No. 02-__

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.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

CARTER G. PHILLIPS
SIDLEY, AUSTIN, BROWN & WOOD, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

RIYAZ KANJI
KANJI & KATZEN
201 South Main St.
Ann Arbor, MI 48104
(734) 769-5400

* Counsel of Record

LLOYD BENTON MILLER *
HARRY R. SACHSE
ARTHUR LAZARUS, JR., PC
MELANIE B. OSBORNE
NACOLE D. HESLEP
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1250 Eye Street, N.W.
Suite 1000
Washington, D.C. 20007
(202) 682-0240

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the federal government can repudiate, without liability, express contractual commitments for which it has received valuable consideration, either by spending down discretionary agency appropriations otherwise available to pay its contracts, or simply by changing the law and the contracts retroactively.

2. Whether government contract payment rights that are contingent on "the availability of appropriations" vest when an agency receives a lump-sum appropriation that is legally available to pay the contracts—as is the law of the Federal Circuit under *Blackhawk Heating*—or is the government's liability calculated only at the end of the year after the agency has spent its appropriations on other activities, as the Tenth Circuit ruled below.

PARTIES TO THE PROCEEDINGS

Petitioners, plaintiffs-appellants below, are the Cherokee Nation of Oklahoma and the Shoshone-Paiute Tribes of the Duck Valley Reservation, Nevada. They brought this action on their own behalf.

Respondents, defendants-appellees below, are the United States, Secretary of Health and Human Services Tommy Thompson, and Interim Director of the U.S. Indian Health Service Charles Grim. (Director Grim has been substituted pursuant to S. Ct. Rule 35.) Individual respondents are sued in their official capacities.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 02-__

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.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Cherokee Nation of Oklahoma and the Shoshone-Paiute Tribes of the Duck Valley Reservation in Nevada petition for a writ of certiorari to review the judgment of the Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Tenth Circuit opinion is reported at 311 F.3d 1054 and reprinted in the Appendix hereto ("App.") at 1a. That opinion affirmed the Order of the District Court for the Eastern District of Oklahoma which is reported at 190 F. Supp. 2d 1248 and reprinted at App. 24a.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 2002. App. 1a. A timely petition for rehearing *en banc* was denied on January 22, 2003. App. 51a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Indian Self-Determination and Education Assistance Act of 1975, as amended ("ISDA" or "Act"), 25 U.S.C. § 450 *et seq*., and the fiscal year ("FY") 1996 and 1997 Appropriations Acts are reprinted at App. 53a-77a.

INTRODUCTION

This case presents issues of extraordinary importance to the federal government's reliability as a contracting party, and to the sanctity of government contracts. Three times in recent years this Court has been forced to compel the Federal Government to respect its contracting parties' rights in order to safeguard the government's long-term interest in ensuring a reliable source of providers of goods and services. *See Franconia Assoc. v. United States*, 122 S. Ct. 1993 (2002); *Mobil Oil Exploration and Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000); *United States v. Winstar*, 518 U.S. 839 (1996). This case is the next logical step in the sequence begun by those decisions.

At issue here is a dispute thrust upon two Indian tribes that contracted with the United States to operate federal hospitals and clinics at a price fixed by statute and the relevant contracts. In each instance, as with hundreds of other Indian tribes, the United States Indian Health Service initially had sufficient funds to pay the contracts but allocated those appropriations instead to other discretionary agency expenses, including expenses Congress by statute expressly prohibited

the agency from favoring over the contracts. The key issue is whether a federal agency may unilaterally cancel the United States' contract obligations by spending its money elsewhere.

The Tenth Circuit held the United States free of any liability whatsoever for its failure to pay fully on the contracts. In a ruling with profound implications for the sanctity of all government contracts, the Tenth Circuit did so first by seizing upon mere appropriations committee language—what Justice Scalia has called the "entrails of legislative history,"[1]—to permit a government agency to escape altogether its contract obligations. Then, as a backstop, the court below sanctioned Congress' returning years later and retroactively repudiating the United States' contractual commitments with impunity. In so ruling the circuit court has jeopardized the implementation of hundreds of government contracts with Indian tribes throughout the Nation, while also calling into question the nature of the United States' obligation to all other government contractors.

All of this comes as a stunning surprise, for it has long been the law of the Federal Circuit that government contract obligations must be paid out of unrestricted agency appropriations that are legally available for that purpose, even if doing so requires internal agency rebudgeting. *E.g.*, *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539 (Ct. Cl. 1980). That court has long held that when the government fails to use unrestricted money, it is liable in damages. *Id.* Thus, even if the government's contract obligations are limited by available appropriations,[2] the United States cannot invoke that limitation without an express congressional limitation in an appropriations act. *Babbitt v. Oglala Sioux Tribal Public Safety Dept.*, 194 F.3d 1374 (Fed.

---

[1] *Int'l Union v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984).

[2] There are at least 50 statutes that unambiguously limit an agency's contracting authority to the availability of appropriations. App. 78a-87a.

Cir. 1999); *accord Shoshone-Bannock Tribes v. Secretary*, 279 F.3d 660 (9th Cir. 2002). Such a congressional limitation was notably absent here with respect to ongoing ISDA contracts with the Indian Health Service. Indeed, in recognition of those very rules, the United States has already settled virtually *identical* breach of contract claims against IHS's sister agency, the Bureau of Indian Affairs ("BIA"), on a class basis.[3] The Tenth Circuit's decision contravenes these well-established rules, converting government contracts into discretionary grants dependent on the whim of government agencies to spend or not to spend unrestricted appropriations on non-contractual obligations first. Accordingly, this Court should grant the petition and reaffirm the sanctity of government contracts and the responsibilities incumbent upon the government when it agrees to become a contracting party.

STATEMENT OF THE CASE

1a. There are 329 Indian tribes and inter-tribal organizations in the United States that annually contract with the U.S. Indian Health Service ("IHS") under the ISDA to administer its diverse health care programs. Most of these programs are operated on economically depressed rural Indian reservations situated in 35 states. Each summer IHS enters into these contracts in advance of appropriations for the coming fiscal year, typically to administer a remote IHS hospital, clinic or community health care program.

b. In 1975 Congress enacted the Indian Self-Determination Act, committing this Nation to "the establishment of a meaningful Indian self-determination policy which will permit an

---

[3] *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D. NM 1999) (first partial settlement); *Ramah Navajo Chapter v. Norton*, __ F. Supp. 2d __, 2002 WL 32005254, *3 (D. NM Dec. 6, 2002) (second partial settlement) (approving settlement of contract damage claims arising in years when (as here) Congress did not limit agency contract payments to "not to exceed" a given sum, and thus did not "cap" such payments).

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 implement this change in federal Indian policy, Congress "directed" the Secretary, "upon the request of any Indian tribe . . . to enter into a self-determination contract." *Id.* § 450f(a)(1) (emph. added). Under an ISDA contract the Secretary is then required to divest himself both of the authority to operate the contracted programs, and of all funding associated with those programs. *Id.* §§ 450f(a)(1), 450j-1(a)(1). In the event of a dispute, the Contract Disputes Act provides a remedy in damages. *Id.* §§ 450m-1(a),(d) (referencing 41 U.S.C. § 601 *et seq.*).

c. Congress in the ISDA required 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 [§ 450j-1(a)]," *id.* § 450j-1(g) (emph. added), and it mandated that the contract amount "shall not be less than the applicable amount determined pursuant to [§ 450j-1(a)]." *Id.* § 450*l*(c), sec. 1(b)(4) (emph. added). Section 450j-1(a), in turn, requires in paragraph (1) that "[t]he amount of funds provided under the terms of self-determination contracts . . . shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs . . . for the period covered by the contract," and in paragraph (2) that "[t]here shall be added to the amount required by paragraph (1) contract support costs." (Emph. added.) *See also id.* §§ 450j-1(a)(2), (3) & (5) (describing the required "contract support costs" that "shall be added" to the contract). These contract support costs include:

> (1) pooled "indirect costs" to administer all tribal operations (§§ 450b(f), 450j-1(a)(3)(A)(ii)); and

> (2) certain unpooled "direct" costs such as workers compensation insurance that specifically support the ISDA contract (§ 450j-1(a)(3)(A)(i)).

The described "contract support costs" cover the "fixed" overhead costs tribal contractors must incur to carry out these federal contracts[4]—costs which, when unreimbursed, must be absorbed through program reductions. Congress in 1988 added these contract support cost payment provisions because IHS's historic underpayment of those costs had become "the single most serious problem with implementation of the Indian self-determination policy," S. Rep. 100-274, at 8 (1987). *See also Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338, 1345 (D.C. Cir. 1996) ("[IHS and BIA] . . . 'systematically violat[ed]' the Tribes' rights in the area of indirect costs"), quoting S. Rep. 100-274, at 37. The Senate Committee added pointedly:

> Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed.

S. Rep. 100-274, at 13. These measures were enacted to make clear 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*. at 12. *See also* 25 U.S.C. §§ 450j-1(b)(1), (3) & (4) (all prohibiting IHS underpayments of ISDA contracts to fund other agency operations).

Consistent with its retention of authority to make final decisions concerning appropriations, Congress also provided that IHS could spend funds only to the extent Congress appropriates to IHS funds that are legally "availab[le]" to carry out the ISDA:

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

---

[4] *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997) (describing these as "fixed" costs).

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

Id. § 450j-1(b). Finally, in 1994 Congress added a special mandatory rule of statutory construction to protect tribal contractors:

> (2) Purpose.—Each provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor * * *.

Id. § 450*l*(c), sec. 1(a)(2) (emph. added).

d. In FY1996 and FY1997 Congress appropriated to IHS lump-sum amounts of $1.75 billion and $1.81 billion, respectively, "to carry out . . . the Indian Self-Determination Act," including the payment of contract support costs to contractors under that Act. Pub. L. 104-134, 110 Stat. 1321-189 (1996) (FY1996); Pub. L. 104-208, 110 Stat. 3009-212 (1996) (FY1997). Neither appropriations act limited the payment of contract support costs for ongoing ISDA contracts, and thus (with the exception of four earmarks) the full appropriation was legally available to pay such costs. At the end of each year IHS recorded substantial unobligated balances of $76,000,000 (FY1996) and $98,000,000 (FY1997). (*See* PRESIDENT'S BUDGET FOR FISCAL YEAR 1998 (Jan. 1997), Budget Appendix at 500 (ident. code 24.40) (reporting $76,000,000 as the FY1996 "actual" "end of year" "unobligated balance available"); PRESIDENT'S BUDGET FOR FISCAL YEAR 1999 (Jan. 1998), Budget Appendix at 404 (reporting $98,000,000 as the FY1997 "actual" "end of year" "unobligated balance available").)

e. IHS has long operated the Owyhee Community Hospital on the remote Shoshone-Paiute Duck Valley Reservation in northern Nevada, along with a variety of community health programs. Similarly, in northeastern Oklahoma, IHS owns

the Stilwell and Sallisaw clinics and also funds "contract health care" ("CHC") physician referral programs and various community health programs, all within the Cherokee Nation's 7,000 square mile jurisdictional area.

As FY1996 approached, the Shoshone-Paiute Tribes entered into an ISDA funding agreement for the coming year under which the Tribes agreed to take over the administration of the Owyhee Hospital on the government's behalf, with the agency to pay for this undertaking in a single amount at the beginning of the year "[s]ubject only to the appropriation of funds by the Congress." App. 5a.[5] As subsequently adjusted to reflect actual Hospital appropriations, the parties' compact and funding agreement required IHS to pay the Tribes' fixed contract support costs totaling $2,035,066 associated with this portion of the contract. App. 8a-9a, 31a-32a. IHS never paid this sum. *Id.* In advance of FY1997, the Tribes once again contracted under the Act to be paid fully at the beginning of the year, and once again IHS failed to pay any of the Tribes' fixed contract support costs associated with the ongoing operation of the Hospital. *Id.* As a consequence, the Tribes were compelled to reduce patient care to cover the shortfall. App. 9a.

As FY1997 approached, the Cherokee Nation similarly contracted to operate the Stilwell and Sallisaw clinics, two CHC physician referral programs, and various other IHS programs. All but one of the two CHC programs had been

---

[5] *See also* Appellants' App. (10th Cir.) at 302 (Shoshone-Paiute Compact requiring an "advance lump sum" payment, "unless otherwise provided in a[n]. . . Annual Funding Agreement," "on or before ten calendar days after the date on which the [OMB] apportions the appropriations for that fiscal year"), 340 (Shoshone-Paiute FY1996 AFA requiring "[o]ne annual payment in lump sum to be made annually in advance (on October 1, 1995)"), 372 (Shoshone-Paiute FY1997 AFA requiring "[o]ne annual payment in lump sum to be made. . . within 20 working days of apportionment [by OMB]").

part of the Cherokee's ongoing contracted operations for several years. Like the Shoshone-Paiute Tribes, although the funding agreement and associated compact required that IHS fully pay the Cherokee's fixed contract support costs at the beginning of the year "[s]ubject only to the appropriation of funds by the Congress," App. 5a, 33a-34a,[6] IHS paid no contract support costs at all associated with the clinics and CHC programs, and it did not fully pay the Cherokee's fixed costs associated with other ongoing IHS programs also administered under the funding agreement.

2a. After exhausting their remedies under the Contract Disputes Act (41 U.S.C. § 601 *et seq.*) and 25 U.S.C. § 450m-1(d), the petitioners filed this breach of contract action against the United States for damages pursuant to § 450m-1(a). In the meantime, and on the heels of a contemporaneous defeat in the lower courts (*infra* at 14 n.9), IHS in 1998 secured from Congress "Section 314," an appropriations act rider purporting retroactively to declare that IHS appropriations in FY1996 and FY1997 had all along been legally unavailable to pay petitioners and other tribal contractors their full contract support costs due under their ISDA contracts:

> 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 payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts . . . with

[6] *See also* Appellants' App. (10th Cir.) at 435 (Cherokee Nation FY1996 AFA requiring that "IHS request apportionment of 100% of total FY96 AFA funding in the first quarter [and] . . . within 21 days [to] process and make available . . . the apportioned amount").

> the [BIA or IHS] as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes, ...

Pub. L. 105-277, § 314, 112 Stat. 2681-288 (1998) ("Section 314").

Pursuant to a pretrial plan temporarily deferring all discovery, the Tribes moved for partial summary judgment to establish as a matter of law that appropriations were legally available at the time to pay fully the Tribes' contracts, and that under *Winstar* Congress could not later retroactively alter the Tribes' contract rights by enacting Section 314. The Secretary cross-moved for summary judgment. With respect to the "ongoing" portions of the petitioners' annual contracts, the district court concluded that: (1) notwithstanding the utter silence in the appropriations acts, FY1996 and FY1997 appropriations for ongoing contract support costs had actually been "earmarked in appropriation committee reports," App. 46a, and (2) such appropriations were in any event "insufficient" because the agency eventually "spent" its appropriations on other things. *Id*.

b. Employing somewhat different reasoning, the Tenth Circuit affirmed. As an initial matter, the court concluded that under § 450j-1(b) the United States has no underlying obligation to a tribal contractor if appropriations are not legally available to the agency to pay the contractor. App. 12a-13a. Next, with respect to "ongoing" contracts the Circuit viewed the issue presented as one of fact, not law, to be determined in light of an agency affidavit the court read as asserting 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 contract support costs would have required IHS to use money otherwise dedicated to other purposes supporting health services delivery to tribes.'" *Id*. 14a-15a. (The court did not address the President's later

budgets to Congress reporting between $76,000,000 and $98,000,000 in unspent FY1996 and FY1997 IHS appropriations. *Supra* at 7.) As for the absence of any limiting earmarks in the two lump-sum appropriations acts, *supra* at 7,[7] the Tenth Circuit simply stated that "while the Tribes correctly argue that the earmark recommendations of a committee are not typically legally binding, the IHS is likewise not obligated to completely ignore them." App. 16a (footnote omitted). The court below also concluded that "[Section] 314 retroactively gave those committee earmarks binding authority," *id*. 16a n.8, adding later that "[Section 314] indicated that the earmarked amounts in the committee reports for ongoing CSCs were intended to be legally binding." *Id.* 21a.

REASONS FOR GRANTING THE PETITION

There are several compelling reasons for granting the petition, reflecting both the enormous national impact of this case on the United States' reliability as a contracting party, and the multiple conflicts the decision below creates with decisions of this Court and other courts of appeals.

I. THE QUESTIONS PRESENTED CONCERNING GOVERNMENT CONTRACTS ARE EXTRAORDINARILY IMPORTANT AND SHOULD BE DECIDED BY THIS COURT.

1. It is difficult to overstate the importance of this case. It directly affects over 300 tribal contractors operating federal hospitals and other health facilities from Oklahoma to Alaska. Yet the stakes are even higher than that, for if, as the Tenth Circuit has held, a government agency can simply decide for itself when it has legally available appropriations to pay a

[7] *See also* App. 8a ("neither Act on its face restricted or limited the amount of funds, out of the lump-sum appropriation, available for [contract support costs] for ongoing programs") (emph. in original).

government contractor, then the whole concept of a government contract obligation has been eviscerated with disturbing consequences for thousands of federal contractors.

Such a sweeping ruling is "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, and alone is a compelling reason to grant the petition. 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, citing *United States v. Bekins*, 304 U.S. 27, 51-52 (1938). Permitting government agencies to avoid paying their just contract debts simply by choosing to spend their moneys 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 884-85, quoting Justice Brandeis in *Lynch v. United States*, 292 U.S. 571, 580 (1934). And, it completely undermines the bedrock principle that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Franconia*, 122 S. Ct. at 2001, quoting *Mobil Oil*, 530 U.S. at 607 (internal quotations omitted).

The untold damage the Circuit's ruling may engender for all government contractors cannot be overemphasized. Now, each time a contractor signs a contract saying that payments are 'subject to the availability of appropriations' (as is the case in at least 50 other statutory schemes, App. 78a-87a), it will not be enough that Congress appropriates monies the agency can lawfully spend to pay the contractor (in terms of the familiar time-purpose-amount test governing the legal

availability of an appropriation[8]). Now, the contractor must also monitor the agency's daily expenditures and implore the agency to honor its contract before spending its monies elsewhere. Even then, there is no assurance the contractor will not be left holding the bag at the end of the year if all the money is gone. This proposition is not only ludicrous; it also defies the whole concept of a contract, for "'[a] [government's] 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 v. Charleston*, 96 U.S. 432, 445 (1877). It is the penultimate "illusory promise." *Winstar*, 518 U.S. at 921 (Scalia, Kennedy & Thomas, JJ. concurring). And, it would be "madness" for contractors ever to enter into such agreements in the future. *Id*. at 864.

The magnitude of these implications alone is a compelling reason to grant the petition. *See Winstar*, 518 U.S. at 860 ("We took this case to consider the extent to which special rules, not generally applicable to private contracts, govern enforcement of the governmental contracts at issue here.").

2. An equally compelling reason to grant the petition is to review the Tenth Circuit's remarkable conclusion that Congress can immunize the government from liability for a class of contract costs it has come to regret simply by enacting a retroactive rider years after performance. Thus, in the midst of litigation, Congress can conveniently declare that the appropriations that were legally available at the time to pay those costs disappeared by fiat.

---

[8] U.S. General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ("APPROPRIATIONS LAW") at 4-2 (1991) (on Westlaw under "GAO REDBOOK"); OMB Cir. A-34 at 11.5 (2000) (answering: "**How can I tell whether appropriations are legally available?"**) (emph. in original).

The enactment of Section 314, a rider whose sole purpose is "self-relief"—strictly to save the government money on fully performed contracts it later found too expensive—crosses the sharp "line" this Court has drawn "between regulatory legislation that is relatively free of Government self-interest . . . and, on the other hand, statutes tainted by a governmental object of self-relief." *Winstar*, 518 U.S. at 896. It is precisely for this reason that this Court has held the government liable when "a substantial part of the impact"—here, indeed, all of the impact—"of the Government's action rendering performance impossible falls on its own contractual obligations." *Id*. at 898.

No ordinary contractor can simply choose one day not to pay its contracts, and correspondingly "this 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.'" *Id*. at 917-18 (Breyer, J. concurring), citing *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986), *Perry v. United States*, 294 U.S. 330, 350-51 (1935), and *Lynch*, 292 U.S. at 576-77. Here, too, the suggestion that Congress can step in with impunity in the middle of litigation and cancel its own contract debts years after the fact, simply to save the government money and undo government defeats in the lower courts,[9] knows no limits. By "expanding the Government's opportunities for contractual abrogation," the decision below produces "the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." *Id.* at 884. The

[9] Section 314 was enacted in the wake of *Shoshone-Bannock Tribes v. Shalala,* 988 F. Supp. 1306 (D. Or. 1997), *modified* 999 F. Supp. 1395 (D. Or. 1998) (holding government liable for underpaying contract support costs). The case was subsequently reversed in part *sub nom.*, *Shoshone-Bannock Tribes v. Secretary*, 279 F.3d 660 (9th Cir. 2002), based largely on § 314.

wholesale disruption of existing doctrine and settled expectations embodied in the holding below compels this Court's review.

II. THE TENTH CIRCUIT DECISION CREATES A DESTABILIZING INTER-CIRCUIT CONFLICT REGARDING AN AGENCY'S DUTY TO MEET CONTRACT OBLIGATIONS OUT OF AVAILABLE APPROPRIATIONS, AND THE FORCE OF MERE APPROPRIATIONS COMMITTEE RECOMMENDATIONS IN GOVERNMENT CONTRACTING MATTERS.

1. The Tenth Circuit decision also creates a sharp conflict with the Federal Circuit regarding an agency's duty to honor its contractual commitments out of available appropriations. In *Blackhawk* (binding precedent within the Federal Circuit[10]), the then-Court of Claims held that once a legally available appropriation is enacted from which a contract payment is due, at that moment the contractor's right to be paid becomes "a vested right," 622 F.2d at 553, adding:

> Administrative barriers [regarding internal agency budgets and reprogrammings] 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.

Id. at 552 n.9.[11] The Tenth Circuit's contrary holding—that the availability of an appropriation to pay a contract

---

[10] *South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (*en banc*) ("adopt[ing] [as] an established body of law as precedent" "[t]hat body of law represented by the holdings of the Court of Claims and the Court of Customs and Patent Appeals announced before the close of business on September 30, 1982").

[11] *Blackhawk* is but an expression of standard appropriations law, *see, e.g.*, APPROPRIATIONS LAW at 2-25 - 26 (discussing *Blackhawk*). *See also*

obligation depends on how the agency chooses to spend that appropriation—is diametrically opposed to the standard appropriations rule applied in *Blackhawk*.[12] It is also contrary to the Court of Claims' holding that the government cannot claim poverty as a defense when the "agency simply did not make an adequate [appropriations] request" to cover its contract obligations and other agency expenditures in the first place. *S.A. Healy Co. v. United States*, 576 F.2d 299, 305 (Ct. Cl. 1978).[13] These are serious decisional conflicts

---

id. at 6-17 ("Where a contractor is but one party out of several to be paid from a general appropriation, the contractor is under no obligation to know the status or condition of the appropriation account on the government's books"); *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892) ("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.").

[12] The ISDA's provisions give special force here to the *Blackhawk* rule, because the Act commands that an ISDA contract must include "the full amount of funds to which the contractor is entitled under [25 U.S.C. § 450j-1(a)]," *see* § 450j-1(g), and directs that the amount of the contract "shall not be less than the applicable amount determined pursuant to [§ 450j-1(a)]," *see* § 450*l*(c), sec. 1(b)(4) (emph. added). These measures establish a binding earmark that controls the agency's subsequent expenditure of its lump sum appropriation. This is so because "when an authorization establishes a minimum earmark ('not less than,' 'shall be available only'), and the related appropriation is a lump-sum appropriation which does not expressly mention the earmark . . . the agency must observe the earmark [set forth in the authorizing statute]." APPROPRIATIONS LAW at 2-42 - 43, citing 64 Comp. Gen. 388 (1985) (emph. added). *See also Int'l Union*, 746 F.2d at 861 n.5 ("An agency may, of course, be constrained to expend a certain portion of a lump sum appropriation . . . aris[ing]. . . from the terms of the substantive statute for which the appropriation was usable.")

[13] The situation is particularly absurd here when the President informs Congress that the agency actually has leftover and unobligated

between the court below and the Circuit invested with exclusive jurisdiction over virtually all other government contracts. This conflict gravely upsets the stability of government contracts, warranting review by this Court.

2. Similarly, the Tenth Circuit's reliance on appropriations committee recommendations[14] to excuse IHS from paying these ongoing contracts conflicts with the law of other circuits and this Court.

As noted in *Blackhawk*,

> 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, see 17 Comp. Gen. 147, 150 (1937).

---

appropriations available. *Supra* at 7. In any event, the agency's subsequent exhaustion of its appropriation is no bar to an award of damages under 41 U.S.C. § 612(a) of the Contract Disputes Act. *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1583 (Fed. Cir. 1994) (describing the Judgment Fund established under 31 U.S.C. § 1304 to pay contract damage awards as "a central, government-wide judgment fund from which judicial tribunals administering or ordering judgments, awards, or settlements may order payments without being constrained by concerns of whether adequate funds existed at the agency level to satisfy the judgment"); *Lopez v. A.C.&S., Inc.*, 858 F.2d 712, 716 (Fed. Cir. 1988) ("courts and boards, in rendering judgment, are not required to investigate whether program funds are available" "to pay court judgments and appeal board awards").

[14] *E.g.* S. Rep. 104-125, at 94 (1995) (FY1996) ("The Committee recommends $153,040,000 for contract support, the same as the House") (emph. added); S. Rep. 104-319, at 90 (1996) (FY1997) ("The Committee recommends $160,660,000 for contract support") (emph. added).

622 F.2d at 547 n.6 (emph. added). Or, as Justice Scalia for the D.C. Circuit put it in *International Union*:

> Lump-sum appropriations are a common feature of the legislative landscape, and we are not prepared to approach their interpretation by assuming that they are inherently ambiguous, capable of meaning either that no funds *need* be spent on any particular included program, or (as the Secretary seems to assert here) that no funds *could* be spent on a particular one, or that the funds *must* be distributed among all included programs in a given fashion--all as the committee reports and other entrails of legislative history might suggest.

746 F.2d at 861 (emph. in original). Indeed, in this Court it was the IHS itself which successfully argued in *Lincoln v. Vigil* that:

> [W]here "Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on" the agency.

508 U.S. 182, 192 (1993) (emph. added), quoting *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975). This is but hornbook appropriations law, APPROPRIATIONS LAW at 6-159, and the Tenth Circuit's creation of a destabilizing new rule—that committee reports establish new binding guidelines on the rights of government contractors to be paid out of available lump-sum appropriations—compels review by this Court.

In sum, the Tenth Circuit's conclusion that IHS could escape its contract obligations by relying on appropriations committee recommendations is doubly in conflict with decisions of this Court and other circuits: (1) it conflicts with the

lump-sum rule governing when a contractor's rights vest, and (2) it conflicts with the lump-sum rule that committee reports establish no limitation on an agency's use of its lump-sum appropriation. This Court should grant the petition to bring the Tenth Circuit into conformity with the decisions of this Court, the Federal Circuit and the D.C. Circuit on a matter of extraordinary importance to all government contractors.

III. THE TENTH CIRCUIT DECISION REPRESENTS AN UNPRECEDENTED EXPANSION OF CONGRESS' POWER TO CLARIFY PRIOR AMBIGUOUS LAW INTO AN UNREVIEWABLE POWER UNILATERALLY TO ABROGATE CONTRACT RIGHTS.

The Tenth Circuit's conclusion that Congress can enact retroactive legislation that alters pre-existing law and contract terms in the guise of a "clarification"—though here it is the court of appeals, not Congress, that so characterized Section 314—is directly at odds with the law of other Circuits and this Court. To be sure, Congress can enact retroactive legislation, *INS v. St. Cyr*, 533 U.S. 289, 315-17 (2001), though the standard for doing so is appropriately high, *id*., considering both the constitutional and contractual lines Congress may not cross.[15] And as *Winstar* instructs, Congress' power to impair vested contract rights is decidedly limited, for the United States is bound to its contracts as much as a private party, and no party to a contract can unilaterally declare what the contract means, including its ambiguous terms. Rather, well-settled contract rules are available to the courts for resolving such matters. *E.g.*, *Javierre v. Central Altagracia*, 217 U.S. 502, 507 (1910) (burden on those

[15] *See Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 856 (1990) (Scalia, J. concurring) (noting the Constitution "proscribes all retroactive application of punitive law . . . and prohibits (or requires compensation for) all retroactive laws that destroy vested rights").

"seeking to escape from the contract made by them on the ground of a condition subsequent, embodied in a proviso"); *Massachusetts Bay Trans. Auth. v. United States*, 254 F.3d 1367, 1373 (Fed. Cir. 2001) (party asserting impossibility has burden of proving 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"); *United Pacific Ins. Co. v. United States*, 497 F.2d 1402, 1407 (Ct. Cl. 1974) (contractor's reasonable interpretation of ambiguous provision controls where government drafted the contract); *The Padbloc Company, Inc. v. United States*, 161 Ct. Cl. 369, 376-77 (1963) ("'We are not to suppose that one party was to be placed at the mercy of the other'" so as to "[give] the United States carte blanche."); *see also* 25 U.S.C. § 450*l*(c), sec. 1(a)(2) (ISDA contracts "shall be liberally construed for the benefit of the Contractor").

Although the Tenth Circuit cited no authority in support of Congress' apparent power to "clarify" whether IHS had a contractual duty to pay three years earlier, the nearest authority confirms only Congress' recognized power retroactively to clarify a genuine ambiguity in a prior regulatory enactment. *E.g.*, *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 380-81 (1969) (regulation of broadcasters under the Communications Act); *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) (regulation of labor relations under the Taft-Hartley Act). To extend *Red Lion* to the interpretation of government contracts—here, to permit the government years after performance and in the middle of litigation unilaterally and retroactively to declare what the contract means—would cut the heart out of this Court's government contracting jurisprudence and undo the bedrock principle that the government is to be treated just like any other private party in its contracting relations. The other Circuits have never taken *Red Lion* into this domain, and the Tenth Circuit's establishment of a more liberal *Red Lion* rule when

it comes to government contracts—an area where, if anything, the rules should be stricter—produces a serious inter-circuit split warranting review by this Court.[16]

Even retroactive amendments to purely regulatory regimes can be problematic, and in considering *Red Lion* other Circuits have therefore recognized that "retroactive application" of a non-clarifying amendment "would pose a series of potential constitutional problems," *Beverly Comm. Hosp. v. Belshe*, 132 F.3d 1259, 1265 (9th Cir. 1997). Thus, even in the regulatory arena, care must be taken to draw a distinction between situations where Congress merely clarifies an earlier ambiguity (as in *Beverly*) and situations where Congress actually enacts a retroactive change impacting vested rights. After all, it is one thing to clarify an earlier law and quite another to change it, for no matter how a "clarification" may be cast, "WHITE cannot retrospectively be made to assert BLACK." *United States v. Montgomery Co. Md.*, 761 F.2d 998, 1003 (4th Cir. 1985). The other Circuits thus take care to confine *Red Lion* and its progeny to situations involving genuine clarifications. *E.g.*, *Liquilux Gas Corp. v. Martin Gas Sales*, 979 F.2d 887 (1st Cir. 1992); *NCNB Texas Nat'l Bank v. Cowden*, 895 F.2d 1488, 1500-01 (5th Cir. 1990); *Brown v. Marquette Sav. and Loan Ass'n*, 686 F.2d 608, 615 (7th Cir. 1982); *Callejas v. McMahon*, 750 F.2d 729, 731 (9th Cir. 1984). The Eleventh Circuit put it well:

> Several factors are relevant when determining if an amendment clarifies, rather than effects a substantive change to, prior law. A significant factor is whether a conflict or ambiguity existed with respect to the interpretation of the relevant provision when the amendment

---

[16] *See Winstar*, 518 U.S. at 897 n.41 (where there is a "concern with governmental self-interest . . . 'complete deference to a legislative assessment of reasonableness and necessity is not appropriate'") & 898 ("The greater the Government's self-interest, however, the more suspect becomes the [Government's] claim").

> was enacted. If such an ambiguity existed, courts view this as an indication that a subsequent amendment is intended to clarify, rather than change, the existing law. Second, courts may rely upon a declaration by the enacting body that its intent is to clarify the prior enactment.

Piamba Cortes v. American Airlines, Inc., 177 F.3d 1272, 1283-84 (11th Cir. 1999) (citations omitted). *See also Beverly*, 132 F.3d at 1265-66 (subsequent statute, entitled "Clarification," was enacted in the wake of a "split of authority" regarding the admittedly inscrutable Social Security Act); *Paramount Health Systems, 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 that the district judge had given to the statute, even if that meaning was crystal clear").

The Tenth Circuit has changed all this, turning upside-down the narrow jurisprudence regarding retroactive clarifications. Under its formulation, the fact that contract rights are at issue is immaterial; the legislation at issue need not be cast as a clarification at all; there is no need for a history of judicial struggles with the earlier law's interpretation; and there is no need for any other indicia that something was ambiguous or confusing in the first place. Under the Tenth Circuit's view of it, even a law like Section 314 which has a telling "notwithstanding" clause—conveying Congress's intent plainly to change what would otherwise be the law and the government's contracting obligations under it—can judicially be reinterpreted to be a mere clarification. The actual clarity of the earlier law is unimportant. Nor does it matter that the only objective evidence suggests quite the contrary: that in the weeks following a defeat in other ISDA litigation finding IHS liable for underpaying contract support costs, *supra* at 14 n.9, IHS ran to Congress and secured

Section 314 in what the Tenth Circuit now announces was a successful effort to "clarify" the law retroactively and thus foreclose further liabilities. The Tenth Circuit's reformulation of the law governing retroactive clarifications shows no limits and sanctions precisely such profoundly unfair results.

Unless reversed, there will be no end to government agencies that suffer defeats in the lower courts turning to Congress for retroactive "notwithstanding" amendments to undo vested contractual and statutory rights. With the stroke of a pen appropriations that years earlier indisputably were legally available can now be made to disappear retroactively, along with the contract payment rights that had long ago vested upon enactment of those appropriations. Such an enormous and unprecedented expansion of Congress' power seriously erodes both this Court's careful protection of contract rights reflected in *Winstar*, *Mobil* and *Franconia*, and this Court's narrow retroactivity jurisprudence reflected in *St. Cyr*. Both the extreme consequences of such a proposition for all contractors dealing with the government, and the more limiting views from other Circuits concerning retroactive clarifications of regulatory measures, warrant granting certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

CARTER G. PHILLIPS
SIDLEY, AUSTIN, BROWN & WOOD, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

RIYAZ KANJI
KANJI & KATZEN
201 South Main St.
Ann Arbor, MI 48104
(734) 769-5400

* Counsel of Record

LLOYD BENTON MILLER *
HARRY R. SACHSE
ARTHUR LAZARUS, JR., PC
MELANIE B. OSBORNE
NACOLE D. HESLEP
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1250 Eye Street, N.W.
Suite 1000
Washington, D.C. 20007
(202) 682-0240

Counsel for Petitioners

APPENDIX A

[Decided Nov. 26, 2002]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 01-7106

CHEROKEE NATION OF OKLAHOMA; SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,

Plaintiffs-Appellants,

v.

TOMMY G. THOMPSON, Secretary of Health and Human Services; MICHAEL H. TRUJILLO, Director of the Indian Health Service, United States Department of Health and Human Services,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District Court of Oklahoma

Before MURPHY, ANDERSON, and BALDOCK, Circuit Judges.

ANDERSON, Circuit Judge.

This case involves the adequacy of funding provided by the United States to plaintiffs, two Native American Tribes, for their performance of contracts operated under the Indian Self-Determination and Education Assistance Act. The Tribes

appeal the grant of summary judgment to the United States. We affirm.

BACKGROUND

Under the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. §§ 450-450(n), as amended, the Secretary of Health and Human Services ("Secretary") may enter into contracts or compacts with Indian tribes (self-determination contracts) to permit the tribes to administer various programs that the Secretary would otherwise administer. The Act further stipulates that the Secretary will provide funding for the administration of those programs. The basic idea behind the ISDA is to promote tribal autonomy and self-determination by permitting tribes to operate programs previously operated by the federal government, but to ensure that they do not suffer a reduction in funding for those programs simply because they assume direct operation of them.

The Indian Health Service ("IHS") provides primary health care for Indians and Alaska natives throughout the United States. In fiscal year 1994, in accordance with the ISDA, plaintiffs, the Shoshone-Paiute and the Cherokee Nation Tribes of the Duck Valley Reservation, entered into Compacts of Self-Governance and associated Annual Funding Agreements with the Secretary to operate certain IHS programs for their members.

Under § 450j-1(a) of the ISDA, the Secretary is obligated to provide funding for those self-determination contracts or compacts[1] in an amount equal to what he would have provided were IHS to continue to provide health care services itself

---

[1]There is no material distinction for purposes of this appeal between an agreement called a "compact" and an agreement called a "contract." Accordingly, as the parties have done, we use the terms interchangeably.

directly. This is called the "Secretarial amount." 25 U.S.C. § 450j-1(a)(1). See Ramah Navajo Sch. Bd., Inc. v. Babbitt, 87 F.3d 1338, 1341 (D.C. Cir. 1996) (describing the Secretarial amount as the "amount of funding that would have been appropriated for the federal government to operate the programs if they had not been turned over to the Tribe").

In addition to the Secretarial amount, the ISDA directs the Secretary to provide contract support costs ("CSC") to cover the direct and indirect expenses associated with operating the programs. The ISDA does not precisely define what CSC are.[2] We have observed that "[r]eviewing . . .the [ISDA] as a whole, . . . 'contract support costs' encompasses 'indirect costs' incurred by a tribal organization in carrying out a self-determination contract." *Ramah Navajo Chapter v. Lujan,* 112 F.3d 1455, 1461 (10th Cir. 1997). "Indirect costs" are, in turn, defined as those "incurred for a common or joint purpose benefiting more than one contract objective . . .," 25 U.S.C. § 450b(f), as contrasted with "direct program costs," which are those "that can be identified specifically with a particular

---

[2]The ISDA provides some general guidance as to what CSC are: "the reasonable costs for activities which must be carried on by a tribal organization as a contractor . . . but which–

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or
(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

25 U.S.C. § 450j-1(a)(2). It also provides for the payment of CSC for "direct program expenses for the operation of the Federal program that is the subject of the contract," as well as "any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service or activity pursuant to the contract." 25 U.S.C. § 450j-1(a)(3)(A)(i), (ii).

contract objective," 25 U.S.C. § 450b(c). See Shoshone-Bannock Tribes v. Secretary, 279 F.3d 660, 663 n.5 (9th Cir. 2002); Ramah Navajo Chapter, 112 F.3d at 1457-58. As this case demonstrates, the adequacy of the funding provided for tribal indirect costs has proven to be a recurring and troublesome issue. See Ramah Navajo Chapter, 112 F.3d at 1462 ("The legislative history indicates one of the primary concerns of Congress in enacting the [1988] amendments [to the ISDA] was the chronic underfunding of tribal indirect costs.") (citing S.Rep. No. 100-274 at 8-13 (1987)). See United States General Accounting Office, Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to Be Addressed at p.3 (June 1999) (noting that while "Tribes' allowable contract support costs have tripled from 1989 through 1998–increasing from about $125 million to about $375 million. . . . Congress has not funded contract support to keep pace with these increases, resulting in funding shortfalls").

The ISDA provides a further and, in this case, significant caveat to the funding obligations: "Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter." 25 U.S.C. § 450j-1(b); see also 25 U.S.C. § 450j(c) ("The amounts of [self-determination] contracts shall be subject to the availability of appropriations."). The first clause in § 450j-1(b) is called the "availability clause" and the second the "reduction clause."

Additionally, every self-determination contract entered into under the ISDA must either contain or incorporate by reference the provisions of a model agreement prescribed by the ISDA. 25 U.S.C. § 450*l*(a). The model agreement reiterates the availability clause, specifically providing that the amount

funded by the Secretary is "[s]ubject to the availability of appropriations. . . ." 25 U.S.C. § 450l (c) (describing § 1(b)(4) of model agreement). Accordingly, the compact with the Shoshone-Paiute Tribe contained the following clause:

> Funding Amount. Subject only to the appropriation of funds by the Congress of the United States and to adjustments pursuant to [25 U.S.C. § 450j-1] of the Indian Self-Determination and Education Assistance Act, as amended, the Secretary shall provide the total amounts specified in the Annual Funding Agreement.

Appellants' App. at 302. The compact with the Cherokee Nation contained virtually identical language. See id. at 425.

Additionally, the Annual Funding Agreement between the Shoshone-Paiutes and the Secretary included the following provision:

> Section 9 - Adjustments.
>
> (a) Due to Congressional Actions. The parties to this Agreement recognize that the total amount of the funding in this Agreement is subject to adjustment due to Congressional action in appropriations Acts or other laws affecting availability of funds to the Indian Health Service and the Department of Health and Human Services. Upon enactment of any such Act or law, the amount of funding provided to the Tribes in this Agreement shall be adjusted as necessary, after the Tribes have been notified of such pending action and subject to any rights which the Tribes may have under this Agreement, the Compact, or the law.

Appellants' App. at 342. The Annual Funding Agreement between the Cherokee Nation and the Secretary stated as follows:

> The parties agree that adjustments may be appropriate due to unanticipated Congressional action. Upon enactment of

> relevant Appropriations Acts, the adjustments may be negotiated as necessary; provided, however, the Nation shall be notified and consulted in advance of any proposed adjustments. It is recognized by the parties that circumstances may arise where funding variances or other changes or modifications may be needed, and the parties shall negotiate same in good faith. Provided, however, this AFA shall not be modified to decrease or delay any funding except pursuant to mutual agreement of the parties.

Appellants' App. at 450.

Recognizing that there could be numerous tribes competing for funding, the ISDA gave the IHS some flexibility in determining how to allocate funds: "[p]ayments of any grants or under any contracts pursuant to section 450f and 450h of this title may be made in advance or by way of reimbursement and in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this part." 25 U.S.C. § 450j(b). This case concerns a dispute about the allocation of CSC funds to the plaintiff Tribes for fiscal years 1996 and 1997.

In allocating CSCs for those years, IHS categorized contracts with tribes into two broad groups–"existing" contracts and "new or expanded" contracts.[3] Existing contracts were those that a tribe had been operating in a prior year or years. IHS allocated CSCs to existing contracts generally in accordance with the recommendations contained in appropriation committee reports. New or expanded contracts were those involving programs which tribes had never operated before.

---

[3]IHS' methodology in awarding CSC funds was explained in an internal agency guideline call the Indian Self-Determination Memorandum 92-2. This memorandum was superseded in 1996 by IHS Circular No. 96-04, which contains essentially the same methodology.

With respect to these new or expanded contracts, IHS took the ISD Fund Congress had appropriated for the "transitional costs of initial or expanded tribal contracts" and established a priority list based on the date the tribe requested funding for a new or expanded contract. Each year IHS would fully pay for CSCs for new or expanded contracts at the top of the priority list, and continue down the list until the ISD Fund was fully depleted. Contracts that had been so funded were removed from the list, and those below it advanced. In practice, the funds for new or expanded contracts were depleted before every tribe on the priority list received its CSC funding for new or expanded programs.

At the end of each year, the IHS would summarize the full CSC needs of each contracting tribe, in the prior year, calculate how much the IHS paid toward those CSC needs, and determine the resulting shortfall, if any. The Director of the Division of Financial Management for the IHS stated that in 1997 there was a CSC funding shortfall of $81,996,000 and in 1996 a CSC funding shortfall of $43,000,000. Fitzpatrick Decl. at ¶ 8, Appellants' App. at 530.

As indicated, this case concerns a dispute about the amount of CSCs provided to the plaintiff Tribes in fiscal years 1996 and 1997.[4] For fiscal year 1996, the House Committee on Appropriations recommended that approximately $1.7 billion be appropriated to IHS, with $153 million to be spent on CSCs for existing self-determination contracts, and $7.5 million on such costs for new or expanded self-determination contracts. See H.R.Rep. No. 104-173, at 97 (1995). As actually enacted, the Appropriations Act for 1996 appropriated the recommended $1.7 billion, of which approximately $1.374 billion was

[4]Plaintiffs aver that the Shoshone-Paiute tribe was underfunded in 1996 and 1997, and that the Cherokee Nation tribe was underfunded in 1997.

unrestricted. Of that $1.374 billion, however, $7.5 million "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, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act." Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-189 (1996).

For fiscal year 1997, Congress similarly appropriated a lump sum of approximately $1.8 billion to IHS for administration of the ISDA, of which $160,000,000 had been earmarked by the appropriations committee report for CSCs for existing contracts. See S. Rep. No. 104-319, at 90 (1996). As with the 1996 appropriation, in the actual Appropriations Act, Congress appropriated the recommended $1.8 billion, with $1.426 billion unrestricted, and, as in 1996, it allocated $7.5 million to the ISD Fund for new or expanded contracts under the ISDA. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-212, 3009-213 (1996). Thus, neither Act on its face restricted or limited the amount of funds, out of the lump-sum appropriation, available for CSCs for ongoing programs. Both designated $7.5 million to "remain available until expended" in the ISD Fund to pay for CSCs for new or expanded contracts.

In fiscal years 1996 and 1997, the requests for CSCs for new and expanded contracts exceeded the $7.5 million allocated. As a result, full CSC funding for such new and expanded contracts was delayed and/or not paid at all for some tribes, including the plaintiffs. Additionally, plaintiffs allege that CSC funding for their ongoing contracts was inadequate. The Cherokee Nation claims that, in total, it was not paid $3.4 million in CSC for fiscal year 1997. See First Amended Comp. at ¶¶ 31, 32; Appellants' App. at 44. The Shoshone-Paiute Tribe claims it was not paid $3.5 million in CSC for fiscal

years 1996 and 1997. See id. at ¶¶ 14, 15; Appellants' App. at 39-40; Fitzpatrick Decl. at 18, Appellants' App. at 534-35. Both Tribes assert that, because of these budget shortfalls, they were compelled to make substantial cuts in their programs.

On October 21, 1998, Congress passed the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 314, 112 Stat. 2681-288 (1998), which imposed a mandatory cap on the total amount of CSC funding for new and expanded programs. Section 314 states in part:

> Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Law 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes. . . .

The public laws referenced in § 314 included the 1996 and 1997 Appropriations Acts which, as indicated, had appropriated $7.5 million for CSCs for new and expanded programs. Additionally, the committee reports which preceded those laws had earmarked certain amounts for CSCs for ongoing programs. In 1998 Congress also enacted a one-year moratorium barring the Secretary from entering into further ISDA contracts. See id., § 328; see also Citizen Potawatomi Nation v. Norton, 248 F.3d 993, 1001 (10th Cir.), modified on rehearing, 257 F.3d 1158 (2001).

Alleging that the Secretary failed to fully pay all of their CSCs associated with both the ongoing portions of their

compacts with the IHS and the initial and expanded portions of their compacts, the plaintiff Tribes brought administrative claims against the Secretary under the Contract Disputes Act, 41 U.S.C. §§ 601-13. When that failed to resolve the dispute, the Tribes filed this action in March 1999, seeking damages and declaratory relief against the United States, the Secretary, and the Director of the IHS. All parties filed motions for summary judgment, and, on June 25, 2001, the district court denied the Tribes' motions, granted the United States' motion for summary judgment and dismissed the case.

Concluding that the language of the ISDA was clear and unambiguous, the district court reasoned as follows:

> This court finds the contracts at issue are conditioned on the IHS having sufficient funding. This court does not agree with the interpretation espoused by plaintiffs that the language in the Self-Determination Contracts which states that contract support costs are "subject to availability of appropriations" limits only the Secretary's ministerial duty to disburse funds but not her ultimate liability for full contract support costs. . . . To adopt plaintiffs' interpretation would render the phrase "availability of appropriations" meaningless.

Cherokee Nation v. United States, 190 F. Supp.2d 1248, 1259 (E.D. Okla. 2001). The court further found that:

> the money appropriated to IHS for fiscal years 1996 and 1997 was already committed to pay for funding of recurring costs and other mandatory obligations. Thus, there were simply insufficient appropriations to pay the contract support costs requested by plaintiffs. Further, the IHS could not use any of its annual appropriations to pay plaintiffs' contract supports costs without impairing its ability to discharge its responsibilities with respect to other tribes and individual Indians.

Id. at 1260. The court also held that § 314 limited the funds available for CSCs for new or expanded programs:

> Section 314 imposes a $7.5 million cap on IHS' payments each year to tribes for contract support costs for their new and expanded programs from 1994 through 1998. This amount had already been disbursed for the years in question. Section 314 bars further payments for those years since no appropriations were available.

Id. at 1262. Finally, the court rejected plaintiffs' argument that, regardless of the level of appropriations, the government was nonetheless liable to them under contract principles for their full CSCs.

Plaintiff Tribes appeal, arguing: (1) sufficient appropriations were legally available such that the Secretary was able to and should have paid plaintiffs' full CSCs for fiscal years 1996 and 1997 and neither the availability-of-appropriations clause nor the reduction clause contained in 25 U.S.C. § 450j-1(b) provide a defense to that obligation; (2) section 314 does not excuse the failure to pay because it would amount to a retroactive extinguishment of vested contractual and statutory rights, thereby, at a minimum, exposing the government to liability in damages; and (3) plaintiffs' contracts under the ISDA obligated the IHS to secure adequate appropriations to satisfy its contractual obligations.

We review the grant of summary judgment de novo, applying the same standard as did the district court. Ramah Navajo Chapter, 112 F.3d at 1460. Summary judgment is appropriately granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "We examine the factual record and reasonable inferences therefrom in the light most favorable to the nonmoving party." Ramah Navajo Chapter, 112 F.3d at 1460.

DISCUSSION

"The starting point in any case involving statutory construction is the language of the statute itself." Id. The government argues that § 450j- 1(b) clearly and unambiguously states that the IHS' obligation to provide full funding for ongoing and/or new and expanded CSC for plaintiffs' programs in fiscal years 1996 and 1997 is subject to the availability of appropriations by Congress, and, since there were insufficient appropriations to fully pay those costs, IHS incurs no liability for its failure to so pay. It further argues that three circuit courts have so held, and we should align ourselves with those courts.

We begin, therefore, with the relevant language of the ISDA: "Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe. . . ." 45 U.S.C. § 450j- 1(b). As the statute plainly states, the *"provision* of funds" is "*subject to* the availability of appropriations." Id. (emphasis added). This is so "[n]otwithstanding *any other provision* " of the Act. Id. (emphasis added).

This language is "clear and unambiguous." Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't, 194 F.3d 1374, 1378 (Fed.Cir. 1999). By means of this express language, "Congress has plainly excluded the possibility of construing the contract support costs provision as an entitlement that exists independently of whether Congress appropriates money to cover it." Shoshone-Bannock Tribes, 279 F.3d at 665. We agree with those courts, as well as the District of Columbia Circuit, which also found the statutory language clear and compelling:

> [W]e read the subject-to-availability-of-funds provision to mean precisely what it says: the Secretary need only distribute the amount of money appropriated by Congress under the Act, and need not take money intended to serve non-CSF purposes under the ISDA in order to meet his responsibility to allocate CSF.

Ramah Navajo Sch. Bd., 87 F.3d at 1345. To hold otherwise would "render the subject-to-appropriations language of § 450j-1(b) meaningless." Oglala Sioux Tribal Pub. Safety Dep't, 194 F.3d at 1378.

Plaintiffs respond that appropriations *were,* in fact, "legally available" to fully pay their CSCs. Thus, they argue that the availability clause does not excuse the government's failure to fully pay their CSCs for their ongoing programs/contracts or their new or expanded ones. Because the arguments are slightly different with respect to CSC funding for ongoing contracts, as contrasted with new or expanded ones, we address each set of contracts in turn.

I. Ongoing Contract CSCs

Plaintiffs make a series of arguments about why, notwithstanding the availability clause, they were entitled to full funding of CSCs for ongoing programs. First, they argue that the appropriations for ongoing CSCs at issue here were legally available because they were part of a lump-sum unrestricted appropriation for IHS, and the fact that the appropriations committee reports recommended that CSCs for ongoing contracts be limited to $153 million in 1976 and $160 million in 1997 is irrelevant in the face of the silence of the Appropriation Acts on the issue. They also argue that CSC payments cannot "take a back-seat to IHS's discretionary decisions about how best to spend its lump-sum appropriations" without violating both the spirit of the ISDA as a whole and the legislative history of the 1988 amendments to

the ISDA. Appellants' Op. Br. at 28. Those amendments include § 450j-1(b), which itself reflected "a studied congressional intent to *deny* the Secretary *all* discretion over contract funding decisions." Id. Finally, they argue the district court erred in relying on the recommendations of the appropriations committees as providing an "earmark" capping the amount available for ongoing CSCs.

Based on the materials before it at the summary judgment stage, the district court found that "[m]ost of IHS' annual appropriations are distributed to area offices for the payment of recurring costs . . . [which are costs that] occur automatically from year to year and must be funded without reduction." Cherokee Nation, 190 F. Supp.2d at 1250 (citing the Declaration of Carl Fitzpatrick, the Director of the Division of Financial Management for the IHS). Thus, "[i]n fiscal year 1997, IHS allocated to the Area Offices approximately $1,368,893,059 of the total approximately $1.8 billion annual appropriation on a recurring basis. . . ." Fitzpatrick Decl. at ¶ 10, Appellants' App. at 530-31. For fiscal year 1996, the IHS allocated approximately $1,313,990,083 on a recurring basis. Id., Appellants' App. at 531.

Further, in accordance with the appropriation committee report recommendations, the IHS allocated to area offices for tribal contract CSCs $153,040,000 in 1996 and $160,660,000 in 1997. Id. at ¶ 17, Appellants' App. at 534. Fitzpatrick further declared that "reprogramming additional funds for contract support costs would have required IHS to use money otherwise dedicated to other purposes supporting health services delivery to tribes." Id. at ¶ 17, Appellant's App. at 534. Finally, Fitzpatrick stated that all of the money appro-

priated for fiscal years 1996 and 1997 was in fact spent, leaving a zero balance at the end of the year.[5]

While plaintiffs argue that the district court's conclusions on these points are unsupported or somehow erroneous, they do not directly challenge the validity or accuracy of the Fitzpatrick Declaration, nor explain why the district court was not entitled to rely on it in ruling on the motions for summary judgment. The Fitzpatrick Declaration demonstrated that providing to the plaintiff Tribes their entire CSCs for ongoing contracts would have necessitated a reduction in funding for other tribal programs, or a reprogramming of such funds.[6]

Plaintiffs argue that the government is simply making an "after-the-fact" justification for its failure to fully pay CSCs, once it decided to spend all the money appropriated to it on other items. They argue that their contractual and statutory entitlement to such full funding vested immediately, at the beginning of each fiscal year, and, presumably, ahead of other

---

[5]Plaintiffs dispute the validity of the assertion that no moneys were left over from the appropriations for IHS in 1996 and 1997. In support of their allegation that there was not a zero balance, however, the Tribes refer us to a document in their appendix titled "Procedures for Allocating Prior Year Unobligated Balances to Satisfy CSC Shortfalls." Appellants' App. at 489. Plaintiffs assert it is dated November 1998, although no date appears on the document. Moreover, it is labeled "DRAFT *For Discussion Purposes Only*" and, in any event, does not support plaintiffs' assertion that there were, in fact, balances remaining from fiscal years 1996 and 1997. Thus, this document fails to rebut the Fitzpatrick Declaration's statement that there was a zero balance.

[6]Plaintiffs assert that the government's "'reduction clause' defense is nothing but a *post hoc* rationalization for actions that patently violated the Tribes' rights." Appellants' Op. Br. at 38 n.61. However, as the government points out, the record demonstrates that the IHS made its budgetary allocations for all funds, including CSCs, at the beginning of the year. See Fitzpatrick Decl. ¶ 4 & Ex. F., Appellants' App. at 528, 540-43.

IHS obligations. But, as the government points out, plaintiffs provide no support for that assertion, nor would that make sense, given the structure of the compacts plaintiffs have with the government, as well as the IHS' numerous other mandatory financial obligations.[7]

Moreover, while the Tribes correctly argue that the earmark recommendations of a committee are not typically legally binding,[8] the IHS is likewise not obligated to completely ignore them. Nothing suggests that the IHS awarded the amount it did for ongoing program CSCs because it felt *legally* obligated to do so because of the committee report recommendations, as opposed to making that allocation as an exercise of the limited discretion inevitably vested in it. See Ramah Navajo Chap., 112 F.3d at 1463 (noting that 1988 amendments retain for government some discretion in awarding CSCs); Ramah Navajo Sch. Bd., Inc., 87 F.3d at 1346 n.11 (noting the very limited discretion the Secretary has to award insufficient CSC funds under the ISDA).[9] In sum, we agree with the district

---

[7]Both the ISDA, which authorizes the contracts at issue, and the contracts themselves, explicitly make the availability of the sums owed to the Tribes subject to the availability of appropriations. Thus, it is implicit that, whenever the contracts stated the CSC funds were due, only those funds were due which had sufficient appropriations "backing" them. Further, plaintiffs fail to explain why their claims for CSC funds should take priority over all other tribal claims for funds from IHS.

[8]As we discuss infra, § 314 retroactively gave those committee earmarks binding authority.

[9]Plaintiffs argue that the 1988 amendments to the ISDA reflect a desire to severely limit the Secretary's discretion in allocating CSC funds. We agree. As the D.C. Circuit observed, "Congress left the Secretary with as little discretion as feasible in the allocation of CS[C]." Ramah Navajo Sch. Bd., 87 F.3d at 1344. However, as the discussion in Ramah Navajo Sch. Bd. indicates, we must bear in mind the context in which CSCs are allocated.

(continued...)

court that funding for the Tribes' ongoing CSCs was subject to the availability of appropriations from Congress, and there were insufficient appropriations to fully pay those CSCs.

II. New or Expanded Contracts

As all parties agree, the 1996 and 1997 Appropriations Acts specifically addressed funding for new or expanded tribal contracts: "$7,500,000 shall remain available until expended [for the ISD Fund] . . . for the transitional costs of initial or expanded tribal contracts." 110 Stat. 1321-189, 110 Stat. 3009-212, 213. As all parties also agree, tribes requested far more than the $7.5 million available for new or expanded contracts, and, pursuant to its queue or priority list system, the IHS awarded CSC funds to tribes ahead of plaintiffs on the priority list.

Plaintiffs argue that the "shall remain available" language placed no cap or limit on the amount of CSC funds which could be awarded to tribes for new or expanded programs, so IHS' failure to award more than the $7.5 million violated both the ISDA and plaintiffs' compacts with the government. We disagree.

The Ninth Circuit in Shoshone-Bannock Tribes considered this very issue. It concluded as follows:

> The appropriation language is arguably ambiguous. The language, $7.5 million "shall remain available until

---

[9](...continued)
Where there are sufficient appropriations to fully fund all CSCs, "the Act informs the Secretary exactly how the full funding should be allocated." Id. at 1348. In the face of an insufficient appropriation, the Secretary must "follow as closely as possible the allocation plan Congress designed in anticipation of *full* funding." Id. Thus, where appropriations are insufficient, the Secretary has a very limited discretion to allocate those funds in a manner consistent with the ISDA.

> expended" is not an unambiguous cap, as was the "of which not to exceed" language of the [1995] appropriation. By themselves, the words might mean that $7.5 million is available, without necessarily implying that other money is unavailable. Alternatively, they could mean that, of the total appropriation, only $7.5 million is available for the contract support costs. The House Appropriations Committee provided explanatory language in its report on the appropriation. The Committee Report speaks to a concern it had "to contain the cost escalation in contract support costs," and says "[t]he Committee has provided $7,500,000 for the Indian Self-Determination Fund . . . to be used for new and expanded contracts." This Committee Report language lends itself to the second reading, that only $7.5 million is available, not the first. The most natural reading is that the Committee gave attention to how much of the total appropriation should go to contract support costs for new and expanded contracts and decided that $7.5 million was all they wanted to spend.

Shoshone-Bannock Tribes, 279 F.3d at 666 (footnote omitted).

The Ninth Circuit found further support for its conclusion in § 314, by which, the court opined, "Congress eliminated the ambiguity retroactively." Id. Thus, the court concluded:

> The "availability" language in the fiscal year 1996 appropriation either plainly limits the funds available for contract support to the $7.5 million appropriated for that purpose or, if we were to take the interpretation most favorable to the Tribes, is at best ambiguous, leaving room for an argument that the remaining $1.7 billion is also "available." But the ambiguity, if there is any, is cleared away, both by the Appropriations Committee report explaining the $7.5 million appropriation when it was made

> and, with no possible ambiguity, by the 1999 "that's all there is" language in § 314.

Id. at 667.

Plaintiffs respond that the term "shall remain available" has a particular meaning in appropriations law: "the language in the ISD provision is about *when* a stated sum of money may be spent *after* the current fiscal year on CSCs for 'initial or expanded' contracts, not how much may be spent in the *current* year for that purpose." Appellants' Op. Br. at 35. But the two decisions of the Comptroller General plaintiffs cite in support of that interpretation do not, in our view, support it.[10] We agree

---

[10] In Matter of Forest Service-Appropriations for Fighting Forest Fires, B-231,711, 1989 WL 240615 at *2 (Comp. Gen.1989), the Comptroller General observed that "the language 'of which $263,323,000 for . . . firefighting ... shall remain available' . . . does not represent a line-item limitation or a cap on the amount of money available for obligation for firefighting. Rather, this language expresses the availability *of a specific amount* as to time–two years instead of one." (emphasis added) (footnote omitted). In Matter of: The Honorable Thad Cochran, B-271,607, 1996 WL 290140 at *1 (Comp. Gen.1996), the Comptroller General stated that "[w]hen the Congress expressly provides that an appropriation 'shall remain available until expended,' it constitutes a no-year appropriation and all statutory limits on when *the funds* may be obligated and expended are removed." (emphasis added). Both of those decisions clearly discuss the temporal limitation the phrase "shall remain available" places on expenditures, but they do not clearly support plaintiffs' argument that the *amount* of funds specified is subject to unlimited expansion.

Furthermore, our view is supported by the Office of General Counsel of the United States General Accounting Office: "The 'shall be available' family of earmarking language presumptively 'fences in' the earmarked sum (both maximum and minimum), but is more subject to variation based upon underlying congressional intent." 2 United States General Accounting Office, Principles of Federal Appropriations Law, at 6-8 (2d ed.1992). There is no evidence of an underlying Congressional intent rebutting the presumption that the "shall be available" language

(continued...)

with the Ninth Circuit that a better reading of the language is that Congress intended to limit the amount available for new or expanded CSCs to $7.5 million.

III. Section 314

As indicated, in October 1998, Congress passed an Emergency Supplemental Appropriations Act, which included § 314. That section stated in part that "amounts appropriated to or earmarked in committee reports for . . . the [IHS] by Public Laws . . . 104-134[and] 104-208 . . . for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts, . . . compacts, or annual funding agreements with . . . the [IHS] as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes. . . ." Pub. L. No. 105-277, § 314, 112 Stat. 2681-288 (1988). Public Laws 104-134 and 104-208 were, respectively, the Appropriations Acts for fiscal years 1996 and 1997.

The government argues we need not consider § 314 as a retroactive law; rather, it simply clarifies what Congress meant in enacting the 1996 and 1997 Appropriations Acts. The Tribes argue that, if we construe § 314 retroactively, it amounts to a breach of statutory and contractual vested rights.

"[I]t is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect." INS v. St. Cyr, 533 U.S. 289, 316 (2001). There must, however, be "a clear indication from Congress that it intended such a result." Id.; see also Daniels v. United States, 254 F.3d

---

[10](...continued)
fenced in the earmarked amount of $7.5 million. Indeed, to the extent there is any indicia of Congressional intent, either in the appropriations committee report or in the later-enacted § 314, it supports the conclusion that Congress intended the $7.5 million to be a maximum.

1180, 1187 (10th Cir. 2001) ("Congress . . . has the power to . . . direct [a] statute's retroactive application, but it must do so explicitly.").

Whether we view this as a retroactive law, or as merely a clarification of the prior Appropriations Acts, Congress could not have been clearer as to its intent that the Act have a retroactive effect. It specifically references prior laws enacted in prior years, both by number and by date, and specifically states that "the amounts appropriated to or earmarked in committee reports . . . are the total amounts available." Thus, Congress indisputably indicated no more funds would be available to pay CSCs for those years, and it made it very clear that that is what it intended to appropriate for those years. We therefore agree with the district court that § 314 supports its conclusion that Congress intended to make available for CSCs for new or expanded contracts in fiscal years 1996 and 1997 *only* $7.5 million. Further, it indicated that the earmarked amounts in the committee reports for ongoing CSCs were intended to be legally binding. And, as we explain infra, because any contract claim was conditioned on, and subject to, available appropriations, we reject plaintiffs' argument that § 314 breached plaintiffs' contractual and /or statutory rights.

IV. Contract Claims

Finally, the Tribes argue that, under the doctrine of New York Airways, Inc. v. United States, 369 F.2d 743 (Ct.Cl. 1966), "an ISDA contract binds the United States to pay even where the agency fails to seek sufficient appropriations from Congress." Appellants' Op. Br. at 2. In New York Airways, the plaintiff helicopter company sued the government for money allegedly not paid for mail delivery. The company was entitled by statute to receive compensation for its services, but the amounts earmarked in the appropriations act were exhausted before the end of the fiscal year. The Court of Claims held the

government was obligated to pay the helicopter service: "the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Governmental obligation created by statute." New York Airways, 369 F.2d at 748 (citing United States v. Vulte, 233 U.S. 509 (1914)). By contrast, however, where a "contract expressly provided that the quantities of work ordered shall be kept 'within the limits of available funds,'" and where the relevant statute "prohibited obligating the Government to pay a larger sum . . . than covered by a specific appropriation" then work "performed in excess of the appropriation was held not to create an obligation against the Government enforceable in the courts." Id.

This case is like the latter situation, in that the government's contractual and statutory obligation to pay CSCs was expressly subject to the availability of appropriations. The doctrine of New York Airways does not therefore support the Tribes' assertion that the government is liable under contract principles despite any shortfall in appropriations. See Oglala Sioux, 194 F.3d at 1379 (rejecting the identical argument based on New York Airways, stating "Oglala's situation differs fundamentally in that the ability of Interior to bind the Government contractually was expressly conditioned on the availability of appropriations.").[11]

---

[11]The Tribes also argue that, under United States v. Winstar Corp., 518 U.S. 839 (1996), the government may not "repudiate its own debts . . . simply in order to save money" and that "when it attempts to do so it is no more than a party breaching a contract." Appellants' Op. Br. at 46. Thus, they suggest that, whether or not appropriations were available, the government remained contractually bound. We disagree. It was always clear and explicit, both in the ISDA and in the contracts with the government, that the funding was subject to available appropriations and, despite the Tribes' repeated

(continued...)

CONCLUSION

We have carefully considered all of the Tribes' arguments. For the foregoing reasons, we AFFIRM the judgment of the district court.

---

[11](...continued)
assertions to the contrary, there were, in fact, insufficient appropriations to permit full funding.

APPENDIX B

[Filed June 25, 2001]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 99CV92

CHEROKEE NATION OF OKLAHOMA; SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

UNITED STATES OF AMERICA, DONNA E. SHALALA, Secretary of the United States Department of Health and Human Services, and MICHAEL H. TRUJILLO, Director of the Indian Health Service, United States Department of Health and Human Services,

Defendants.

ORDER

Before the court for its consideration is the plaintiffs Cherokee Nation and the Shoshone-Paiute Tribes' motion for partial summary judgment of liability on the first and second causes of action and the plaintiffs' motion for declaratory judgment on the third cause of action. Also at issue is the defendants' cross motion for summary judgment.

I. Facts

The court finds the facts as follows. The Indian Self-Determination and Education Assistance Act of 1975, 25

U.S.C. § 450 *et. seq.* (hereinafter the "ISDA") was designed to promote tribal autonomy and self-governance. In the ISDA, Congress allowed tribes to assume direct operation of federal programs administered to tribes that formerly had been controlled by the Indian Health Services (hereinafter "IHS"). The ISDA directs the Secretary of the Interior:

> . . . upon the request of any Indian tribe . . ., to enter into a self-determination contract . . . . with a tribal organization to plan, conduct, and administer programs or portions thereof . . . . [that are provided] for the benefit of Indians because of their status as Indians. 25 U.S.C. § 450f(a)(1).

If the tribe elects to assume operation of programs, the tribe enters into a Self-Determination Contract or a Self-Governance Compact.[1] If a tribe enters into one of these agreements with the government, the only role of the IHS is to monitor the operations of the tribes. The ISDA was designed to assure that funding for services provided to tribes would not be decreased solely because a tribe had assumed operation of the program in question. The ISDA requires that funding under the contract "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs . . ." (25 U.S.C. § 450j-1(a)(1)). This amount, known as the "secretarial amount", is the "amount of funding that would have been appropriated for the federal government to operate the programs if they had not been turned over to the Tribe." Ramah Navajo School Board, Inc. v. Babbitt, 87 F.3d 1338, 1341 (D.C.Cir.1996).

In addition to the secretarial amount, the tribes are also paid contract support costs. However, in the beginning these

---

[1]In the case at bar, both plaintiffs are parties to a compact. Since Self-Governance Compacts and Self-Determination Contracts are both subject to the same Congressional appropriations mechanism, the terms will be used interchangeably. 25 U.S.C. § 450j-1(b).

payments were inadequate to meet the needs of the tribal contractors. In 1988, Congress responded by amending the ISDA to make payment of contract support costs mandatory. (Senate Report 103-374, dated September 26, 1994, presented by Senator Inouye from the Committee on Indian Affairs, attached to Plaintiffs' Motions for Summary Judgment as Exhibit "3" and Report to Congressional Committees, entitled "Shortfalls in Indian Contract Support Costs Need to be Addressed," dated June 1999 and prepared by the Governmental Accounting Office, attached to Plaintiffs' Motions for Summary Judgment as Exhibit "2"). The ISDA specifically enumerates which items can be characterized as contract support costs. The ISDA states contract support costs include all "reasonable costs for activities which must be carried on by a tribal organization as a contractor compliance with the terms of the contract and prudent management," and which are not already included in the secretarial amount specified in 25 U.S.C. § 450j-1(a)(2). (25 U.S.C. § 450j-1(a)(2)). Contract support costs fall into two categories: direct and indirect. The ISDA defines the term indirect contract support cost as those "costs incurred for a common or joint purpose benefiting more than one contract objective or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved;" 25 U.S.C. § 450b(f). Direct contract support costs are all those allowable costs that strictly benefit the IHS programs only and that are not otherwise included in either the indirect costs or in the secretarial amount. 25 U.S.C. § 450b(f). On an annual basis, the IHS calculates the "full" contract support cost needs of each tribal contractor using a variety of information. (Department of Health and Human Services Indian Self- Determination Memorandum No. 92-2 entitled "Contract Support Cost Policy" at 5- 9 attached to Plaintiffs' Motions for Summary Judgment as Exhibit "4"). The IHS issues a shortfall report which reflects the deficiency in contract

support costs. In this shortfall report, the IHS summarizes each tribes "full" contract support cost needs from the prior year, how much IHS paid against the need, and the resulting shortfall, if any. (Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E").

IHS finances Self-Determination Contracts and Compacts under the ISDA, as well as all of its direct health service programs, through funds derived from an annual lump-sum appropriation from Congress designated for "Indian Health Services." IHS' total appropriations from Congress in fiscal years 1996 and 1997 was $1,747,842,000 and $1,806,269,000 respectively. (Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-212 (1997) attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "C", Omnibus Consolidated Appropriations Act, 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-189 (1996) attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "B" and Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E"). Most of IHS' annual appropriations are distributed to area offices for the payment of recurring costs. (Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E"). Recurring costs occur automatically from year to year and must be funded without reduction. In fiscal years 1996 and 1997 respectively, IHS allocated $1,313,990,083 and $1,368,893,059 in recurring costs to area offices. (Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E").

The remainder of the total annual lump-sum appropriated to IHS is retained each year by headquarters for activities that it manages. All of the money reserved for fiscal years 1996 and 1997 was spent, leaving a zero balance at the end of those fiscal years. (Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E").

For fiscal years 1996 and 1997, Congress earmarked in appropriation committee reports, $153,040,000 in 1996 and $160,660,000 in 1997, to be spent on existing contract support costs. These contract support funds were allocated to the area offices for tribal Contracts and Compacts for fiscal years 1996 and 1997. Any diversion of funds for additional contract support costs would have required the IHS to use money otherwise dedicated for other purposes. (Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E"). To fully pay the contract support costs as requested by plaintiffs would cause a reduction in funding which could severely cripple or even eradicate many health programs serving other tribes or individual Indians. (Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E").

The defendants allege that they failed to pay the plaintiffs the full amount of contract support costs they were requesting because plaintiffs were not the proper recipients based on the queue list system. (Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E"). The funds allocated to the IHS for the execution of self-determination contracts were consistently insufficient to meet the obligation. The queue list system was developed to address the shortfall IHS was encountering with payment of

contract support costs. IHS determined that it would place all requests on a queue list or priority list, based on the date of receipt of the request. Approved requests for contract support costs would be 100% funded on a first-come, first-serve basis. Once these funds were exhausted, tribes awaiting new contract support cost funding would be provided new funds in the order they made their request when additional appropriations were available. In the year a tribe reached the top of the queue, it would be paid its new contract support costs for that year and would continue to be paid at least that amount of contract support costs for the newly funded program every year thereafter. This procedure has been used since 1992 for self-determination contracts and was subsequently applied to self-governance compacts. (Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E").

In 1998, Congress passed the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 314, 112 Stat. 2681, 2681- 288 (1998). This section imposes a cap on IHS payments each year to tribes for contract support costs for new and expanded programs from 1994 through 1998. Congress earmarked $7.5 million to be taken from the lump-sum appropriation for contract support costs for each year from 1994 through 1997, to pay tribes for new contract support costs resulting from new or expanded programs. (Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-2084, 110 Stat. 3009 at 3009-213 (1997) and Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 at 1321-189 (1996)). In 1996 and 1997, the IHS had already spent its $7.5 million allotment on tribes which were ahead of the Shoshone-Paiute Tribes on the queue list. In 1997, the Cherokee Nation did not receive any additional funding for contract support costs

because IHS had already spent its $7.5 million allotment on tribes which were ahead of the Cherokee Nation on the queue list. (Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E").

Shoshone-Paiute tribes are federally recognized Indian tribes with an enrolled population of approximately 1,800 members, most of whom live on or near the Duck Valley Reservation, in the desert of northern Nevada and southern Idaho. The health facilities of the tribes are located in Owyhee, Nevada. In 1976, IHS built a 15 bed Owyhee Community Health Facility which is still in use. (Affidavit of Winona Manning attached to the Plaintiffs' Motions for Summary Judgment as Exhibit "16").

In 1988, IHS announced plans to terminate inpatient care at the Owyhee Community Health Facility. In October 1994, the tribes entered into a Self- Governance Compact with IHS, with a plan to contract for the operation of the community health facility. (Affidavit of Winona Manning attached to the Plaintiffs' Motions for Summary Judgment as Exhibit "16").

Next, the Shoshone-Paiute tribes expanded an existing Self-Determination Contract with IHS by contracting to operate the balance of the IHS community health programs. On January 1, 1995, they shifted these programs over to an Annual Funding Agreement, under their compact, for the remainder of fiscal year 1995. (Affidavit of Winona Manning attached to the Plaintiffs' Motions for Summary Judgment as Exhibit "16").

In fiscal year 1996, the Shoshone-Paiute tribes amended the compact expanding the IHS programs they administered to include community health programs plus all of the available IHS Owyhee Hospital Services. Since fiscal year 1996, they have continued to deliver these services. (Affidavit of Winona Manning attached to the Plaintiffs' Motions for Summary Judgment as Exhibit "16").

In their Compact of Self-Governance dated October 1, 1994, Article II, Section 3 provides: "Funding Amount. Subject only to the appropriation of funds by the Congress of the United States and to adjustments pursuant to § 106(b) of the Indian Self-Determination and Education Assistance Act, as amended, the Secretary shall provide the total amounts specified in the Annual Funding Agreement." (Compact of Self-Governance between the Duck Valley Shoshone-Paiute Tribes and the United States of America, attached to the Plaintiffs' Motions for Summary Judgment as Exhibit "19" at 10). Further, in the Annual Funding Agreement entered into between the Shoshone-Paiute tribes and the government, Section 9-Adjustments provides:

> (a) Due to Congressional Actions. The parties to this Agreement recognize the total amount of the funding in this Agreement is subject to adjustment due to Congressional action in appropriations Acts or other laws affecting availability of funds to the Indian Health Service and the Department of Health and Human Services. Upon enactment of any such Act or law, the amount of funding provided to the Tribes in this Agreement shall be adjusted as necessary, after the Tribes have been notified of such pending action and subject to any rights which the Tribes may have under this Agreement, the Compact or the law.

(Annual Funding Agreement between the Duck Valley Shoshone-Paiute Tribes and the Secretary of the Department of Health and Human Services of the United States of America, dated October 1, 1995, attached to the Plaintiffs' Motions for Summary Judgment as Exhibit "23" at 13).

For the year 1996, the Secretary agreed in the Shoshone-Paiute tribes' Amended 1996 Annual Funding Agreement that the "amounts that are available to the Tribes pursuant to the Compact and Title III" include "approved and agreed recurring direct ($494,517) and non-recurring indirect

($1,173,149) contract support funds . . . associated with both those programs", and $367,400 in "approved and agreed . . . . non-recurring direct start-up or preaward contract support costs in connection with the [same programs]". (Amendment Number 1 to the Fiscal Year 1996 Annual Funding Agreement for the Shoshone-Paiute Tribes of the Duck Valley Reservation, amended March 6, 1996, dated May 22, 1996 attached to the Plaintiffs' Motions for Summary Judgment as Exhibit "26" at 1).

In fiscal year 1997, the Shoshone-Paiute tribes and IHS agreed simply that "the sum of $1,847,196 in recurring direct and indirect contract support cost funds associated with those programs," and $435,762 in nonrecurring funding, of this specified amount $367,400 represents "one-time start-up or preaward contract support funds". This same document provides in Section 9: "(a) Due to Congressional Actions. The parties to this Agreement recognize that the total amount of the funding in this Agreement is subject to the availability of appropriations." (Annual Funding Agreement, dated October 1, 1996 attached to Plaintiffs' Motions for Summary Judgment as Exhibit "27" at 8-9, 14). Plaintiffs allege defendants failed to fully pay the contract support costs for the years 1996-1997.

The Cherokee Nation is a federally recognized tribe with an enrollment in excess of 200,000 members. Approximately 91,000 members live within the Cherokee Tribal Jurisdictional Service Area which is a 7,000 square mile region in the northeast corner of Oklahoma. Tribal services are provided throughout the Tribal Jurisdictional Area. The Cherokee Nation has operated various IHS care programs under the authority of the Indian Self-Determination Act for the benefit of its members and other eligible Indians. In fiscal year 1994, the Cherokee Nation began operating these and other IHS programs pursuant to a Self-Governance Compact and associated Annual

Funding Agreements. Under the terms of its compact and its fiscal year 1997 Annual Funding Agreement the Cherokee Nation operated five rural outpatient clinics, providing basic outpatient medical care, dental programs, optometry, radiology, mammography, behavioral health services, medical laboratory services, pharmacy services, community nutrition programs, and a public health nursing program. The Cherokee Nation also operated associated programs associated with the IHS Claremore Hospital. (Affidavit of Bill Thorne attached to Plaintiffs' Motions for Summary Judgment as Exhibit "36", Compact of Self-Governance between The United States of America and the Cherokee Nation, at 4, dated June 1993, attached to Plaintiffs' Motions for Summary Judgment as Exhibit "37", Annual Funding Agreement between the Cherokee Nation and the United States of America, dated July 1996, attached to Plaintiffs' Motions for Summary Judgment as Exhibit "39" and Addendum No. 1 to FY 1997 Annual Funding Agreement between the United States of America and the Cherokee Nation, dated 1997, attached to Plaintiffs' Motions for Summary Judgment as Exhibit "40").

In its Self-Governance Compact entered into in 1993, Article IV, Section 3 provides:

> "Funding Amount. Subject only to the appropriation of funds by the Congress of the United States, and to adjustments pursuant to section 106(b) Title III of P.L. 93-638, as amended the Secretary shall provide to the Nation the total amount of funds specified in the Annual Funding Agreement incorporated by reference in Article V, Section 1. In accordance with Section 304 Title III of P.L. 93-638, as amended the use of any and all funds under this Compact shall be subject to specific directives or limitations as may be included in applicable appropriations acts."

(Compact of Self-Governance between The United States of America and the Cherokee Nation, at 4, dated June 1993,

attached to the Plaintiffs' Motions for Summary Judgment as Exhibit "37" at 4).

In the Annual Funding Agreement which was incorporated into the Self- Governance Compact Section 10 provides in pertinent part:

> The parties agree that adjustments may be appropriate due to unanticipated Congressional action. Upon enactment of relevant Appropriations Acts, the adjustments may be negotiated as necessary; provided, however, the Nation shall be notified and consulted in advance of any proposed adjustments. It is recognized by the parties that circumstances may arise where funding variances or other changes or modifications may be needed and the parties shall negotiate same in good faith. Provided, however, this AFA shall not be modified to decrease or delay any funding except pursuant to mutual agreement of the parties.

(Annual Funding Agreement between the Cherokee Nation and the United States of America at 5, dated July 1996, attached to the Plaintiffs' Motions for Summary Judgment as Exhibit "39" at 5).

In fiscal year 1997, the Cherokee Nation calculated that it was entitled to be paid $4,442,099 in indirect costs associated with carrying out all of its contracted IHS programs. (Affidavit of Bill Thorne attached to Plaintiffs' Motions for Summary Judgment as Exhibit "36"). IHS paid $1,656,151, to the Nation. Further, the IHS never paid the Cherokee Nation any direct contract support costs for several newer programs, although the Nation requested–and the local Oklahoma area office approved–specific amounts of direct contract support costs for each of these programs. (Affidavit of Bill Thorne attached to Plaintiffs' Motions for Summary Judgment as Exhibit "36").

On March 5, 1999, the Cherokee Nation of Oklahoma and the Shoshone-Paiute Tribes filed a lawsuit in this court alleging the defendants committed a breach of contract and violated the provisions of the ISDA by failing to pay the proper amount to the tribes for contract support costs. On May 17, 1999, the plaintiffs filed their first amended complaint re-alleging the prior two causes of action and alleging an additional cause of action which states that Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for fiscal year 1999, Pub. L. 105-277, does not retroactively extinguish or otherwise bar the claims asserted in their complaint.

Plaintiffs filed motions for summary judgment on their three causes of action and the defendants filed a cross motion for summary judgment on all three causes of action asserted by plaintiffs. Currently pending before the court are the Plaintiffs' Motion for Partial Summary Judgment of Liability on the First and Second Causes of Action, the Plaintiffs' Motion for Declaratory Judgment on the Third Cause of Action and the Defendants' Cross Motion for Summary Judgment. On April 5, 2000, after filing the motions for summary judgment, plaintiffs moved to have the court certify a class. On February 9, 2001, the court denied that motion.

II. Standard of Review

25 U.S.C. § 450m-1(a) of the ISDA authorizes district courts to exercise jurisdiction over civil actions brought under the ISDA and to order appropriate relief. However, it fails to provide any standard of review. The parties have been unable to agree on the appropriate standard of review for this court. Plaintiffs argue the appropriate standard of review is *de novo.* They argue that under the ISDA, the Contract Disputes Act, 41 U.S.C. § 601 *et. seq.,* applies to civil actions arising under Self-Determination Contracts and Self-Governance Compacts pursuant to 25 U.S.C. § 450m-1(d) and ISDA Title III, §

303(d), reprinted at 25 U.S.C. § 450f (note). Thus, plaintiffs argue the Contract Disputes Act applies to their claims. Plaintiffs argue the Contract Disputes Act provides that a contractor's appeal from the decision of a contracting officer "shall proceed *de novo*." 41 U.S.C. § 609(a)(3).

Plaintiffs also argue that even if the Contract Disputes Act were not applicable to their lawsuit, the standard of review for this case would still be *de novo* under the ISDA. Plaintiffs argue that Congress intended a *de novo* review when it used the terms "original jurisdiction", "civil action", and "other appropriate relief" including money damages in the ISDA. Plaintiffs also argue the legislative history and canons of statutory construction support this court exercising a *de novo* review over an action brought pursuant to the ISDA.

Defendants argue that since the ISDA does not set forth the standard of review, the Administrative Procedures Act (hereinafter the "APA") will provide the appropriate standard. Under the APA, the court must uphold an agency decision unless plaintiffs can show the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." In support of their argument, defendants present to the court three unreported cases, Suquamish Tribe v. Ada Deer, C-96-5468 (RJB) (W.D.Wash., September 2, 1997), California Rural Indian Health Board, Inc., v. Donna Shalala, C-96- 3526 (DLJ) (N.D. Cal. April 24, 1997) and Yukon-Kuskokwim Health Corporation v. Shalala, A-96-155 (JWS) (D . Alaska April 15, 1997). These cases have also considered the appropriate standard of review under the ISDA and have held the APA standard of review controls. Addressing the same arguments which have been advanced here, those courts held the ISDA is ambiguous and resolved the ambiguity by applying the presumption against *de novo* review.

The ISDA states: "The Contract Disputes Act . . . shall apply to self-determination contracts . . ." 25 U.S.C. § 450m-1(d).

The Contract Disputes Act states that a claim brought pursuant to the act should "proceed *de novo*." 41 U.S.C. § 609(3). In their first amended complaint, the plaintiffs allege a cause of action pursuant to the Contract Disputes Act. (See First Amended Complaint May 17, 1999 at paragraph 2, 17 and 34). Defendants argue that even if plaintiffs intended to allege a cause of action under the Contract Disputes Act, they failed to do so.

Defendants contend the Contract Disputes Act only applies to claims for money damages. Defendants argue plaintiffs are not actually seeking money damages resulting from a breach of their contracts, but rather are requesting additional contract support funding to which they are allegedly entitled under their contracts and the ISDA. Defendants contend money damages are given to compensate for a suffered loss. In the case at bar, plaintiffs are seeking a specific remedy. A specific remedy is not a substitute for injuries but is an attempt to give the plaintiffs the very thing to which they are entitled. Defendants argue this case really concerns a question of whether defendants have properly interpreted the ISDA rather than a dispute over how much they owe in alleged damages. While it is not entirely clear what specific money damages plaintiffs are seeking in this action, this court finds this lawsuit centers around how much the defendants possibly owe in alleged damages to plaintiffs for failure to fulfill the terms of their contracts.[2] Thus, it appears to this court their request can

---

[2]The defendants also argue that even if plaintiffs' claims were characterized as one for money damages, the *de novo* standard still would not apply because that standard only applies to suits brought in the Court of Claims. However, 25 U.S.C. § 450m-1(a) provides that the United States district courts and the Court of Claims have concurrent jurisdiction. Thus, absent statutory authority to the contrary, the court would be required to apply a *de novo* standard of review to any claim brought pursuant to the Contract Disputes Act.

properly be termed as one for money damages. Bowen v. Massachusetts, 487 U.S. 879, 895, 900-901 (1988). As a result, this lawsuit is properly brought under the Contract Disputes Act and the *de novo* standard applies.

Even if the court had found the plaintiffs' case was not properly brought under the Contract Disputes Act, the court would have found the standard of review for an action brought pursuant to the ISDA to be *de novo*.[3] In interpreting a statute, the function of the court is simple. It is to "construe the language so as to give effect to the intent of Congress." United States v. American Trucking Associations, 60 S.Ct. 1059, 1063 (1940). "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." Id.

25 U.S.C. § 450m-1(a) provides:

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

---

[3]The court considered the three unreported cases cited by defendants in support of their argument that the APA standard of review applies. However, the court found the reasoning and analysis in Shoshone-Bannock Tribes of Fort Hall v. Shalala, 988 F. Supp. 1306 (D. Or. 1997), more persuasive. Accordingly, this court holds that the appropriate standard of review is *de novo*.

> subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

It is well-settled law that when a statute provides for judicial review but fails to set-forth the standards for that review, the court looks to the APA for guidance. United States v. Carlo Bianchi & Company, 373 U.S. 709, 715 (1963). The APA standard of review requires a court to determine if the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). It also limits review to the administrative record. 5 U.S.C. § 706. However, it has been noted that when Congress intends review to be confined to the administrative record, it so indicates, either expressly or by use of a term like "substantial evidence". Chandler v. Roudebush, 425 U.S. 840, 862, n. 37 (1976). It is clear from the plain language of the statute there is no such language indicating that review under the ISDA is limited to the restrictive APA standard. In fact, this court finds the plain language of the statute, along with its legislative history, indicates a *de novo* review of an action brought pursuant to the ISDA was intended by Congress.

Section 450m-1(a) of the ISDA grants district courts "original jurisdiction" over "civil actions" with authorization to award money damages. This court finds the use of these terms taken in combination denote an intention by Congress to grant the right of *de novo* review. As the District Court of Oregon stated, "The phrase 'original jurisdiction' has been distinguished from appellate jurisdiction both by Black's Law Dictionary 991 (5th ed.1990) and by Article III, Section 2, Clause 2 of the United

States Constitution." Shoshone-Bannock Tribes of Fort Hall v. Shalala, 988 F. Supp. 1306, 1314 (D. Or. 1997). It is possible that Congress intended to provide for a *de novo* review when it determined to use the term 'original jurisdiction.' However, very little can be determined by Congress' choice to use the term "original jurisdiction" standing alone. As the court stated in Shoshone- Bannock, "..a court with 'original jurisdiction' may exercise essentially appellate powers, as with district court review under the APA, while courts with appellate jurisdiction may conduct *de novo* review as with appellate review of district court's conclusions of law." Id.

This court agrees with the District Court of Oregon that the use of the phrase "civil action" in combination with "original jurisdiction" and the power to award money damages in the ISDA supports a *de novo* review. Shoshone- Bannock of Fort Hall, 988 F. Supp. at 1315. Congress has previously used the terms "original jurisdiction" or "civil action" when vesting jurisdictionin the district courts in matters that proceed *de novo.* **See** 28 U.S.C. §§ 1331, 1332, 1335, 1337, 1338, 1339, 1340 and 1343. Shoshone-Bannock of Fort Hall, 988 F. Supp. at 1314. In Chandler, the United States Supreme Court was interpreting the statutory language of Title VII, which allows a federal employee to bring a "civil action" following an agency decision. In evaluating the language of the statute, the United States Supreme Court held that under Title VII federal employees are entitled to the same rights as private-sector employees, namely discovery and *de novo* review of an agency decision. Chandler, 425 U.S. at 845.

This court also finds it instructive that the ISDA allows for money damages whereas the APA does not. 5 U.S.C. § 702. This court believes this again expresses Congress' intention for actions brought under the ISDA to be submitted to a *de novo* review.

The legislative history of the ISDA also indicates that Congress intended a *de novo* review. In the early days of the ISDA the Secretary of the United States Department of Health and Human Services was originally delegated broad general authority to "perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out" the ISDA. 25 U.S.C. § 450k(a).[4] The ISDA took the extraordinary step of requiring the IHS, operated by the Secretary of the Department of Health and Human Services, to turn over the direct operation of its federal programs to any Indian tribe which elects to run those programs for its people. 25 U.S.C. § 450f(a)(1). The ISDA requires the defendants to divest themselves of the authority as well as the associated funding to operate their programs. However, the Secretary was apparently reluctant to follow the mandate issued by Congress and the tribes never received the appropriate amount of funding. In 1988 and 1994, viewing their delegation of this broad authority to the IHS as a mistake, Congress enacted sweeping amendments to restrict the authority of the Secretary. These amendments were designed to limit the Secretary's discretion as much as possible. (See Senate Report 103-374, dated September 26, 1994 presented by Senator Inouye from the Committee on Indian Affairs attached to Plaintiffs' Motions for Summary Judgment as Exhibit "2" and 25 U.S.C. § 450k which restricts IHS' discretion over the contracting process.)

Under the ISDA, a tribe has two alternative appeal routes when the Secretary declines a Self-Determination Contract. The tribes have the right to "a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised." 25 U.S.C. § 450f(b)(3). The appeal may be within the

---

[4]This language was subsequently stricken in the 1994 amendments.

agency or to an administrative law judge. 25 U.S.C. § 450f(e)(2). If the tribe chooses not to take that route, it can file an action in district court. 25 U.S.C. § 450f(b)(3). Obviously, Congress intended to give the tribes the option to bypass the agency review process.

In construing a statute, a court must look "to the provisions of the whole law, and its object and policy." United States National Bank of Oregon v. Independent Insurance Agents of America, Inc., 508 U.S. 439, 455 (1993). This court finds the policy and objectives to be achieved through the ISDA and any alleged violations by the agency are best redressed by the right to *de novo* review. Shoshone-Bannock of Fort Hall, 988 F. Supp. at 1316. The court agrees with the court in Shoshone-Bannock Tribes of Fort Hall when it stated:

> To deny a tribe the same rights with respect to a claim filed in a federal district court than it is entitled to obtain through the administrative process would be a perverse result. A tribe should be entitled to the same full discovery, hearing and *de novo* review when it elects to proceed directly to court as it is entitled to receive if it elects to proceed before the agency or an ALJ.

Shoshone-Bannock of Fort Hall, 988 F.Supp. at 1317.

This court agrees that given the history of the ISDA, including Congress' repeated attempts to limit the Secretary's discretion and the provision for a full review at the agency level, that Congress intended more than a cursory review of the administrative record. This court holds that Congress intended *de novo* review of claims brought under the ISDA.[5]

---

[5]In arriving at this conclusion, the court was mindful of the direction the Tenth Circuit Court of Appeals gave to courts interpreting the ISDA. In interpreting 25 U.S.C. § 450j-1, the Tenth Circuit Court of Appeals stated "the canon of [statutory] construction favoring Native Americans controls

III. PLAINTIFFS ARE NOT ENTITLED TO ADDITIONAL CONTRACT SUPPORT COSTS

The plaintiffs argue they are entitled to their full contract support costs under their respective contracts because the terms in these documents are legally binding. Plaintiffs also argue the ISDA entitles them to full payment of their contract support costs.[6] Defendants respond that plaintiffs ignore the fact that their Self-Determination Contracts specifically state that those contracts are subject to the "availability of appropriations" even in the absence of the statutory funding cap established by the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 314, 112 Stat. 2681, 2681-288 (1998) (hereinafter "Section 314"). Defendants state that no appropriations were in fact available to satisfy the claims made by plaintiffs for the years 1996 and 1997. Defendants further contend Section 314 definitively prescribes that no further appropriations were available to pay the contract support costs requested by plaintiffs for fiscal years 1996 and 1997 for their new and expanded programs undertaken in those years. Defendants finally argue the IHS could only pay such costs to plaintiffs by deducting funding from programs that serve other tribes. This diversion of funds would be in violation of the responsibility the IHS has to other tribes and in violation of the express provisions of the ISDA.

---

over the more general rule of deference to agency interpretations of ambiguous statutes." Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1462 (10th Cir.1997). The Tenth Circuit Court of Appeals stated "if the [Act] can reasonably be construed as the Tribes would have it construed, it must be construed that way." Id. at 1462, quoting Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1445 (D.C.Cir. 1988).

[6]The parties agree that since the court failed to certify a class in the case at bar, the only years at issue for payment of contract support costs are 1996 and 1997.

Both of the contracts at issue contain the following language "Subject only to the appropriations of funds by the Congress of the United States and the adjustments pursuant to § 106(b)." In fact, this language is utilized in all contracts and compacts entered into under the ISDA. Further, the statute itself specifically states the obligations are dependent on funding. 25 U.S.C. § 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 and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

This court finds the contracts at issue are conditioned on the IHS having sufficient funding. This court does not agree with the interpretation espoused by plaintiffs that the language in the Self-Determination Contracts which states that contract support costs are "subject to availability of appropriations" limits only the Secretary's ministerial duty to disburse funds but not her ultimate liability for full contract support costs. It has been held that "The language of [25 U.S.C.] § 450j-1(b) is clear and unambiguous; any funds provided under an ISDA contract are 'subject to the availability of appropriations.' . . . Other sections of the ISDA indicate congressional intent to make ISDA funding subject to the availability of appropriations." Babbitt v. Oglala Sioux Tribal Public Safety Department, 194 F.3d 1374, 1378 (C.A. Fed. 1999). To adopt plaintiffs' interpretation would render the phrase "availability of appropriations" meaningless. "The best evidence of [congressional] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous . . . we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment

process." West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 98-99 (1991). "When the words of a statute are unambiguous, then, 'judicial inquiry is complete'". Connecticut National Bank v. Germain, 503 U.S. 249, 254 (1992). In Oglala, that court simply concluded the ISDA is clear "if the money is not available, it need not be provided." Oglala, 194 F.3d at 1379. This court agrees the statute is unequivocal, if the money is not available, IHS does not have to provide it.

Plaintiffs acknowledge their Self-Determination Contracts do include language that they are subject to "available appropriations". However, plaintiffs argue there were appropriations legally available to pay the contract support costs for the years in question. The court finds this contention without merit. Plaintiffs contend that in 1996 $1.374 billion and in 1997 $1.426 billion was appropriated as a lump-sum to IHS to implement the ISDA and other specified laws. Plaintiffs argue there is nothing in the appropriation acts which limits the use of these funds. Plaintiffs claim that if appropriated funds were legally available to pay the contract support request, the Secretary had no discretion to refuse payment. In support of this argument, the plaintiffs cite Alamo Navajo School Board, Inc., and Miccosukee Corporation, IBCA Nos. 3560-3562, 3463-3466, 1997 WL 759441 (Dec. 4, 1997), rev'd, Babbitt v. Miccosukee Corporation, 217 F.3d 857 (Fed.Cir. 1999), *cert. denied,* 530 U.S. 1203 (2000). In Alamo, the court held the availability of appropriations language does not apply where the appropriation is in the form of an unrestricted lump-sum amount that is sufficient to cover mandatory funding and "where the Department's current appropriations Act lacks any statutory earmark affecting the use of funds for such purposes." Id. at 20-21. Plaintiffs also cite Shoshone-Bannock Tribes of Fort Hall for the proposition that contract support costs must be

paid if the agency has received sufficient appropriations to do so.

IHS' total appropriations from Congress for "Indian Health Services" in fiscal years 1996 and 1997 was $1,747,842,000 and $1,806,269,000 respectively. Most of IHS' annual appropriations are distributed to area offices for the payment of recurring costs. Recurring costs occur automatically from year to year and must be funded without reduction. In fiscal years 1996 and 1997, respectively, IHS allocated $1,313,990,083 and $1,368,893,059 in recurring costs to area offices. The remainder of the total annual lump-sum appropriated to IHS is retained each year by headquarters for activities that it manages. All of the money reserved for fiscal years 1996 and 1997 was spent leaving a zero balance at the end of those fiscal years. For fiscal years 1996 and 1997, Congress earmarked in appropriation committee reports, $153,040,000 in 1996 and $160,660,000 in 1997 to be spent on existing contract support costs. These contract support funds were allocated to the area offices for tribal contracts and compacts for fiscal years 1996 and 1997. The court finds the money appropriated to IHS for fiscal years 1996 and 1997 was already committed to pay for funding of recurring costs and other mandatory obligations. Thus, there were simply insufficient appropriations to pay the contract support costs requested by plaintiffs. Further, the IHS could not use any of its annual appropriations to pay plaintiffs' contract support costs without impairing its ability to discharge its responsibilities with respect to other tribes and individual Indians. Such a reduction could severely impair various Indian programs. 25 U.S.C. § 450f, § 306 and 450j-1(b) prohibits the IHS from reducing funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization to fund their self-determination contracts.

Plaintiffs also argue that even if no appropriations were available the government is nonetheless liable to them for

contract support costs under the ISDA. In support of the proposition that the ISDA affirmatively requires the government to enter into contracts for a specified amount of contract support costs and to be held liable for that amount regardless of the appropriations, plaintiffs cite New York Airways, Inc. v. United States, 369 F.2d 743 (Cl. Ct. 1966). This court agrees with the court in Oglala that the New York Airways case is inapplicable to the case at bar. Oglala, 194 F.3d at 1379. In New York Airways, the government, as a contracting party, had an unqualified contractual obligation for which it had simply failed to appropriate money and pay. In the instant case, the agency's ability to bind the government contractually was expressly conditioned by statute and contract on the availability of appropriations. Further, the statute at issue in New York Airways provided the government should "make payments out of appropriations," unlike the statute in this case which provides the government payments are "subject to the availability of appropriations." Thus, the court finds the holding in New York Airways is not dispositive of the issues before this court. This court finds the situation in the instant case distinctly different from the cases cited by plaintiffs on this issue because this case involves a statute which expressly restricts the government's authority to pay contractual obligations in excess of appropriations. Accordingly, the only conclusion this court can reach is that the funding of contract support costs must be subject to the availability of appropriations. The court finds the defendants cannot be liable for contract support costs that go beyond the limits of those funds.

In the years in question, the defendants were allocated $7.5 million for payment of new contract support costs. The court finds the plain language of Section 314 caps the amount the government can spend on new contract support costs to $7.5 million. Section 314 states:

> Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes, except that, for the Bureau of Indian Affairs, tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, self-governance compacts or annual funding agreements.

Due to the repeated insufficiency of appropriations to pay contract support costs, the IHS developed a system for payment of new contract support costs. The queue list was designed to allocate the limited funds on a first-come, first-serve basis. In 1997 the IHS had already spent its $7.5 million allotment on tribes ahead of the Cherokee Nation on the queue list. As a result, the Cherokee Nation did not receive any additional funding for contract support costs for those new programs in fiscal year 1997. As to the Shoshone-Paiute tribes, they too did not receive any additional funding for contract support costs for 1996 or 1997 because IHS had already disbursed its $7.5 million allocation to tribes ahead of this plaintiff on the queue list.

This court finds that to allow the IHS to pay additional contract support costs would violate the appropriations clause because it would require spending money that had not been appropriated by Congress. Office of Personnel Management v. Richmond, 496 U.S. 414, 424, 426 (1990) (holding "no money

can be paid out of the Treasury unless it has been appropriated by an act of Congress").

Plaintiffs also argue the holding in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir.1997), supports their position that the cap of $7.5 million for contract support costs is not applicable. However, the Ramah case is distinguishable because the tribes did not ask for amounts over the amount appropriated. In that case, the tribes were disputing how the Bureau of Indian Affairs apportioned the money it was appropriated. Plaintiffs also argue that Section 314 only applies to unobligated balances for 1996 and 1997. As the court discussed previously it has found that there were no unobligated balances for the years 1996-1997.

Further, plaintiffs argue that since a class has not been certified, this case no longer involves "cap" year circumstances. Plaintiffs contend that Congress only began to implement the cap for contract support costs in 1998. However, this court finds that Section 314 applies to the years 1996 and 1997. Section 314 imposes a $7.5 million cap on IHS' payments each year to tribes for contract support costs for their new and expanded programs from 1994 through 1998. This amount had already been disbursed for the years in question. Section 314 bars further payments for those years since no appropriations were available.

Finally, plaintiffs maintain that even if the appropriations were not available, the defendants would still be liable for the contract support costs under governmental contracting principals. Plaintiffs contend the Self-Determination Contracts require the government to pay the full amount of contract support costs. Plaintiffs argue that since they have a statutory right to contract support costs under their contracts and statutes, Congress cannot by Section 314, or otherwise, destroy that right without breaching the contract. However, the cases which plaintiffs cite in support of this proposition are factually

distinguishable from the case at bar. In United States v. Winstar Corporation, 518 U.S. 839 (1996), the United States Supreme Court found the government had, in its contracts, assumed the risk that subsequent changes in the law might prevent it from performing. Id. at 907-910, 116 S. Ct. 2432. In the instant case, there is no evidence that the government intended to assume the risk if Congress failed to provide sufficient appropriations. In fact, after a review of the contracts into which plaintiffs entered, it appears as if plaintiffs assumed the risk of a shortfall. The contracts clearly state that the obligations are subject to the availability of appropriations. Plaintiffs also cite Mobil Oil Exploration and Producing Southeast Inc. v. United States, 530 U.S. 604 (2000), and Schism v. United States, 239 F.3d 1280 (Fed. Cir.2001), for the proposition that the government is liable for a breach of contract. However, this court also finds these cases factually distinguishable. Those cases did not involve a situation like the one in the case at bar where the agency's ability to contractually bind the government was expressly conditioned by a previously enacted statute and by the contract itself on the availability of appropriations.

Accordingly, this court **denies** the plaintiffs' motion for summary judgment on its first and second causes of action as well as their motion for summary judgment for a declaratory action regarding Section 314. Further, the court **grants** the defendants' motion for summary judgment.

IT IS SO ORDERED this 25th day of June, 2001.

/s/_____
Frank H. Seay
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 01-7106

CHEROKEE NATION OF OKLAHOMA; SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,

Plaintiffs-Appellants,

v.

TOMMY G. THOMPSON, Secretary of Health and Human Services; MICHAEL H. TRUJILLO, Director of the Indian Health Service, United States Department of Health and Human Services,

Defendants-Appellees.

ORDER

Filed January 22, 2003

Before MURPHY, ANDERSON, and BALDOCK, Circuit Judges.

Appellants' petition for rehearing is denied.[1]

---

[1]Movants' motions for leave to become an amici curiae supporting the appellants' petition for rehearing filed by the Ramah Navajo Chapter, Ogalala Sioux Tribe, Ramah Navajo School Board, Inc., National Congress of American Indians, Norton Sound Health Corporation, Arctic Slope Native Association, Aleutian/Pribilof Islands Association, Bristol Bay Area Health Corporation, Tanana Chiefs Conference, Kodiak Area Native Association, Southeast Alaska Regional Health Corporation and the

(continued...)

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the en banc petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

By: Deputy Clerk

---

[1](...continued)
Metlakatla Indian Community are denied.

APPENDIX D

STATUTORY PROVISIONS INVOLVED

25 U.S.C. § 450 provides:

(a) Findings respecting historical and special legal relationship; and resultant responsibilities

The Congress, after careful review of the Federal government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that–

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

* * *

25 U.S.C. § 450a provides:

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such

services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through 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. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

* * *

25 U.S.C. § 450b provides:

For purposes of this subchapter, the term–

* * *

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

* * *

(j) "self-determination contract" means a contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this subchapter between a

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

* * *

25 U.S.C. § 450f provides:

(a) Request by tribe; authorized programs

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

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

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

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

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

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

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

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of paragraph (4), the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that–

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

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

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

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

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

* * *

(b) Procedure upon refusal of request to contract

Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall–

(1) state any objections in writing to the tribal organization,

(2) provide assistance to the tribal organization to overcome the stated objections, and

(3) provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 450m-1(a) of this title.

* * *

(e) Burden of proof at hearing or appeal declining contract; final agency action

(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3) or any civil action conducted pursuant to section 110(a), the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

(2) Notwithstanding any other provision of law, a decision by an official of the Department of the Interior or the Department of Health and Human Services, as appropriate (referred to in this paragraph as the "Department") that constitutes final agency action and that relates to an appeal within the Department that is conducted under subsection (b)(3) of this section shall be made either–

(A) by an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency (such as the Indian Health Service or the Bureau of Indian Affairs) in which the decision that is the subject of the appeal was made; or

(B) by an administrative judge.

* * *

25 U.S.C. § 450j provides:

* * *

(b) Payments; transfer of funds by Treasury for disbursement by tribal organization; accountability for interest accrued prior to disbursement

Payments of any grants or under any contracts pursuant to section 450f and 450h of this title may be made in advance or by way of reimbursement and in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this part. The transfer of funds shall

be scheduled consistent with program requirements and applicable Treasury regulations, so as to minimize the time elapsing between the transfer of such funds from the United States Treasury and the disbursement thereof by the tribal organization, whether such disbursement occurs prior to or subsequent to such transfer of funds. Tribal organizations shall not be held accountable for interest earned on such funds, pending their disbursement by such organization.

(c) Term of self-determination contracts; annual renegotiation

(1) A self-determination contract shall be–

(A) for a term not to exceed three years in the case of other than a mature contract, unless the appropriate Secretary and the tribe agree that a longer term would be advisable, and

(B) for a definite or an indefinite term, as requested by the tribe (or, to the extent not limited by tribal resolution, by the tribal organization), in the case of a mature contract.

The amounts of such contracts shall be subject to the availability of appropriations.

(2) The amounts of such contracts may be renegotiated annually to reflect changed circumstances and factors, including, but not limited to, cost increases beyond the control of the tribal organization.

* * *

25 U.S.C. § 450j-1 provides:

(a) Amount of funds provided

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary

would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which–

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

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

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

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

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

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

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this subchapter, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

* * *

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

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

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

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

(b) Reductions and increases in amount of fund provided

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

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

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

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

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

(C) a tribal authorization;

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

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

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

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

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

Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving

a tribe to make funds available to another tribe or tribal organization under this subchapter.

(c) ANNUAL REPORTS.—Not later than May 15 of each year, the Secretary shall prepare and submit to Congress an annual report on the implementation of this Act. Such report shall include—

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

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

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

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

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

(6) an accounting of any deficiency in funds needed to maintain the preexisting level of services to any Indian tribes affected by contracting activities under this Act, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal year accounting cycle, as authorized by section 105(d).

(d) Treatment of shortfalls in indirect cost recoveries

(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

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

* * *

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

Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

* * *

(*l*) Suspension, withholding, or delay in payment of funds

(1) The Secretary may only suspend, withhold, or delay the payment of funds for a period of 30 days beginning on the date the Secretary makes a determination under this paragraph to a tribal organization under a self- determination contract, if the Secretary determines that the tribal organization has

failed to substantially carry out the contract without good cause. In any such case, the Secretary shall provide the tribal organization with reasonable advance written notice, technical assistance (subject to available resources) to assist the tribal organization, a hearing on the record not later than 10 days after the date of such determination or such later date as the tribal organization shall approve, and promptly release any funds withheld upon subsequent compliance.

(2) With respect to any hearing or appeal conducted pursuant to this subsection, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for suspending, withholding, or delaying payment of funds.

* * *

25 U.S.C. § 450k provides:

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

(1) Except as may be specifically authorized in this subsection, or in any other provision of this subchapter, the Secretary of the Interior and the Secretary of Health and Human Services may not promulgate any regulation, nor impose any nonregulatory requirement, relating to self-determination contracts or the approval, award, or declination of such contracts, except that the Secretary of the Interior and the Secretary of Health and Human Services may promulgate regulations under this subchapter relating to chapter 171 of Title 28, commonly known as the "Federal Tort Claims Act", the Contract Disputes Act of 1978 (41 U.S.C. § 601 et seq.), declination and waiver procedures, appeal procedures, reassumption procedures, discretionary

grant procedures for grants awarded under section 450h of this title, property donation procedures arising under section 450j(f) of this title, internal agency procedures relating to the implementation of this subchapter, retrocession and tribal organization relinquishment procedures, contract proposal contents, conflicts of interest, construction, programmatic reports and data requirements, procurement standards, property management standards, and financial management standards.

(2)(A) The regulations promulgated under this subchapter, including the regulations referred to in this subsection, shall be promulgated–

(i) in conformance with sections 552 and 553 of Title 5 and subsections (c), (d), and (e) of this section; and

(ii) as a single set of regulations in title 25 of the Code of Federal Regulations.

(B) The authority to promulgate regulations set forth in this subchapter shall expire if final regulations are not promulgated within 20 months after October 25, 1994.

* * *

25 U.S.C. § 450*l* provides:

(a) Terms

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

(1) contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) of this section

(with modifications where indicated and the blanks appropriately filled in), and

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

* * *

(c) Model agreement

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

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

"(a) Authority and Purpose.–

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

"(2) Purpose.–Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions

thereof), that are otherwise contractable under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: (List functions, services, activities, and programs).

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

* * *

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

* * *

"(6) Payment.–

"(A) In general.–Payments to the Contractor under this Contract shall–

"(i) be made as expeditiously as practicable; and

"(ii) include financial arrangements to cover funding during periods covered by joint resolutions adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

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

"(i) In general.–Pursuant to section 108(b) of the Indian Self- Determination and Education Assistance Act, and notwithstanding any other provision of law, for each fiscal year covered by this Contract, the

Secretary shall make available to the Contractor the funds specified for the fiscal year under the annual funding agreement incorporated by reference pursuant to subsection (f)(2) by paying to the Contractor, on a quarterly basis, one-quarter of the total amount provided for in the annual funding agreement for that fiscal year, in a lump-sum payment or as semiannual payments, or any other method of payment authorized by law, in accordance with such method as may be requested by the Contractor and specified in the annual funding agreement.

"(ii) Method of quarterly payment.–If quarterly payments are specified in the annual funding agreement incorporated by reference pursuant to subsection (f)(2), each quarterly payment made pursuant to clause (i) shall be made on the first day of each quarter of the fiscal year, except that in any case in which the Contract year coincides with the Federal fiscal year, payment for the first quarter shall be made not later than the date that is 10 calendar days after the date on which the Office of Management and Budget apportions the appropriations for the fiscal year for the programs, services, functions, and activities subject to this Contract.

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

* * *

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

by program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law.

* * *

"(c) Obligation of the Contractor.–

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

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

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

* * *

"(d) Obligation of the United States.–

"(1) Trust responsibility.–

* * *

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

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

* * *

"(e) Other provisions.–

* * *

"(2) Contract modifications or amendment.–

"(A) In general.–Except as provided in subparagraph (B), no modification to this Contract shall take effect unless such modification is made in the form of a written amendment to the Contract, and the Contractor and the Secretary provide written consent for the modification.

"(B) Exception.–The addition of supplemental funds for programs, functions, and activities (or portions thereof) already included in the annual funding agreement under subsection (f)(2), and the reduction of funds pursuant to section 106(b)(2), shall not be subject to subparagraph (A).

* * *

"(f) Attachments.–

* * *

"(2) Annual funding agreement.–

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

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

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

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

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

* * *

25 U.S.C. § 450m-1 provides:

(a) Civil actions; concurrent jurisdiction; relief

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to

compel the Secretary to award and fund an approved self-determination contract).

(b) Revision of contracts

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

* * *

(d) Application of Contract Disputes Act

The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. 607).

* * *

25 U.S.C. § 450n provides:

Nothing in this subchapter shall be construed as–

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

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

Pub. L. 104-134, 110 Stat. 1321-189 (1996) ("FY1996 Appropriations Act") in pertinent part provides:

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, $1,747,842,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 300aaa-2 for services furnished by the Indian Health Service: Provided, That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2203; 25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: Provided further, That $12,000,000 shall remain available until expended, for the Indian Catastrophic Health Emergency Fund: Provided further, That $350,564,000 for contract medical care shall remain available for obligation until September 30, 1997: Provided further, That of the funds provided, not less than $11,306,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act, as amended: Provided further, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: Provided further, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall be available for two fiscal years after the fiscal year in which they were collected, for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of

planning, design, or construction of new facilities): Provided further, That 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, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act: Provided further, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 1997: Provided further, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act, as amended, shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended.

Pub. L. 104-208, 110 Stat. 3009-212 (1996) ("FY1997 Appropriations Act") in pertinent part provides:

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, $1,806,269,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 238(b) for services furnished by the Indian Health Service: Provided, That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: Provided further, That $12,000,000 shall remain available until expended, for the Indian Catastrophic Health Emergency Fund: Provided further,

That $356,325,000 for contract medical care shall remain available for obligation until September 30, 1998: Provided further, That of the funds provided, not less than $11,706,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act: Provided further, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: Provided further, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall remain available until expended for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, or construction of new facilities): Provided further, That 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, compacts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act: Provided further, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 1998: Provided further, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended.

Pub. L. 105-277, § 314, 112 Stat. 2681-288 (1998) ("Section 314") provides:

> Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes, except that for the Bureau of Indian Affairs tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, self-governance compacts or annual funding agreements.

APPENDIX E

STATUTES CONDITIONING AGENCY CONTRACTING AUTHORITY ON THE AVAILABILITY OF APPROPRIATIONS

1. 7 U.S.C. § 178n(c) ("Notwithstanding any other provision of this subchapter the authority to enter into contracts shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriations Acts.") (Pub. L. 95-592, § 16, Nov. 4, 1978, 92 Stat. 2534).

2. 8 U.S.C. § 1524(b) ("The authority to enter into contracts under this subchapter shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance in appropriation Acts.") (June 27, 1952, c. 477, Title IV, Ch. 2 § 414, as added Mar. 17, 1980, Pub. L. 96-212, Title III, § 311(a)(2), 94 Stat. 116).

3. 10 U.S.C. § 1076a(i) ("The authority of the Secretary of Defense to enter into a contract under this section for any fiscal year is subject to the availability of appropriations for that purpose.") (Added Pub. L. 99-145, Title VI, § 651(a)(1), Nov. 8, 1985, 99 Stat. 655).

4. 10 U.S.C. § 2350e(b) ("Authority under this section to enter into contracts shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.") (Added Pub. L. 101-189, Div. A, Title IX, § 932(a)(1), Nov. 29, 1989, 103 Stat. 1536).

5. 10 U.S.C. § 2632(b)(4) ("The authority under subsection (a) to enter into contracts under which the United States is obligated to make outlays shall be effective for any fiscal year only to the extent that the budget authority for such outlays is provided in advance by appropriation Acts.")

(Pub. L. 96-125, Title VIII, § 807(a) to (c)(1), Nov. 26, 1979, 93 Stat. 949, 950).

6. 10 U.S.C. § 2780 (a)(2) ("The authority of the Secretary to enter into a contract under this section for any fiscal year is subject to the availability of appropriations.") (Added Pub. L. 99-661, Div. A., Title XIII, § 1309(a), Nov. 14, 1986, 100 Stat. 3982).

7. 12 U.S.C. § 1715z-1(i)(1) ("The aggregate amount of outstanding contracts to make such payments shall not exceed amounts approved in appropriation Acts . . . .") (June 27, 1934, c. 847, Title II, § 236, as added Aug. 1, 1968, Pub. L. 90-448, Title II, § 201(a), 82 Stat. 498).

8. 15 U.S.C. § 648(*l*) ("The authority to enter into contracts shall be in effect for each fiscal year only to the extent and in the amounts as are provided in advance in appropriations Acts.") (Pub. L. 85-536, § 2[21], as added Pub. L. 96-302, Title II, § 202, July 2, 1980, 94 Stat. 843).

9. 15 U.S.C. § 649b(h) ("The authority to enter into contracts shall be in effect for each fiscal year only to the extent or in the amounts as are provided in advance in appropriation Acts.") (Pub. L. 96-481, Title III, § 302, Oct. 21, 1980, 94 Stat. 2331).

10. 15 U.S.C. § 652(i) ("Any authority to enter contracts or other spending authority provided for in this section is subject to amounts provided for in advance in appropriations Acts.") (Pub. L. 85-536, § 2[25], as added Pub. L. 101-515, Title V, § 7, Nov. 5, 1990, 104 Stat. 2142).

11. 15 U.S.C. § 656(i) ("The authority of the Administrator to enter into contracts shall be in effect for each fiscal year only to the extent and in the amounts as are provided in advance in appropriations Acts.") (Pub. L. 85-536, § 2[29],

formerly § 2[28], as added Pub. L. 102-191, § 2, Dec. 5, 1991, 105 Stat. 1589 (renumbered and amended)).

12. 16 U.S.C. § 284i ("No authority under this subchapter to enter into contracts or to make payments shall be effective except to the extent and in such amounts as provided in advance in appropriations Acts.") (Pub. L. 89-671, § 10, as added Pub. L. 97-310, Oct. 14, 1982, 96 Stat. 1458).

13. 16 U.S.C. § 429b-5(b) ("Notwithstanding any other provision of sections 429b to 429b-5 of this title, authority to enter into contracts, to incur obligations, or to make payments under sections 429b to 429b-5 of this title shall be effective only to the extent, and in such amounts as are provided in advance in appropriation Acts.") (Apr. 17, 1954, c. 153, § 6, as added Oct. 13, 1980, Pub. L. 96-442, § 2, 94 Stat. 1887).

14. 16 U.S.C. § 3208(a) ("No authority to enter into contracts or to make payments or to expend previously appropriated funds under this Act shall be effective except to the extent or in such amounts as are provided in advance in appropriation Acts.") (Pub. L. 96-487, Title XIII, § 1321, Dec. 2, 1980, 94 Stat. 2487).

15. 16 U.S.C. § 3644 ("New spending authority or authority to enter into contracts provided in this chapter shall be effective only to such extent, or in such amounts, as are provided in advance in appropriation Acts.") (Pub. L. 99-5, § 15, Mar. 15, 1985, 99 Stat. 15).

16. 20 U.S.C. § 2392 ("Any authority to make payments or to enter into contracts under this chapter shall be available only to such extent or in such amounts as are provided in advance in appropriation Acts.") (Pub. L. 88-210, Title III, § 312, as added Pub. L. 105-332, § 1(b), Oct. 31, 1998, 112 Stat. 3122).

17. 20 U.S.C. § 3475(b) ("Notwithstanding any other provisions of this chapter, no authority to enter into contracts or to make payments under this subchapter shall be effective except to such extent or in such amounts as are provided in advance under appropriation Acts.") (Pub. L. 96-88, Title IV, § 415, Oct. 17, 1979, 93 Stat. 685).

18. 21 U.S.C. § 1181 ("The authority of the Secretary to enter into contracts under this subchapter and subchapter V of this chapter shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance by appropriation Acts.") (Pub. L. 92-255, Title IV, § 414, as added Pub. L. 96-181, § 9(a), Jan. 2, 1980, 93 Stat. 1314).

19. 22 U.S.C. § 2194a ("The authority of the Overseas Private Investment Corporation to enter into contracts under section 2194(a) of this title shall be effective for any fiscal year beginning after September 30, 1981, only to such extent or in such amounts as are provided in appropriation Acts.") (Pub. L. 97-65, § 5(b)(2), Oct. 16, 1981, 95 Stat. 1023).

20. 22 U.S.C. § 4609(c) ("Any authority provided by this chapter to enter into contracts shall be effective for a fiscal year only to such extent or in such amounts as are provided in appropriation Acts.") (Pub. L. 98-525, Title XVII, § 1710, Oct. 19, 1984, 98 Stat. 2659).

21. 25 U.S.C. § 640d-11(d)(2) ("The authority of the Commissioner to enter into contracts for the provision of legal services for the Commissioner or for the Office of Navajo and Hopi Indian Relocation shall be subject to the availability of funds provided for such purpose by appropriation Acts.") (As amended Pub. L. 100-666, § 4(a), Nov. 16, 1988, 102 Stat. 3929).

22. 25 U.S.C. § 764(b) ("Provided, That no authority to enter into contracts or to make payments under this subchapter shall be effective except to such extent or in such amounts as are provided in advance in appropriation Acts.") (Pub. L. 96-227, § 5, Apr. 3, 1980, 94 Stat. 319).

23. 25 U.S.C. § 1658 ("The authority of the Secretary to enter into contracts under this subchapter shall be to the extent, and in an amount, provided for in appropriation Acts.") (Pub. L. 94-437, Title V, § 508, as added Pub. L. 100-713, Title V, § 501, Nov. 23, 1988, 102 Stat. 4824).

24. 25 U.S.C. § 1805 ("No authority to enter into contracts provided by this section shall be effective except to the extent authorized in advance by appropriations Acts.") (Pub. L. 95-471, Title I, § 105, formerly § 104, Oct. 17, 1978, 92 Stat. 1326 (renumbered and amended)).

25. 29 U.S.C. § 1581 ("Notwithstanding any other provision of this chapter, no authority to enter into contracts or financial assistance agreements under this chapter shall be effective except to such extent or in such amount as are provided in advance in appropriation Acts.") (Pub. L. 97-300, Title I, § 171, Oct. 13, 1982, 96 Stat. 1354) (repealed Pub. L. 105-220, Title I, § 199(c)(2)(B), Aug. 7, 1998, 112 Stat. 1059).

26. 29 U.S.C. § 2939(f) ("Notwithstanding any other provision of this chapter, the Secretary shall have no authority to enter into contracts, grant agreements, or other financial assistance agreements under this chapter except to such extent and in such amounts as are provided in advance in appropriations Acts.") (Pub. L. 105-220, Title I, § 189, Aug. 7, 1998, 112 Stat. 1051).

27. 38 U.S.C. § 1711(c)(2) ("The authority of the Secretary to enter into contracts under this subsection shall be effective for any fiscal year only to such extent or in such amounts

as are provided in appropriation Acts.") (Pub. L. 96-22, Title II, § 202, June 13, 1979, 93 Stat. 54).

28. 38 U.S.C. § 1712A(e)(3) ("The authority of the Secretary to enter into contracts under this subsection shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.") (Added Pub. L. 96-22, Title I, § 103(a)(1), June 13, 1979, 93 Stat. 48, § 612A).

29. 38 U.S.C. § 1720C(e) ("The authority of the Secretary to enter into contracts under this section shall be effective for any fiscal year only to the extent that appropriations are available.") (Added Pub. L. 101-366, Title II, § 201(a)(1), Aug. 15, 1990, 104. Stat. 437, § 620c (renumbered and amended)).

30. 38 U.S.C. § 1732(d)(1) ("The authority of the Secretary to enter into contracts and to make grants under this section is effective for any fiscal year only to the extent that appropriations are available for that purpose.") (Added Pub. L. 93-82, Title I, § 107(a), Aug. 2, 1973, 87 Stat. 184, § 632).

31. 42 U.S.C. § 238k ("The authority of the Secretary to enter into contracts under this chapter shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance by appropriation Acts.") (July 1, 1944, c. 373, Title II, § 242, formerly Title V, § 514, as added Nov. 9, 1978, Pub. L. 95-632, § 11(e), 92 Stat. 3456 (renumbered)).

32. 42 U.S.C. § 241(b)(5) ("The authority of the Secretary to enter into any contract for the conduct of any study, testing, program, research, or review, or assessment under this subsection shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance

in appropriation Acts.") (July 1, 1944, c. 373, Title III, § 301, 58 Stat. 691).

33. 42 U.S.C. § 300e-16(c) ("The authority of the Secretary to enter into contracts under subsections (a) and (b) of this section shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance by appropriation Acts.") (July 1, 1944, c. 373, Title XIII, § 1317, as added Nov. 1, 1978, Pub. L. 95-559, § 7(a), 92 Stat. 2134).

34. 42 U.S.C. § 300v-2(c) ("The authority of the Commission to enter into such contracts is effective for any fiscal year only to such extent or in such amounts as are provided in advance in appropriation Acts.") (July 1, 1944, c. 373, Title XVIII, § 1803, as added Nov. 9, 1978, Pub. L. 95-622, Title III, § 301, 92 Stat. 3440).

35. 42 U.S.C. § 702(a)(1) ("The authority of the Secretary to enter into any contracts under this subchapter is effective for any fiscal year only to such extent or in such amounts as are provided in appropriations Acts.") (Aug. 14, 1935, c. 531, Title V, § 502, as added Aug. 13, 1981, Pub. L. 97-35, Title XXI, § 2192(a), 95 Stat. 819).

36. 42 U.S.C. § 1437c(c)(1) ("The additional authority to enter into such contracts provided on or after October 1, 1980, shall be effective only in such amounts as may be approved in appropriation Acts.") (Pub. L. 96-399, Title II, § 201(a), Oct. 8, 1980, 94 Stat. 1624).

37. 42 U.S.C. § 1437s(g) ("Any authority of the Secretary under this section to provide financial assistance, or to enter into contracts to provide financial assistance, shall be effective only to such extent or in such amounts as are or have been provided in advance in an appropriation Act.") (Sept. 1, 1937, c. 896, Title I, § 21 as added Feb. 5, 1988,

Pub. L. 100-242, Title I, § 123, 101 Stat. 1842) (renumbered and amended).

38. 42 U.S.C. § 2286h ("The authority of the Board to enter into contracts under this subchapter is effective only to the extent that appropriations (including transfer of appropriations) are provided in advance for such purpose.") (Aug. 1, 1946, c. 724, Title I, § 319, as added Sept. 29, 1988, Pub. L. 100-456, Div. A, Title XIV, § 1441(a)(1), 102 Stat. 2083).

39. 42 U.S.C. § 2394 ("The authority to enter into a contract under the preceding sentence with the Los Alamos School Board and with the county of Los Alamos, New Mexico, shall be effective with respect to a period before July 1, 1997, only to the extent or in such amounts as are provided in appropriation Acts.") (Pub. L. 99-661, Div. C, Title I, § 3138(b)(1), Nov. 14, 1986, 100 Stat. 4066).

40. 42 U.S.C. § 4594 ("The authority of the Secretary to enter into contracts under this chapter shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance by appropriation Acts.") (Pub. L. 91-616, Title VI, § 604, as added Pub. L. 96-180, § 17, Jan. 2, 1980, 93 Stat. 1306).

41. 42 U.S.C. § 5671(a)(7)(B) ("New spending authority or authority to enter into contracts . . . shall be effective only to such extent and in such amounts as are provided in advance in appropriation Acts.") (Pub. L. 93-415, Title II, § 299 formerly § 261, Sept. 7, 1974, 88 Stat. 1129).

42. 42 U.S.C. § 7256(b) ("Notwithstanding any other provision of this subchapter, no authority to enter into contracts or to make payments . . . shall be effective except to such extent or in such amounts as are provided in advance in appropriation Acts.") (Pub. L. 95-91, Title VI, § 646, Aug. 4, 1977, 91 Stat. 599).

43. 42 U.S.C. § 7923 ("The authority under this subchapter to enter into contracts or other obligations requiring the United States to make outlays may be exercised only to the extent provided in advance in annual authorization and appropriation Acts.") (Pub. L. 95-604, Title I, § 113, Nov. 8, 1978, 92 Stat. 3031).

44. 42 U.S.C. § 8274 ("Authority under this part to enter into acquisition contracts shall be only to the extent as may be provided in advance in appropriation Acts.") (Pub. L. 95-619, Title V, § 565, Nov. 9, 1978, 92 Stat. 3281).

45. 42 U.S.C. § 9662 ("Any authority provided by this Act, including any amendment made by this Act, to enter into contracts to obligate the United states or to incur indebtedness for the repayment of which the United States is liable shall be effective only to such extent or in such amounts as are provided in appropriation Acts.") (Pub. L. 99-499, § 3, Oct. 17, 1986, 100 Stat. 1614).

46. 42 U.S.C. § 12377(a) ("New spending authority or authority to enter into contracts as provided in this subchapter shall be effective only to the extent and in such amounts as are provided in advance in appropriations Acts.") (Pub. L. 101-501, Title IX, § 988, Nov. 3, 1990, 104 Stat. 1283).

47. 48 U.S.C. § 1933(j)(3) ("No authority under this subsection to enter into contracts or to make payments shall be effective except to the extent and in such amounts as provided in advance in appropriations Acts.") (Pub. L. 99-658, Title I, § 104, Nov. 14, 1986, 100 Stat. 3675).

48. 49 U.S.C. § 103(e) ("Notwithstanding any other provision of this chapter, no authority to enter into contracts or to make payments under this subsection shall be effective, except as provided for in appropriations Acts.") (Pub. L. 103-440, Title II, § 216, Nov. 2, 1994, 108 Stat. 4624).

49. 50 App. U.S.C. § 1989b-8 ("No authority under this title to enter into contracts or to make payments shall be effective in any fiscal year except to such extent and in such amounts as are provided in advance in appropriations Acts.") (Pub. L. 100-383, Title I, § 109, Aug. 10, 1988, 102 Stat. 910).

50. 50 App. U.S.C. § 1989c-7 ("No authority under this title to enter into contracts or to make payments shall be effective in any fiscal year except to such extent and in such amounts as are provided in advance in appropriations Acts.") (Pub. L. 100-383, Title II, § 208, Aug. 10, 1988, 102 Stat. 916).