts. Using "virtually identical language" developed by IHS, the compacts specified that the Secretary's payments were "[s]ubject only to the appropriation of funds by the Congress of the United States and to adjustments pursuant to [§ 450j-1(b)] of the [ISDA]." JA 78. Echoing this language, the Shoshone AFAs noted that the contract amount was only subject "to adjustment due to *Congressional* action in appropriations Acts or other laws affecting [the] availability of funds to the [IHS]," while also specifying that any subsequent adjustment in funding amount shall be "subject to any rights which the Tribes may have under this Agreement, the Compact, or the law." JA 121-22 (emphasis added). Similarly, the Cherokee AFA made note of possible "unanticipated *Congressional* action" and specified that changes may be proposed "[u]pon enactment of relevant Appropriations Acts," though cautioning that the AFA funding amount "shall not be modified to decrease or delay any funding except pursuant to mutual agreement of the parties." JA 190 (emphasis added). At no time did either Tribe consent to a decrease in CSC funding. In each instance, IHS based its failure to pay on its non-binding CSC allocation policy and alleged appropriation shortfalls.

6. The 1998 Rider "Section 314." As noted, these two breach of contract cases arose in FY1994 through FY1997. In connection with this same period, a similar case was proceeding in Oregon district court, and in December 1997 and February 1998 that court held the Government liable for

failing to pay a tribal contractor full CSCs in FY1996.[8] Also in December 1997, the IBCA issued a similar ruling against the BIA involving its FY1993 lump-sum appropriation.[9] Contemporaneously, in November 1997 IHS widely circulated to tribal contractors a draft document proposing to collect the unspent lump-sum appropriations then still available from the several preceding Appropriations Acts (that is, FY1993 through FY1996), and to pay those funds to contractors who had been shorted in the prior years (as 31 U.S.C. 1552(a) & 1553(a) permit). JA 206. But in October 1998 Congress enacted "Section 314," an FY1999 Appropriations Act rider, which the Secretary has argued retroactively declared that additional IHS appropriations in FY1994 through FY1997 were legally unavailable to pay Tribes their full CSC obligations. *E.g.*, *Cherokee*, Pet. 20a-21a; *Thompson*, Pet. 69a. The rider in part provides:

> Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the [BIA and IHS] by [the FY1994 through FY1998 Appropriations Acts] . . . for [CSCs] associated with

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[8] *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306, 1332 (D. Or. 1997) ("*Shoshone I*") ("no statute expressly restrict[ed] the Secretary's ability to shift funds within its general appropriations to pay CSC"), modified, 999 F. Supp. 1395 (1998) ("*Shoshone II*"), on remand, 58 F. Supp. 2d 1191 (1999) ("*Shoshone III*"), rev'd as to "new and expanded" CSCs and § 314, 279 F.3d 660 (9th Cir. 2002) ("*Shoshone IV*").

[9] *In re Alamo Navajo School Bd., Inc. & Miccosukee Corp.*, Nos. 3463-3466 & 3560-3562, 98-2 BCA ¶¶ 29,831 & 29,832, 1997 WL 759441 (IBCA Dec. 4, 1997), *appeal voluntarily dismissed in part sub nom. Babbitt v. Miccosukee Corp.*,185 F.3d 880 (Fed. Cir. 1998) (unpub'd) (involving pre-FY1994 years when the BIA's CSC appropriation was not capped), *rev'd in part*, 217 F.3d 857 (Fed. Cir. 1999) (unpub'd) (involving later years when the BIA CSC appropriation was capped). Congress did not begin capping the availability of the IHS appropriation to pay "ongoing" CSCs until FY1998, *supra* 12.

> self-determination or self-governance contracts . . . are the total amounts available for fiscal years 1994 through 1998 for such purposes . . . .

Pub. L. No. 105-277, § 314, 112 Stat. 2681-288 (1998). Although the history specific to this rider is unilluminating, the accompanying Senate Appropriations Committee report elsewhere noted that "in several cases the Federal courts have held the United States liable for insufficient CSC funding," and on this account requested a General Accounting Office report. S. Rep. No. 105-227, at 52 (1998).

7. Proceedings Below.

a. *Cherokee*, No. 02-1472. After exhausting their remedies under the CDA the Tribes in March 1999 joined together in a breach of contract action against the United States, seeking damages under § 450m-1(a). *Cherokee*, Pet. 35a. On cross-motions for summary judgment, the district court concluded that, notwithstanding silence in the Appropriations Acts, the FY1996 and FY1997 appropriations for ongoing CSCs had been "earmarked in appropriation committee reports," *Cherokee*, Pet. 46a, adding that appropriations were "insufficient" because IHS eventually "spent" its appropriations on other things. *Id.* The district court also ruled that § 314 imposed a retroactive "cap" on the amounts IHS could spend on CSCs associated with the "initial or expanded" portions of the Tribes' contracts. *Id.* 49a.

The Tenth Circuit affirmed, relying on an agency affidavit to conclude that "all of the money appropriated for fiscal years 1996 and 1997 was in fact spent, leaving a zero balance at the end of the year," and further "declar[ing] that 'reprogramming additional funds for [CSCs] would have required IHS to use money otherwise dedicated to other purposes supporting health services delivery to tribes.'" *Id.* 14a-15a. The court further ruled that the Secretary had the discretion to follow committee recommendations in lieu of his contract obligations, *id.* 16a, and that "§ 314 retroactively gave those

committee earmarks binding authority," *id.* 16a n.8. Finally, the court found the ISD Fund language ambiguous, and that Congress in § 314 retroactively removed the ambiguity, *id.* 18a-20a.

b. *Thompson*, No. 03-853. After exhausting its remedies under the CDA (*Thompson*, Pet. 74a), the Cherokee Nation filed a timely appeal with the IBCA. Following the enactment of § 314, IHS moved to dismiss. *Id.* 9a-10a, 52a. The Cherokee Nation then moved for partial summary judgment of liability. *Id.* 52a. In ruling for the Tribe, the IBCA held that the appropriations committee's "nonstatutory instruction[s]" were "legally unenforce[able]" and "non-binding" under standard appropriations law. *Id.* 57a. Relying on "case law that dates back to the post-Civil-War period," the Board held that "when a Government agency has a sufficient unrestricted lump-sum appropriation available to it, it is bound by its contracts to the same extent that a private party would be." *Id.* 66a. The Board also rejected the Secretary's § 314 argument, finding the rider to have "simply prohibit[ed] the future use of unspent appropriated funds for the 5 prior years as a budgetary measure," *id.* 71a, a reference to 31 U.S.C. 1552(a), 1553(a). On reconsideration the IBCA reaffirmed its ruling, concluding that "IHS has provided neither adequate nor convincing proof . . . that any actual reduction of funds for other tribes would be required to fully fund Appellant's CSCs." Pet. 47a.

The Federal Circuit affirmed, grounding its decision on five "fundamental principles of appropriations law, as enunciated by the Supreme Court, by this court, by our predecessor court, and by other circuits," and by "the opinions of the General Accounting Office [GAO] . . . and . . . the opinions of the Comptroller General." *Thompson*, Pet. 12a. Applying these controlling principles, the court ruled that committee recommendations were not binding and that the Secretary therefore lacked discretion under the ISDA's "availability clause" not to pay the contract obligations in

full, even if doing so required reprogramming other funds, *id.* 19a-20a. In addition to elementary government contracting law, the court rested its decision on the ISDA's elimination of Secretarial discretion over contract funding matters. *Id.* 21a. With respect to CSCs due on the "initial or expanded" portions of the contracts, the Circuit noted the Secretary's "conce[ssion]" that the ISD Fund language did not cap such costs, *id.* 23a, adding that the carryover term establishing the Fund is universally understood as an unambiguous "term of art" "indicating that unexpended funds 'shall remain available' for the same purpose during the succeeding fiscal year." *Id.* 25a.

With respect to § 314, the Federal Circuit concluded that "a statute enacted by Congress . . . could not abrogate the contractor's right to payments that were due before the passage of the statute," *id.* 27a, and that "a later statute cannot be read as clarifying the meaning of an earlier statute where the earlier statute is unambiguous." *Id.* 29a.

Finally, the Federal Circuit concluded the Secretary had failed to raise a triable issue that fully paying on the contracts would have compelled reductions in programs serving other tribes, noting that the Secretary "retained" each year between $25.5 million and $36 million as a "residual" amount to administer "inherently federal functions," and also ended each year with between $1.2 million to $6.8 million in unspent funds, *id.* 32a-33a. Finally, the court rejected the Secretary's late suggestion that the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, could somehow bar a CDA damages award paid out of the Judgment Fund, 31 U.S.C. 1304. Pet. 34a-35a.

SUMMARY OF ARGUMENT

I. Resolution of the issues presented in these cases turns on the plain and unambiguous meaning of the ISDA's mandatory contracting terms. Those terms required the Secretary to enter into contracts for the full amount specified

in 25 U.S.C. 450j-1(a), including the Secretarial amount and CSCs. Although the "provision of funds" for the contracts was "subject to the availability of appropriations," under each of the four relevant Appropriations Acts the full amounts necessary to pay these contracts were "obligated" by operation of law on the date of "contract award." Thus, necessary appropriations were "legally available" to pay these contracts.

The "availability of appropriations" clause is a routine term of art in federal appropriations law, directed to the legal existence of an appropriation to pay a given sum under the so-called "purpose-time-amount" test. Under that test, each of the four Appropriations Acts included funds that were "legally available" to pay the full amounts specified in the ISDA contracts. Since each appropriation available to pay these contracts provided an unrestricted lump-sum amount, rather than a capped amount, under the rule of *Ferris v. United States* the contractors' legal rights could not "be affected or impaired by [the appropriation's] maladministration or by its diversion, whether legal or illegal, to other objects." 27 Ct. Cl. 542, 546 (1892); *see also Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 552 (Ct. Cl. 1980). Application of the *Ferris-Blackhawk* rule to these lump-sum appropriations is confirmed by Congress's decision elsewhere in these same Acts (and later in other Acts) to cap CSC payments, but not to do so in the provisions at issue here. *Russello v. United States*, 464 U.S. 16, 23 (1983). The rule is consistent with Congress's decision in each Act to deem the necessary contract amounts "obligated" as of the date of contract award, and it cannot be defeated by resort to non-binding committee recommendations regarding how the Secretary might spend his appropriation.

The Secretary had no general discretion, whether based on 'committee recommendations' or otherwise, not to reprogram other funds if necessary to meet his contract obligations, both because a contract is a mandatory payment obligation, *Blackhawk*, 622 F.2d at 552, and because the ISDA made that

obligation a statutory mandate. *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993).

To confer on the Secretary discretion to spend down his appropriation ahead of his ISDA contract obligations would "exclude from the coverage of the statute most of the conduct that Congress obviously intended to prohibit," *Holloway v. United States*, 526 U.S. 1, 9 (1999), rendering the Act's key funding provisions "a nullity," *Christensen v. Harris County*, 529 U.S. 576, 585 (2000), while disregarding the overarching statutory command that the ISDA and ISDA contracts "be liberally construed for the benefit of the Contractor." 25 U.S.C. 450*l*(c) (sec. 1(a)(2)). More broadly, such a construction of the routine "availability clause" in Government contracts would frustrate the "'[p]unctilious fulfillment of contractual obligations [which] is essential to the maintenance of the credit of public as well as private debtors,'" *Winstar*, 518 U.S. at 885, by making such contracts "an absurdity." *Murray*, 96 U.S. at 445.

The ISD Funds established in each Appropriations Act did not cap CSCs associated with the expanded portions of the Tribes' contracts. First, they do not mention all CSCs, and are limited only to "transitional costs"—one-time "startup costs" specified in § 450j-1(a)(5). Second, the term of art "shall remain available" that defines each Fund is not a cap on current year spending but only a set-aside of funds for potential "carryover" to future years; the Secretary has consistently so conceded throughout the life of these cases.

Given the unambiguous language of the Appropriations Acts and the ISDA within the framework of time-honored principles of federal contracting and appropriations law, § 314 years later did not, and could not, reduce the Secretary's pre-existing obligation for the full amounts necessary to pay these Tribes on contracts long since performed. Section 314's plain meaning indicates Congress intended only to limit the future expenditure of any remaining unobli-

gated balances from the earlier years. The broader interpretation the Secretary advances would violate the rule that "a later Congress cannot control the interpretation of an earlier enacted statute," *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996). More gravely, the Government's construction would amount to an improper congressional repudiation of Government contracts "simply in order to save money," *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55 (1986). Worse yet, that construction would render § 314 an unconstitutional attempt to decree "findings and results under old law" for determining the availability of appropriations under the earlier Appropriations Acts (and thus the Government's liability under long-completed contracts), contrary to the rule of *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

II. The Secretary's failure to pay also was not excused by the ISDA's "reduction clause." First, the Secretary waived any right to invoke that clause. Second, the Secretary's construction of that clause would again "exclude from the coverage of the statute most of the conduct Congress obviously intended to prohibit," *Holloway*, 526 U.S. at 9, by wiping out the ISDA's express prohibitions in § 450j-1(b) *against* reducing contract amounts to pay for the Secretary's "administration" and other diverse "Federal functions." Third, the Secretary's proof confirmed that ample funds outside those targeted by the reduction clause were available for reprogramming to satisfy the Secretary's legal duty to pay these contract obligations.

ARGUMENT

The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). "[W]here, as here, the statute's language is plain," "it is also where the inquiry should end, for . . . 'the sole function of the courts is to enforce it according to its terms.'" *United States*

v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989), quoting *Caminetti v. United States,* 242 U.S. 470, 485 (1917).

This case begins and ends with the plain meaning of key, unambiguous terms in the ISDA and the accompanying Appropriations Acts, which are crystalline on several points. The Secretary is required to enter into contracts upon terms that are dictated by law. 25 U.S.C. 450f(a)(1), 450*l*(c). Those terms require the Secretary to "add to the contract the full amount to which the contractor is entitled," including both the Secretarial amount and CSCs. § 450j-1(g). CSCs are amounts a contractor "is entitled to receive;" they are "required to be paid" and "shall [be] ma[d]e available;" they "shall be added" to the Secretarial amount; they "shall consist of" specified items; they "shall include" various amounts; and (together with the Secretarial amount) they "shall not be less than the applicable amount determined under [§ 450j-1(a)]." § 450j-1(a)(2), (3), (5); § 450*l*(c) (sec. 1(b)(4)).

Neither § 450j-1(b)'s "availability" clause (Part I) or "reduction" clause (Part II) which the Secretary relies upon serves to excuse the Secretary's actions here.

I. THE SECRETARY'S FAILURE TO PAY WAS NOT EXCUSED BY THE ISDA'S "AVAILABILITY" CLAUSE.

A. Appropriations Were Available As A Matter Of Law To Pay The Full Amount Of The ISDA Contracts, Including CSCs, In The Relevant Fiscal Years.

Upon enactment, and by the terms of each Appropriations Act, funds to pay each pre-existing contract were "deemed to be obligated at the time of the . . . contract award." *E.g.*, 107 Stat. at 1408. Thus, since the Appropriations Acts contained no earmarking caps on the amounts available to liquidate those obligations, the Secretary's ample appropriations "to carry out the ISDA" were legally available to pay the Cherokee Nation's and Shoshone-Paiute Tribes' contracts.

The ISDA's condition that contract payments are "subject to the availability of appropriations" was satisfied, the necessary funds were "obligated" immediately by operation of law, and the Secretary was duty bound to pay.

1. Section 450j-1(b)'s "availability of appropriations" clause is a well-understood term in appropriations law, and Congress is presumed to know the meaning of such time-honored "'terms of art.'" *INS v. St. Cyr*, 533 U.S. 289, 312 n.35 (2001), quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952); *see also Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 615 (2001) (Scalia, Thomas, JJ. concurring) ("[w]ords that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning"); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (Congress presumed "knowledgeable about existing law pertinent to the legislation it enacts").

As the GAO has noted in its oft-cited treatise on appropriations law, *e.g., Lincoln*, 508 U.S. at 192, "availability" simply means whether "a given item is or is not a legal expenditure" in a given year, an inquiry that turns on the familiar "purpose, time, and amount" test. U.S. General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW at 4-2 (2d. ed. 1991) ("APPROPRIATIONS LAW").[10] *See also* INSTRUCTIONS ON BUDGET EXECUTION, OMB Circular A-34, sec. 11.5 at 8-10 (2000) (the 'purpose-time-amount' test answers the question: "**How can I tell whether appropriations are legally available?**"), *superceded by* OMB

[10] *See Thompson*, Pet. 12a ("the opinions of the [GAO], as expressed in [APPROPRIATIONS LAW], and . . . of the Comptroller General . . . while not binding, are 'expert opinion[s], which we should prudently consider'"), quoting *Delta Data Sys. Corp. v. Webster,* 744 F.2d 197, 201 (D.C. Cir. 1984); *Ass'n of Civilian Technicians v. FLRA*, 269 F.3d 1112, 1116 (D.C. Cir. 2001) (same); *Int'l Union v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) (Scalia, J.) (noting GAO's "'accumulated experience and expertise' in the field of government appropriations").

Circular A-11, Part 4 (2002). Thus, appropriations are "legally available" for a "legal expenditure" when making the expenditure is (1) for one of the *purposes* for which the appropriations were made; (2) for an obligation arising in the same *time* period covered by the appropriation; and (3) within the *amount* statutorily authorized for the expenditure. *Id.*

Applying this routine principle of appropriations law, it is readily apparent that the "ongoing" CSC contract payments the Secretary failed to make were "legal expenditures," and that the appropriations were "legally available" to make them. This is so because (1) each payment would have "carr[ied] out" the Appropriations Acts' purpose; (2) each payment would have been for an obligation arising in the same year covered by each appropriation; and (3) the payments would not have exceeded the $1.3 to $1.4 billion Congress made available each year "to carry out the ISDA." In short, the condition reflected in the ISDA—"subject to the availability of appropriations"—was satisfied. This conclusion is reinforced, even mandated, by each Act's declaration that the "available" funds for ISDA contracts have been "obligated" as of the date of the contract award, for an "[o]bligation" is a "legally binding agreement . . . that require[s] the Government to make payments," OMB Circular A-11, sec. 20.5(a) (2003), "'a definite commitment which creates a legal liability of the Government for the payment of appropriated funds for goods and services ordered or received.'" APPROPRIATIONS LAW 7-3 (citing Comp. Gen. decisions). The Government's liability for the full contract obligation could not be clearer.

The Secretary does not dispute that making each payment fell within the "purpose" and "time" prongs of the "availability" test. The Secretary does dispute that paying full CSCs to these contractors was within the "amounts" statutorily authorized each year, but that position cannot be reconciled with settled appropriations law.

2. Fundamental to government contracting law is a long-standing distinction between (1) general lump-sum appro-

priations, *see Int'l Union*, 746 F.2d at 861 ("the lump-sum appropriation has a well understood meaning"); and (2) specific appropriations that recite (or 'cap') the amount available for a particular purpose (usually applicable to a single contract). In the case of a lump-sum appropriation, "[a] contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects." *Ferris*, 27 Ct. Cl. at 546. *See also Dougherty v. United States*, 18 Ct. Cl. 496, 503 (1883) ("we have never held that persons contracting with the Government for partial services under general appropriations are bound to know the condition of the appropriation account at the Treasury or on the contract book of the Department"); *Blackhawk*, 622 F.2d at 552 (holding the Government liable for failing to make first settlement payment due from a lump-sum appropriation prior to enactment of a restricting amendment). In the lump-sum *Ferris-Blackhawk* situation, an agency's exhaustion of an appropriation without fully paying the contract prevents the agency from spending more, given the proscription of the ADA, 31 U.S.C. 1341(a)(1)(A), but does not bar a recovery of damages. *N.Y. Cent. RR v. United States*, 65 Ct. Cl. 115, 128 (1928); *see also Lee v. United States*, 129 F.3d 1482, 1484 (Fed. Cir. 1997); *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1583 (Fed. Cir. 1994); APPROPRIATIONS LAW 6-17.

By contrast, where there is a specifically appropriated sum for a given undertaking, a contractor may, in appropriate circumstances, be held to the limits of the capped amount. *Sutton v. United States*, 256 U.S. 575 (1921) (contractor held to notice of $20,000 statutory limit on agency authority to contract with contractor); *Shipman v. United States*, 18 Ct. Cl. 138 (1883) ("where an alleged liability rests wholly upon the authority of an appropriation they must stand and fall together"); *but see New York Airways, Inc. v. United States*,

369 F.2d 743, 748-49 (Ct. Cl. 1966) (government liability may survive a legally insufficient appropriation depending upon the terms of the contract and the authorizing legislation); *Ross Constr. Corp. v. United States*, 392 F.2d 984, 986-87 (Ct. Cl. 1968) (government liable for losses "beyond the control or responsibility of the . . . contractor"). *See* APPROPRIATIONS LAW 6-18 (discussing the *Ferris* and *Sutton* rules).

Here, there was a lump-sum appropriation, unrestricted in amount, that was legally available to IHS to pay ISDA contract obligations. Unlike *Sutton*, there was no statutory earmark limiting the amount available for a contract. *Id.* 6-4 n.1 (defining "earmark[ ]" as "a specific statutory designation"). To be sure, Congress imposed precisely such a statutory "earmark" on *the BIA*'s payment of ongoing CSCs in a *different* portion of the very same Appropriations Acts, using the common term "not to exceed" (*supra* 12), and in the same manner Congress also capped IHS's ongoing CSC payments in *later* years. *Id.* But the decisive point here is that Congress elected *not* to limit IHS's contract payments in fiscal years 1994-1997. Of course, "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello*, 464 U.S. at 23. Congress's deliberate use of the term of art "not to exceed" elsewhere forecloses inferring from utter silence in the IHS portions of these Acts a comparable legal restriction on IHS's payment of CSCs. Indeed, Congress's decision to begin capping IHS's ongoing CSC payments in FY1998 reflected a deliberate change, not some accident of drafting, *see* H.R. Conf. Rep. No. 105-337, at 90 (1997) ("Amendment No. 110 . . . inserts language placing a cap . . . on contract support costs in the [IHS], services account"), and a "cardinal principle of statutory construction" is the "'duty to give effect, if possible, to every clause and word of a statute'" so as not to render any "superfluous," *Duncan v. Walker*, 533

U.S. 167, 174 (2001). *Pierce County v. Guillen*, 537 U.S. 129, 145 (2003) (an amendment must be given "'real and substantial effect'").

In sum, under the *Ferris-Blackhawk* rule, the Government is liable in damages for the unpaid contract amounts, regardless of any subsequent exhaustion, "whether legal or illegal," of the Secretary's appropriations for other purposes. Even putting *Ferris* aside, the Government is still liable because the Appropriations Acts at issue here deemed the contract amounts to be instantly "obligated" back to the date of contract "award," well in advance of any possible future exhaustion of the appropriation for other purposes.[11]

3. The Tenth Circuit in *Cherokee* fundamentally erred in concluding that the Secretary could elevate mere committee recommendations over his contract obligations. *Cherokee*, Pet. 7a-8a. The court's action violated the "fundamental principle of appropriations law . . . that where 'Congress merely appropriates lump-sum amounts . . . indicia in com-

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[11] Putting the *Ferris-Blackhawk* rule aside, the ISDA is arguably an independent source of a *minimum* earmark for the full contract amounts out of the agency's general lump-sum appropriation. This argument rests on Congress's direction in the ISDA that the amount of each contract "*shall not be less than* the applicable amount determined pursuant to [§ 450j-1(a)]." § 450*l*(c) (sec. 1(b)(4)) (emphasis added). The Comptroller General has held that measures in *authorizing* statutes requiring an agency to pay a stated amount establish binding "earmarks" that control the agency's spending absent an overriding provision in an appropriations act. APPROPRIATIONS LAW 2-42 - 43 ("when an authorization establishes a minimum earmark ('not less than,' 'shall be available only'), and the related appropriation is a lump-sum appropriation . . . the agency must observe the earmark . . . even though following the earmark will drastically reduce the amount of funds available for non-earmarked programs funded under the same appropriation"), citing *In re Hon. Brown*, 64 Comp. Gen. 388 (1985); *In re Hon. Oxley*, B-131935, 1986 WL 63785 (Comp. Gen. Mar. 17, 1986). This rule reflects the application of the more general rule that, wherever possible, appropriations acts must be read consistent with the applicable authorizing acts.

mittee reports and other legislative history as to how funds should or are expected to be spent do not establish any legal requirements on' the agency." *Lincoln*, 508 U.S. at 192, quoting *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975); *see also* APPROPRIATIONS LAW 6-159 ("The rule applies equally whether the legislative history is mere acquiescence in the agency's budget request or an affirmative expression of intent.") As Justice Scalia put it in *Int'l Union*, "as far as the courts are concerned" the "focus . . . must be upon the text of the appropriation," not "committee reports and other entrails of legislative history." 746 F.2d at 860-61.

The Tenth Circuit disregarded this cardinal principle in the contract setting, where it has long been settled law that:

> the amounts requested or earmarked for the individual items that comprise the budget estimates presented to the Congress, and on the basis of which a lump-sum appropriation is subsequently enacted, are not binding on the administrative officers unless those items (and their amounts) are carried into the language of the appropriations act itself.

Blackhawk, 622 F.2d at 547 n.6. Contrary to the Tenth Circuit's view, the committees' diverse recommendations did not justify the Secretary's failure to pay.

4. The absence of any statutory earmarks, coupled with the ISDA's mandate to pay and the presence of contract obligations, required the Secretary to "reprogram" how he originally planned to spend his appropriation if his original budget was insufficient to meet those obligations (something he certainly was authorized to do, *see Thompson*, Pet. 15a-16a, discussing reprogramming procedures and citing *Lincoln*, *LTV* and *Blackhawk*). The Tenth Circuit's view that the Secretary's reprogramming authority in these circumstances was discretionary was wrong, for "an agency is *required* to reprogram if doing so is necessary to meet debts or obligations." *Id.* 16a, citing APPROPRIATIONS LAW 2-26 ("In some situations, the agency's discretion [to reprogram]

may rise to the level of a duty."). In that event, the Secretary simply has no discretion to disregard his "debts or obligations," and may *not* simply choose to adopt a committee's "recommendations." Thus, when given a lump-sum appropriation that is legally available to pay an obligation, "[a]dministrative barriers [regarding internal agency budgets] of the sort which the Government's argument raises are purely of an in-house accounting nature and, as such are irrelevant to any determination respecting the availability of appropriated funds." *Blackhawk*, 622 F.2d at 552 n.9. Since here "there was no statutory restriction on the reprogramming authority . . . the agency was obligated to make the payments and was liable for breach of contract when it declined to do so." *Thompson*, Pet. 16a.

The *Cherokee* court found spending discretion in *Lincoln*. But *Lincoln* warned that "an agency is not free simply to disregard statutory responsibilities," like those reflected in the ISDA. 508 U.S. at 193. If the ISDA is anything–particularly given § 450j-1(b)'s unique limiting provisions–it is the epitome of a statute that has "circumscribe[d] as tightly as possible the discretion of the Secretary" to manipulate a lump-sum appropriation in a way that would shortchange tribal contractors. *RNSB*, 87 F.3d at 1344.

B. The Tenth Circuit's Reformulation Of The "Availability" Clause Is Neither Plausible Nor Consistent With *Winstar*, *Lynch* And *Murray*.

1. Only by ignoring ordinary principles of appropriations law could the Tenth Circuit conclude that the Secretary retained some measure of "discretion" regarding how much of the appropriation would be made available to pay these pre-existing contract obligations. *Cherokee*, Pet. 16a. The argument it accepted boils down to this: "availability" means whatever the agency chooses not to spend eventually on something else. (Indeed, the Secretary's evidence below was directed at just that.) This formulation fails for two reasons.

First (and as just noted), "it is well recognized that if the Secretary has the authority to reprogram and there are funds available in a lump-sum appropriation, there are 'available funds.'" *Thompson*, Pet. 20a. Even the very committees that made the "recommendations" the Secretary now invokes fully understood this rule: "Without a ceiling on contract support the Bureau [of Indian Affairs] could be required to reprogram from other tribal programs in the Operation of Indian Programs to fund 100 percent of tribal contract support costs." H.R. Rep. No. 105-609, at 57 (1998); *see also* S. Rep. No. 100-274, at 42 (Congressional Budget Office letter noting the 1988 ISDA Amendments could require agencies to pay CSC first). That is exactly what *Blackhawk* holds.

Second, making an exception from ordinary contract and appropriations law here to give the Secretary "discretion" *not* to reprogram "would be directly contrary to the purpose of the 1988 Amendments," *Thompson*, Pet. 21a. The whole point of those Amendments was to "le[ave] the Secretary with as little discretion as feasible in the allocation of [CSCs]," *RNSB*, 87 F.3d at 1344, precisely because of a long history of "systematic[ ]" agency violations of contract rights "particularly in the area of funding indirect [contract support] costs." S. Rep. No. 100-274, at 37. With no discretion even in the contract terms, § 450*l*(c), and express prohibitions on contract funding reductions, § 450j-1(b), it is not credible that in the routine "availability" clause Congress actually intended *sub silentio* to vest in the Secretary the very "discretion" to reduce contract amounts that established law denies all other agencies when dealing with government contractors. Such a formulation improperly "exclude[s] from the coverage of the statute most of the conduct Congress obviously intended to prohibit," *Holloway*, 526 U.S. at 9, rendering the Act's key funding provisions "a nullity." *Christensen*, 529 U.S. at 585; *see also Train v. City of New York*, 420 U.S. 35, 45-46 (1975) ("We cannot believe that Congress at the last minute scuttled the entire effort by providing the Executive with the

seemingly limitless power to withhold funds from allotment and obligation"). This Court should reject such a warped construction of this remedial legislation, all the more so given the Act's mandatory rule that the ISDA and every contract entered into thereunder "shall be liberally construed for the benefit of the Contractor." § 450*l*(c) (sec. 1(a)(2)); *see also* Title III § 303(e); 25 C.F.R. § 900.3(a)(5) (same).

2. The ISDA's "availability" clause is a common feature in the landscape of government contract law. *E.g.*, *Cherokee*, Pet. 78a-87a (listing statutes). If, as the Tenth Circuit has held, a government agency, armed with such a clause and an unrestricted lump-sum appropriation, can simply decide for itself when it has legally available appropriations to pay a contract obligation, the whole concept of a government contract has been eviscerated. Such a sweeping rule is flatly "at odds with the Government's own long-run interest as a reliable contracting partner in the myriad workaday transaction of its agencies," *Winstar*, 518 U.S. at 883. Borrowing from *Winstar*, "[i]njecting the opportunity for . . . litigation [over agency spending decisions] into every common contract action would . . . produce the untoward result of compromising the Government's practical capacity to make contracts, which we have held to be 'of the essence of sovereignty' itself." *Id.* at 884 (citation omitted). Permitting government agencies to avoid paying their just contract debts simply by choosing to spend their monies elsewhere and then claiming poverty, frustrates the "'[p]unctilious fulfillment of contractual obligations [which] is essential to the maintenance of the credit of public as well as private debtors.'" *Id.* at 885, quoting *Lynch*, 292 U.S. at 580 (1934).

The integrity of the Government's contracting process will not long endure a rule which says that each time a contractor signs a contract stating his payments are "subject to the availability of appropriations" it will not be enough that Congress appropriates monies the agency can lawfully pay to liquidate the obligation. Such a proposition defies the whole

concept of a contract, for "'[a] promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.'" *Winstar,* 518 U.S. at 913 (Breyer, J. concurring), quoting *Murray*, 96 U.S. at 445. It is the quintessential "illusory promise," *id.* at 921 (Scalia, Kennedy & Thomas, JJ. concurring).

C. The ISD Funds In The Four Appropriations Acts Did Not Cap The Availability Of Appropriations To Pay CSCs For The Expanded Portions Of The Tribes' Contracts.

1. The foregoing discussion concerning the availability of appropriations to pay ongoing contract obligations applies equally to CSCs associated with the "initial or expanded" portions of the Tribes' contracts, the only new issue being the meaning of the appropriations language creating the ISD Fund: "of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts . . . with the [IHS] under the provisions of the [ISDA]." To begin, the quoted provision cannot cap all "contract support costs" because it refers only to the limited subcategory of "transitional costs," a phrase whose meaning refers to "startup costs . . . incurred on a one-time basis," 25 U.S.C. 450j-1(a)(5). So, if this is a cap on anything, it is only a cap on transitional costs (a minor component of the instant claims).

But it is no cap at all. Here again, a proper understanding of the quoted provision is found in time-honored appropriations law that Congress is presumed to know: the operative term creating the ISD Fund–"of the funds provided, $7,500,000 *shall remain available until expended*"–establishes a no-year, carryover account that speaks strictly to the *time* during which the designated sum may be spent, but does not limit the *amount* that may be spent for that purpose in the current appropriation year. *In re Forest Service*, B-231711, 1989 WL 240615 (Comp. Gen. Mar. 28, 1989) (phrase "shall

remain available" "does not represent a line-item limitation or a cap on the amount of money available for obligation" in the current year, and is not a "maximum or minimum"); APPROPRIATIONS LAW 6-8 ("remain available" is "[e]armarking language . . . used to vary the period of availability for obligation"). *See also Mass. Dep't of Educ. v. United States Dep't of Educ.*, 837 F.2d 536, 538-39 (1st Cir. 1988); *Wilson v. Watt*, 703 F.2d 395, 400 (9th Cir. 1983); *Nat'l Ass'n of Reg'l Councils v. Costle*, 564 F.2d 583, 589 n.12 (D.C. Cir. 1977); *In re Hon. Cochran*, B-271607 at *1 (Comp. Gen. June 3, 1996) (all holding clause creates a carryover appropriation). As the *Thompson* court noted, "[i]n the present case, there is no indication that the 'shall remain available' language constituted anything other than a typical 'carryover' provision. It certainly did not constitute a statutory cap excusing the Secretary from fulfilling his obligations under the availability clause of section 450j-1(b)." *Thompson*, Pet. 25a-26a. Even the Secretary's internal CSC circular acknowledged that funds for initial and expanded CSCs could be "made available by appropriation *or reprogramming*," another recognition inconsistent with the notion that the ISD Fund language constituted a cap on CSCs. JA 31 (subpar. (ii)).

2. Congress's use of standard terms of art in appropriations law—"shall remain available," "not to exceed," or "up to"—conveys distinctly different and well-accepted understandings. *Id.* 12a (collecting authorities). *See also St. Cyr*, *Buckhannon*, and *Goodyear*, *supra* 26. Each Appropriations Act at issue here is no different; these distinct uses of special terms of art reflect Congress's retained authority to make final decisions concerning appropriations and should not be ignored.

Not until the FY1998 Appropriations Act did Congress choose to limit any of IHS's CSC payments (*supra* 12), and not until FY2000 did Congress go further and limit current-year payments for "initial and expanded" contracts. *Id.* The

absence of such limiting language in the four Acts at issue here is, again, conclusive. Borrowing from *Russello*, 464 U.S. at 23, the Tenth Circuit should have "refrain[ed] from concluding here that the differing language [across all these Acts] . . . has the same meaning in each."

3. The Tenth Circuit ignored the unambiguous dominant phrase "shall *remain* available" in favor of the subordinate phrase "shall *be* available" to create an ambiguity. This error ripped the subsidiary phrase from its moorings, for in context the words "shall be available" are plainly defining the permitted *uses* of the Fund over the stated period of time, not the *amount* of monies being placed into it. In other words, the Appropriations Acts do not say '$7.5 million shall be available for transitional costs,' but rather that $7.5 million shall remain available indefinitely in an ISD Fund, and *that Fund* shall be available to pay transitional costs. Indeed, throughout the life of these cases the Secretary has unambiguously "conceded" that the ISD Fund language did *not* cap the availability of the overall appropriation to pay such costs. He has noted that "'[u]nlike the [BIA], [IHS's] annual appropriation acts [for the ISD Fund] did not place such a cap,'" adding that "'[i]n order to be a statutory "cap," the language would have to read that "not to exceed" $7.5 million was available for new [CSCs], rather than that $7.5 million "shall remain available."'" *Thompson*, Pet. 23a (quoting Secretary's brief). That is a reasonably succinct summary of the law on this point.

D. Section 314 Did Not, And Could Not, Retroactively Alter The "Availability Of Appropriations" Years Earlier To Pay The Tribes' Contract Obligations.

Years after these two Tribes' contracts were fully performed, Congress in § 314 of the FY1999 Appropriations Act declared in pertinent part that "[n]otwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the . . . [IHS] by [the FY1994 through

FY1998 Appropriations Acts] . . . for contract support costs . . . *are* the total amounts available for fiscal years 1994 through 1998 for such purposes." (Emphasis added.)

The precise meaning of this rider seems clear enough. It speaks in the present tense to amounts that "*are* . . . available" for CSCs from the earlier years. *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes"). In combination with the "notwithstanding" clause (presumably intended to override some inconsistent "provision of law"), the rider should be read to say that during the fiscal year the agency is being denied the authority otherwise available under 31 U.S.C. 1552(a), 1553(a), to obligate leftover portions of the earlier lump-sum appropriations for CSC purposes. *Supra* 12. Indeed, such a reading squares with the agency's aborted plan to use its leftover funds precisely this way, *id.* 16, and its temporary effect is confirmed by the measure's annual reenactment, *e.g.*, 113 Stat. at 1501A-192, § 313 (FY2000). The Federal Circuit, the IBCA twice, and the Oregon district court (*Shoshone III*), have all read § 314 this way.

But according to the Secretary, § 314 means something far more momentous: that Congress in 1998, "notwithstanding" the unrestricted language of the earlier Acts, purported to *rewrite* them by adding in capping language where none previously had existed. The plain language of the rider does not compel that reading, and the rider's legislative history does not support it either. Under the Secretary's reading, the rider automatically defeats any contract damage claims pending at the time, so that those cases would be over. And yet, when the committee that wrote the rider addressed CSC issues elsewhere in its report, it discussed the pending cases as if they were continuing. Instead of mentioning § 314, it directed the GAO to prepare a report exploring the background and potential impact of the then-pending litigation. *See* S. Rep. No. 105-227, at 51-52. This is a

meaningless exercise if the Committee believed it was putting an end to that very litigation.

Faced with the clarity of the earlier lump-sum appropriations, the Federal Circuit correctly followed this Court's instruction that "the views of subsequent Congresses cannot override the unmistakable intent of the enacting one." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980). *See also Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283-84 (11th Cir. 1999); *Beverly Cmty. Hosp. Ass'n v. Belshe*, 132 F.3d 1259, 1266 (9th Cir. 1997). That should be the end of the matter.

The Tenth Circuit sidestepped the issue by concluding that § 314 merely *clarified* retroactively the earlier Appropriations Acts, presumably a reference to *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969), and its progeny. But "the view of a later Congress cannot control the interpretation of an earlier enacted statute," *O'Gilvie*, 519 U.S. at 90, and these unambiguous lump-sum appropriations were hardly in need of clarification. After all, one can clarify an earlier law, but "WHITE cannot retrospectively be made to assert BLACK." *United States v. Montgomery County*, 761 F.2d 998, 1003 (4th Cir. 1985). *Red Lion* and its progeny should be confined to situations involving genuine clarifications. *E.g.*, *Liquilux Gas Corp. v. Martin Gas Sales*, 979 F.2d 887, 890 (1st Cir. 1992); *NCNB Texas Nat'l Bank v. Cowden*, 895 F.2d 1488, 1500-01 (5th Cir. 1990); *Callejas v. McMahon*, 750 F.2d 729, 731 (9th Cir. 1984); *Brown v. Marquette Sav. & Loan Ass'n*, 686 F.2d 608, 615 (7th Cir. 1982). *See also Piamba*, 177 F.3d at 1283-84 (focusing on "whether a conflict or ambiguity existed" and "a declaration by the enacting body that its intent is to clarify the prior enactment"); *Beverly*, 132 F.3d at 1265-66 (subsequent statute entitled "Clarification" enacted after a "split of authority"). With no ambiguity present here when § 314 was enacted, that rider cannot alter the clear meaning of the earlier Acts. *See also Paramount Health Sys., Inc. v. Wright*, 138 F.3d 706, 710 (7th Cir. 1998) (criticizing

notion that "a disappointed litigant in a statutory case in a federal district court could scurry to Congress while the case was on appeal and request a 'clarifying' amendment that would reverse the interpretation . . . given to the statute, even if that meaning was crystal clear").

The deeper problems with the Secretary's formulation are twofold: The first arises from the fact the availability of appropriations for these contracts was established at the time of the respective Appropriations Acts; since appropriations were legally available under those Acts, the Tribes had a contractual right to payment of CSCs at that time. Congress cannot then go back and legislatively undo the Government's liability, for while the Government retains "sovereign power" to enact "public and general" legislation that *incidentally* affects those with whom it contracts, "[t]his Court has previously rejected the argument that Congress has 'the power to repudiate its own debts, which constitute 'property' to the lender, simply in order to save money.'" *Winstar*, 518 U.S. at 917-18 (Breyer, J. concurring), *quoting Bowen*, 477 U.S. at 55, and citing *Perry v. United States*, 294 U.S. 330, 350-51 (1935), and *Lynch*, 292 U.S. at 576-77. *See also United States v. Larionoff*, 431 U.S. 864, 879-880 (1977) (providing same protection for statutorily created vested rights). Where, as here, there is a particular "concern with governmental self-interest . . . 'complete deference to a legislative assessment of reasonableness and necessity is not appropriate.'" *Winstar*, 518 U.S. at 897 n.41. *See also id.* at 898 ("The greater the Government's self-interest . . . the more suspect becomes the claim" of sovereign authority to act).

The second, and graver, problem with the Secretary's formulation is that interpreting § 314 to govern past obligations of lapsed appropriations raises serious constitutional questions under *Klein*, *supra*, and "every reasonable construction must be resorted to in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895). In *Klein*, this Court declared a statute unconsti-

tutional in part because it sought to "prescribe rules of decision to the Judicial Department of the government in cases pending before it." 80 U.S. at 146-47. Since the *Klein* prohibition "does not take hold when Congress 'amends applicable law,'" *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995), quoting *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 441 (1992), the key distinction for separation of powers purposes is that Congress may "compel[] changes in law, [but] not findings or results under old law." *Robertson*, 503 U.S. at 438. *See also Miller v. French*, 530 U.S. 327, 348-49 (2000). Here, it is clear that § 314 does not "amend" or "compel changes" in any statute with current effect. There is nothing to amend: the statutory appropriations for fiscal years 1994-1997 are completed acts, not statutes with current application subject to congressional revision. The Government's construction of § 314 as intended to declare a binding rule for determining the availability of appropriations under prior-year Appropriations Acts (and thus the Government's liability under those Acts) would render this statute an unconstitutional attempt to decree "findings and results under old law" in then pending breach-of-contract cases (such as the *Thompson* and *Shoshone-Bannock* cases).

The difficulty of construing § 314 in a manner that unlawfully cuts off contract rights contrary to *Winstar*, or in a manner that unconstitutionally declares a rule of decision contrary to *Klein*, confirms the wisdom of avoiding such issues. *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (wherever possible, Court construes statutes to avoid "rais[ing] serious constitutional problems"). Here that course is easy to follow because Congress spoke with "unmistakable intent" in providing unrestricted lump-sum appropriations, which is what the Federal Circuit correctly held.

II. THE SECRETARY'S FAILURE TO PAY WAS NOT EXCUSED BY THE ISDA'S "REDUCTION" CLAUSE.

With the Secretary's failure to pay indefensible under either the ISDA's availability clause or § 314, the Secretary years after the fact asserted that paying anything more to these contractors–even one penny more–would have forced the Secretary to reduce ongoing programs serving other tribes, something he argues he had a right not to do given the ISDA's "reduction clause." The Secretary thus asks the Court to accept that the "reduction clause" authorized him to place off limits precisely the same amount that his erroneous interpretation of appropriations law placed off limits. That theory is too cute by half and the Federal Circuit correctly rejected it.

1. The Secretary's reduction clause argument is nothing but an attempted *post hoc* re-justification for what actually happened. As the Secretary's own affiants unambiguously declared, no consideration was ever given to paying *anything* more in CSCs through reprogramming actions. Rather, payments were limited because of the Secretary's incorrect application of appropriations law: As IHS saw it, each year "*Congress appropriated [a stated sum] for contract support costs*" and each year "the appropriation for [CSCs] has been distributed, and *no [CSC] funds remain* for that fiscal year." JA 286-87 (¶¶3-8) (emphasis added). *See also* JA 288 (¶2) ("the amount of funds Congress appropriated for CSC . . . was limited"); JA 296 (¶¶4, 5) (explaining CSC is a "budget subactivit[y]" and "Congress *earmarked* the funds for each subactivity"); JA 302 (¶24) (repeating "total" amounts "Congress earmarked . . . in its . . . committee reports"). With this erroneous understanding (*supra* Part I), IHS applied lockstep its "CSC policy outlined in IHS Circulars 92-02 and 96-04" and underpaid the contracts. *Thompson*, No. 03-853, 2 C.A. App. at 464-65 (Demaray Aff. ¶22).

The reduction clause afforded the Secretary the chance to assess his reprogramming alternatives before signing these contracts and to compare his mandatory obligations under the ISDA with his overall budget, including funds budgeted for ongoing "programs . . . serving [other] tribe[s]." If he could reprogram without "reduc[ing]" such funds (for instance, by reprogramming funds from his "Federal functions"), then no "reduction clause" issue would arise and he was required to reprogram accordingly. If full payment could *not* be made without reducing funds budgeted for ongoing programs serving other tribes, he would have the choice whether to reduce them anyway. But at the relevant time the Secretary never made such an assessment, and he cannot do so now. Having waived his threshold opportunity prior to award to show that "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under [§ 450j-1(a)]," 25 U.S.C. 450f(a)(2)(D), nothing thereafter could alter the Secretary's duty to pay the full § 450j-1(a) amount (*i.e.*, the Secretarial amount and the associated fixed CSC costs). *See St. Regis Mohawk Tribe*, DAB No. A-02-12, 2002 WL 125183 (DHHS Jan. 17, 2002) (illustrating unsuccessful § 450f(b) appeal from a timely decision declining to award a contract at a stated sum, based upon the reduction clause).

2. Apart from waiver, the issue here presented involves the proper interpretation of the reduction clause: "[n]otwithstanding any other provision of the [Act], . . . the Secretary is not required to reduce programs . . . serving a tribe to make funds available to another tribe . . . under this [Act]." The Secretary advanced the circular proposition that if IHS's overall mission is Indian health, then every agency activity served some tribe; and if IHS eventually spent its entire appropriation, perforce no spending change could have been made to pay more CSCs without reducing an activity serving some other tribe. The Federal Circuit correctly rejected such

a self-defeating construction of the Act that would render the contracts illusory.

Congress no doubt understood IHS's overall mission, yet in drafting the reduction clause it chose not to permit the Secretary to refuse to pay in order to preserve all his budgeted activities. Instead, it focused only on protecting funds for specific "programs . . . serving a tribe," while in the immediately preceding sentence broadly *prohibiting* any reductions in the contract "amount" to pay for the Secretary's "administration" and "Federal functions." The point was to "prevent[ ] the diversion of tribal contract funds to pay for costs incurred by the Federal government." S. Rep. No. 100-274, at 30.[12] Thus, while the Secretary may or may not choose to reprogram funds for programs serving another tribe, subsections (b)(1), (3) & (4) absolutely prohibit him from awarding a reduced contract amount to preserve or enhance his own bureaucracy. It matters not that these functions include "inherent federal functions" (such as conducting hearings) or other federal functions (like "contract monitoring").[13]

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[12] Section 450j-1(b)'s targeting of "Federal functions" reaches considerably more than "inherent federal functions," including "contract monitoring," computer acquisitions, and "technical assistance." Moreover, the standard OMB formulation for "inherent federal functions," *e.g.*, OMB Policy Letter No. 92-1, 57 Fed. Reg. 45096, 45100-102 (Sept. 30, 1992), does not apply under the ISDA. H.R. Rep. No. 106-477, at 18 (1999) (discussing Op. of the Sol., Dep't of the Interior (May 17, 1996)). *See also United States v. Mazurie,* 419 U.S. 544, 556-57 (1975) (discussing delegation doctrine). Even if it did, these "Federal functions" and "administration" are not matters "so intimately related to the public interest as to mandate performance by Government employees."

[13] The dichotomy drawn in § 450j-1(b) was not lost on the appropriators either, who time and again urged the Secretary to *reduce* his own administration so that additional resources would be available to meet the Secretary's obligations to contracting tribes. *See, e.g.*, H.R. Conf. Rep. No. 103-740, at 51 (1994) (demanding IHS reorganize and consolidate "to free up funding for additional self-governance compacts in [FY1995] and beyond"); S. Rep. No. 103-294, at 110 (1994) (demanding IHS restructure

The Secretary's construction of the reduction clause puts so much weight on the "notwithstanding" language in that clause that it "would exclude from the coverage of the statute most of the conduct that Congress obviously intended to prohibit," *Holloway*, 526 U.S. at 9, exempting from any reduction funds budgeted for the very "Federal functions" that Congress wanted to curtail. It would make § 450j-1(b) "destroy itself." *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 228 (1998). Viewed correctly, however, a "notwithstanding" provision trumps only those measures which *must* be trumped else the section be "rendered meaningless," *Shomberg v. United States*, 348 U.S. 540, 545 (1955), reflecting only the "drafter's intention [to] . . . override *conflicting* provisions of any other section," *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (emphasis added). In contrast, to now re-read the ISDA as actually *protecting* the Secretary's bureaucracy would make the entire statutory scheme but "an exercise in futility," *Pierce*, 537 U.S. at 145.

The Federal Circuit's interpretation of the reduction clause gives it appropriate meaning. The Secretary *may*, but need not, reprogram funding for programs serving other tribes to pay an ISDA contractor, but he *must* reprogram other agency funding to pay such contracts (or else, answer in damages). That interpretation reconciles easily with the body of subsection (b), which speaks not to the treatment of funding for other tribal programs but to the subordination of funding for the Secretary's own "administration" and "Federal functions." In accord with the ISDA's special rule of statutory construction, that interpretation is also the one that "benefit[s] . . . the Contractor to transfer the funding . . . from the Federal Government to the Contractor," § 450*l*(c) (sec. 1(a)(2)).

"if additional resources are to be made available to address other priority needs, such as self-governance compacts"); H.R. Rep. No. 103-158, at 100 (1993) (demanding IHS make "reductions . . . across all IHS administrative activities that are not related directly to the provision of health services").

3. The reasonableness of the Federal Circuit's reading of the reduction clause is confirmed by one representative example, "contract monitoring." Twice the ISDA states plainly that the contract amount shall not be reduced to pay for the Secretary's "contract monitoring" activities, §§ 450j-1(b)(1), (3), and just as plainly calls these functions a subset of "Federal functions" (*id.*). "Contract monitoring" is an agency undertaking and certainly not a "program[] . . . serving a tribe" under the reduction clause. It is equally certain the Senate Committee understood that the result of including "contract monitoring" in § 450j-1(b)(1) & (3) would be less funding for that function, for that was the *raison d'etre* of the provision: to undo the explosion in a new "contract monitoring bureaucracy" that had "impose[d] additional reporting requirements on tribal contractors . . . thereby making the contracting process much more burdensome and time-consuming." S. Rep. No. 100-274, at 7. The Committee made plain its "expect[ation] that the federal contract monitoring bureaucracy . . . will be greatly reduced over the next three years." *Id.* at 19.

The Federal Circuit's reading of § 450j-1(b) is eminently sensible given the abuses Congress sought to correct. The Secretary failed to prioritize the payment of these contracts at the expense of funding his diverse "Federal functions" and "administration;" to report annually to Congress on any anticipated mid-year funding "deficiencies," § 450j-1(c)(2); to seek sufficient appropriations; or to seek supplemental appropriations.[14] Such Secretarial misconduct may have led to budgetary constraints, but such consequences still do not excuse a breach of contract. *See United States v. Locke*, 471 U.S. 84, 95 (1985) ("[n]or is the Judiciary licensed to attempt to soften the clear import of Congress' chosen words

[14] *See S.A. Healy Co. v. United States*, 576 F.2d 299, 305 (Ct. Cl. 1978) (holding Government liable in damages for breaching its duty to seek sufficient appropriations to cover the contracts it had signed).

whenever a court believes those words lead to a harsh result"). "Achieving a better policy outcome—if what petitioner urges is that–is a task for Congress, not the courts." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000).

4. The Secretary could never make the showing required under the reduction clause. As an exception to the ISDA's extensive contract payment mandates, the Secretary had the burden to justify any failure to pay under that clause,[15] a heavy burden given that the inability to pay even one penny more without reducing some program serving another tribe is "an element essential to [the Secretary's] case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Mere "conclusory allegations" on the point will not do. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990).

In *Cherokee*, that burden was made more difficult by the Secretary's summary judgment motion. In that setting, the Secretary could prevail only if, after drawing all reasonable inferences in favor of the Tribal contractors, the available evidence established beyond a doubt that the Secretary had no other funds that might have been reprogrammed. The Secretary never carried that burden. To the contrary, the

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[15] *Javierre v. Central Altagracia Inc.*, 217 U.S. 502, 507 (1910) (burden on those "seeking to escape from the contract made by them on the ground of a condition subsequent, embodied in a proviso"); *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) ("the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits"); *Mass. Bay Transp. Auth. v. United States*, 254 F.3d 1367, 1373 (Fed. Cir. 2001) (party asserting impossibility has burden to prove it explored and exhausted alternatives); *New Valley Corp. v. United States*, 119 F.3d 1576, 1584 (Fed. Cir. 1997) ("exculpatory provision . . . must [be] construe[d] . . . narrowly and strictly"); 25 U.S.C. 450f(e)(1) ("With respect to any hearing or appeal conducted pursuant to [§ 450f(b)(3)] or any civil action conducted pursuant to [§ 450m-1(a)], the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal").

implausibility of the Secretary's contention should have compelled entry of summary judgment for the Tribes, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), as it did in *Thompson*.

Beyond commonsense, the record proof defeats the Secretary's contention that everything else the agency did during these years was for an ongoing "program[] . . . serving a tribe." For the only two years for which the Secretary offered any detailed proof, JA 213 (*Cherokee*) (FY1996 and FY1997); JA 295 (*Thompson*) (FY1996), IHS expenditures on "Federal functions" included (1) all manner of activities the Secretary took off the top for his theoretical "residual," including so-called "inherently federal functions," and (2) other Federal functions (like contract monitoring) which § 450j-1(b) expressly prohibits preferring over the contracts. With respect to just the former category, on appeal in *Thompson* "[t]he Secretary admit[ed] that he retained . . . $25,522,460 in 1994, $29,613,574 in 1995, and $35,989,621 in 1996," *Thompson*, Pet. 32a, and the Federal Circuit correctly reasoned that this was one ready source from which "the Secretary was obligated to reprogram," *id.* 33a. With respect to both categories of expenditures, they may include as much as over $400 million in IHS Headquarters funds allocated for, *inter alia*, "inherently federal functions"; "Self-Governance [contract] negotiation[s]" (including "Planning, Negotiation, & Travel"); "Headquarters administrative support functions"; and "research" and "evaluation" projects, and at the Area Office level (but not the local service units) $47.7 million on "Direct Operations." JA 215-18, 426, 435 (*Cherokee*); 298, 302, 460, 478, 488 (*Thompson*).

Beyond these amounts, the Secretary could have also considered reprogramming the annual lump-sum appropriation *increases* he received before allocating those sums to increase his funding for ongoing "programs . . . serving a tribe." And, the Secretary could have used his "'unobligated balances,'" at the least "'ranging between $1.2 and $6.8

million,'" *Thompson*, Pet. 33a, sums which were sufficient to warrant IHS proposing to sweep up these balances precisely to pay the CSC costs the Secretary had until then failed to pay. *Supra* 18. Plainly "[t]hese leftover and unexpended appropriations were also available to the Secretary to meet his contractual obligations and did not constitute funding for programs serving other tribes," *Thompson*, Pet. 33a (not to mention the much larger unobligated balances annually reported to Congress, *supra* 11-12).[16]

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[16] Notwithstanding the Secretary's complaint, *Thompson*, Pet. 28, the Federal Circuit committed no reversible error in quoting certain unrequested information the Secretary volunteered in his own supplemental briefs. At argument government counsel asserted that the agency's entire appropriation had been earmarked or obligated to contracts, and the Court directed the parties to brief that issue. JA 356. The Cherokee did so, relying exclusively on the record, relevant Appropriations Acts, and judicially noticeable public records (*see* F.R.E. 201(d), (f)) to show that the bulk of each year's appropriation was not so earmarked or obligated. The Secretary filed non-responsive briefs which, along the way, informed the court of the amounts quoted here in text. JA 363. Having volunteered the undisputed information in the first place, while never timely objecting to the appellate court's inquiry, the Secretary cannot now be heard to complain that the court read what he wrote. *Ohler v. United States*, 529 U.S. 753, 755 (2000) ("a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted"); *McGillin v. Bennett*, 132 U.S. 445, 453 (1889) (same). And, since the Secretary does not dispute the accuracy of the cited facts, nothing would be gained by ignoring them in favor of a remand whose purpose would be to determine them all over again. Besides, any error was harmless. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553-54 (1984). The Board record already reported $1.4 million in unexpended funds for FY1996, JA 302, judicially noticeable records indicated much larger unobligated balances (*Thompson*, Pet. 33a n.19), and the Board record established that agency funds had been set aside for "inherently federal functions," JA 299. Since the Secretary failed to carry his burden to prove his reduction clause defense for FY1996, and declined to submit *any* comparable data for FY1994 or FY1995, the record proof that did exist was independently sufficient to support the Federal Circuit's rejection of the defense. *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924).

Even the Secretary's own Departmental Appeals Board has rejected IHS's vague and conclusory incantations of the reduction clause:

> IHS'[s] contention that granting the relief requested would somehow injure other tribes appears to be an argument made without any basis. Compliance with an express and unambiguous statutory mandate takes precedence over what is at best a speculative showing of possible harm to unnamed tribes. There is undisputed evidence in the record that IHS has the ability to control and reprogram its funds, and the reprogramming that may be necessitated in this case has clearly been contemplated by Congress by its enacting of the provisions at issue in the first place.

St. Regis Mohawk, 2002 WL 125183, op. at 9-10. These cases are no different. That reasoning is a complete answer to the Secretary's reduction clause argument and the claim should be rejected.[17]

CONCLUSION

For the foregoing reasons, the decision in *Thompson*, No. 03-853 should be affirmed and the decision in *Cherokee*, No. 02-1472 should be reversed.

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[17] The Federal Circuit correctly rejected the Government's attempt to avoid liability by invoking the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7. *Thompson*, Pet. 34a-35a. The Secretary entered into statutorily-authorized contract obligations which he then breached. The Tribes then submitted CDA claims seeking "money damages," as authorized by law. 25 U.S.C. 450m-1(a), (d). By law, CDA damage awards are payable from the Judgment Fund created under 31 U.S.C. 1304(a), *see also Bath Iron*, 20 F.3d at 1583; *Lee*, 129 F.3d at 1484, and the permanent Judgment Fund is certainly an "Appropriation[ ] made by law" under Article I. The Appropriations Clause presents no bar to damage awards in these cases.

Respectfully submitted,

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