No. 11-551

In the Supreme Court of the United States

KENNETH L. SALAZAR, ET AL., PETITIONERS

v.

RAMAH NAVAJO CHAPTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the government is required to pay all of the contract support costs incurred by a tribal contractor under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, where Congress has imposed an express statutory cap on the appropriations available to pay such costs and the Secretary cannot pay all such costs for all tribal contractors without exceeding the statutory cap.

PARTIES TO THE PROCEEDING

Petitioners are Kenneth L. Salazar, Secretary of the Interior; Larry Echo Hawk, Assistant Secretary—Indian Affairs, Department of the Interior; Mary L. Kendall, Acting Inspector General, Department of the Interior; and the United States of America.

Respondents are Ramah Navajo Chapter, the Oglala Sioux Tribe, and the Pueblo of Zuni, as representatives of a certified class of Indian tribes and tribal organizations that have contracted with the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of the Interior, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-87a) is reported at 644 F.3d 1054. The opinion of the district court (App., *infra*, 90a-107a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2011. A petition for rehearing was denied on August 1, 2011 (App., *infra*, 108a-109a). On October 21, 2011, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including

November 14, 2011. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

Pertinent provisions of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, the Anti-Deficiency Act, 31 U.S.C. 1341 *et seq.*, and the Contract Disputes Act, 41 U.S.C. 7101 *et seq.*, are reproduced in the appendix to this petition (App., *infra*, 110a-131a).

STATEMENT

1. a. Congress enacted the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.*, to promote "effective and meaningful participation by the Indian people in the planning, conduct, and administration" of federal programs and services for Indians. 25 U.S.C. 450a(b). The Act "direct[s]" the Secretary of the Interior or the Secretary of Health and Human Services, as appropriate, to enter into a "self-determination contract" at the "request of any Indian tribe" to permit a tribal organization to administer federal programs that the Secretary would otherwise provide directly for the benefit of Indians.[1] 25 U.S.C. 450f(a). "Self-determination contracts with Indian tribes are not discretionary," S. Rep. No. 274, 100th

[1] The Act defines the term "tribal organization" to include, *inter alia*, the governing body of an Indian tribe or any organization controlled or chartered by the tribe. See 25 U.S.C. 450b(*l*).

Cong., 1st Sess. 3 (1987), and the Secretary must accept a tribe's request for a contract except in specified circumstances, see 25 U.S.C. 450f(a)(2). The Act thus generally permits a tribe, at its request, to step into the shoes of a federal agency and administer federally funded services.

The basic parameters of an ISDA contract are set out in the Act. See generally 25 U.S.C. 450*l*(c) (model agreement). As originally enacted in 1975, the ISDA required the Secretary to provide the amount of funding that the "Secretary would have otherwise provided for the operation of the programs" during the fiscal year in question. 25 U.S.C. 450j-1(a)(1). This amount is sometimes called the "secretarial amount." In 1988, Congress amended the ISDA to require that, in addition to the secretarial amount, the Secretary must also provide an amount for the tribe's reasonable "contract support costs," which are costs that a tribe must incur to operate a federal program but that the Secretary would not incur. See Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 205, 102 Stat. 2292 (25 U.S.C. 450j-1(a)(2)). Such costs may include certain direct costs of administering a program, such as costs of complying with special audit and reporting requirements, and indirect costs, such as an allocable share of general overhead. See 25 U.S.C. 450j-1(a)(3)(A). Because this amount may vary from year to year, the sums to be provided are negotiated on an annual basis and memorialized in annual funding agreements. See 25 U.S.C. 450j(c)(2); 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4) and (f)(2)).

b. Federal funding under ISDA contracts, like funding for other federal programs, is contingent upon the availability of appropriations. Congress made that con-

tingency explicit in at least four places in the Act. First, the ISDA declares generally that "[t]he amounts of such contracts shall be subject to the availability of appropriations." 25 U.S.C. 450j(c). Second, Congress directed that "[e]ach self-determination contract" must "contain, or incorporate by reference," certain standard terms. 25 U.S.C. 450*l*(a)(1). Those terms specify that a lack of sufficient appropriations may excuse performance by either party. See 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4) and (c)(3)). Third, the Act requires the Secretary to submit annual reports to Congress describing, *inter alia*, "any deficiency in funds needed to provide required contract support costs to all contractors" and "any deficiency in funds needed to maintain the preexisting level of services to any Indian tribes" under the Act. 25 U.S.C. 450j-1(c).

Finally, in a provision entitled "Reductions and increases in amount of funds provided," Congress stipulated that:

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

25 U.S.C. 450j-1(b). The Act thus contemplates the possibility that the available appropriations may be insufficient to fund the requests of all tribal contractors fully or equally.

c. In *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005) (*Cherokee*), this Court clarified that appropriations are not "unavailable" to satisfy contracts under the

ISDA simply because the Secretary has obligated for other purposes the funds in an unrestricted appropriation. In that case, the Indian Health Service (IHS), an agency of the Department of Health and Human Services, paid only a portion of the contract support costs that it had promised to two tribes in ISDA contracts for fiscal years 1994 through 1997. The tribes brought suit under the ISDA, see 25 U.S.C. 450m-1(a) and (d), and the Contract Disputes Act of 1978, 41 U.S.C. 7101 *et seq.* (formerly codified at 41 U.S.C. 601 *et seq.*), to recover the balance. The government argued, *inter alia*, that it had no further obligation to the tribes because the Secretary had obligated the remaining funds from the unrestricted appropriation for other tribes and for other important administrative purposes. *Cherokee*, 543 U.S. at 641-642.

This Court rejected that argument and held that the Secretary could properly be held liable for the promised but unpaid costs. See *Cherokee*, 543 U.S. at 636-647. Noting that the IHS did "not deny that it promised to pay the relevant contract support costs," *id.* at 636, this Court agreed with the tribes that the government "normally cannot back out" of a contract on the basis of insufficient appropriations "as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue." *Id.* at 637. The appropriations for the fiscal years in question, the Court emphasized, "contained no relevant statutory restriction," *ibid.*, and the agency had available "*other* unrestricted funds, small in amount but sufficient to pay the claims at issue" for the particular tribes before the Court, *id.* at 641. Consequently, the ISDA's proviso that all payments to tribes are "subject to the availability of appropriations," 25 U.S.C. 450j-1(b), could not excuse the government's

breach: "Since Congress appropriated adequate unrestricted funds here," that contingency was irrelevant. 543 U.S. at 643.

2. This case presents an important question not resolved in *Cherokee*: whether the government must pay all of a tribal organization's contract support costs under the ISDA where Congress *has* imposed an explicit statutory cap on the appropriations authorized to pay such costs. The Secretary, through the Bureau of Indian Affairs (BIA) and other offices, provides a broad array of basic educational, economic, and social services to more than 1.9 million Native Americans and Alaska Natives. Nearly 40% of the BIA's annual funding for such services is administered directly by tribes and tribal organizations under ISDA self-determination contracts. All but 12 of the more than 550 federally recognized Indian tribes have at least one ISDA funding agreement with the Secretary.

The Secretary funds ISDA self-determination contracts, like other agency programs, from the lump-sum appropriation provided by Congress each year for the Department of the Interior. Until fiscal year (FY) 1994, Congress followed the same approach for the BIA that it did for the IHS, as described in *Cherokee*: while legislative committee reports discussed specific sums for ISDA contract support costs, see, *e.g.*, H.R. Rep. No. 901, 102d Cong., 2d Sess. 40 (1992), the appropriation acts themselves contained no relevant restrictions, see, *e.g.*, Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 102-381, 106 Stat. 1374.

For FY 1994, however, Congress imposed an express statutory cap on the appropriations available for the Secretary to pay contract support costs under the ISDA. Of a total appropriation in that year of approximately

$1.5 billion for the BIA, Congress specified that "*not to exceed $91,223,000* of the funds in this Act shall be available for payments to tribes and tribal organizations for indirect costs associated with contracts or grants or compacts" under the ISDA. Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, Tit. I, 107 Stat. 1390-1391 (emphasis added). The Conference Report accompanying the bill explained:

> The managers remain very concerned about the continued growth in contract support costs, and caution that it is unlikely that large increases for this activity will be available in future years' budgets. It is also a concern that significant increases in contract support [costs] will make future increases in tribal programs difficult to achieve.

H.R. Conf. Rep. No. 299, 103d Cong., 1st Sess. 28 (1993).

Congress has included a similar "not to exceed" cap for contract support costs in every annual appropriation for Interior since FY 1994.[2] See App., *infra*, 8a. It is undisputed that these statutory caps have restricted the

[2] Subsequent appropriations acts have used the phrase "contract support costs" rather than "indirect costs." See Pub. L. No. 103-332, Tit. I, 108 Stat. 2511 (FY 1995); Pub. L. No. 104-134, 110 Stat. 1321-170 (FY 1996); Pub. L. No. 104–208, 110 Stat. 3009-192 (FY 1997); Pub. L. No. 105-83, Tit. I, 111 Stat. 1554 (FY 1998); Pub. L. No. 105-277, 112 Stat. 2681–245 (FY 1999); Pub. L. No. 106–113, 113 Stat. 1501A–148 (FY 2000); Pub. L. No. 106–291, Tit. I, 114 Stat. 934 (FY 2001); Pub. L. No. 107-63, 115 Stat. 430 (FY 2002); Pub. L. No. 108-7, Div. F, Tit. I, 117 Stat. 231 (FY 2003); Pub. L. No. 108-108, Tit. I, 117 Stat. 1256-1257 (FY 2004); Pub. L. No. 108-447, 118 Stat. 3055 (FY 2005); Pub. L. No. 109-54, Tit. I, 119 Stat. 513-514 (FY 2006); Pub. L. No. 110-5, 121 Stat. 8-9, 27 (FY 2007) (continuing resolution); Pub. L. No. 110-161, Div. F, Tit. I, 121 Stat. 2110 (FY 2008); Pub. L. No. 111-8, 123 Stat. 713-714 (FY 2009); Pub. L. No. 111-88, 123 Stat. 2916 (FY 2010); Pub. L. No. 112-10, Div. B, Tit. VII, 125 Stat. 151 (FY 2011).

available funding at a level "well below the sum total" that would be required for the BIA to satisfy all tribes' requests.[3] *Id.* at 2a; see *id.* at 98a (noting facts not disputed by the parties). Instead, each year the BIA has distributed the available funding among tribal contractors on a "uniform, pro-rata basis," *id.* at 9a, according to plans published annually in the Federal Register. *Ibid.*; see, *e.g.*, *Distribution of Fiscal Year 1994 Contract Support Funds*, 58 Fed. Reg. 68,694 (Dec. 28, 1993).[4] In fiscal years 1994 through 2004, for example, tribal organizations contracting with the BIA were paid between 77% and 93% of their claimed contract support costs. See App., *infra*, 10a.

3. Respondent Ramah Navajo Chapter entered into multiple ISDA self-determination contracts with the BIA in the 1980s for the administration of federally funded law enforcement, water rights, and other programs. See *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, 1458 (10th Cir. 1997). Respondent originally filed this suit against the Secretary in 1990, on behalf of all BIA tribal contractors under the ISDA, to challenge the methodology that Interior's Office of the Inspector General used to set indirect cost rates. *Id.* at 1459; see

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[3] Since FY 1998, Congress has imposed similar statutory caps on contract support cost funding for IHS programs as well. See generally *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010) (holding that the government is not liable for contract support costs above the statutory cap), petition for cert. pending, No. 11-83 (filed July 18, 2011).

[4] In 2006, in consultation with tribes, the BIA adopted a new national policy for the equitable distribution of funding for contract support costs, eliminating the need for annual Federal Register notices. See U.S. Dep't of the Interior, Bureau of Indian Affairs, National Policy Memorandum, Contract Support Cost, NPM-SELFD-1 (May 8, 2006), http://www.bia.gov/idc/groups/public/documents/text/idc-000691.pdf.

1:90-cv-00957 Docket entry No. 96 (D.N.M. Oct. 1, 1993) (class certification order).[5] In 1999, however, the district court granted respondents leave to amend their complaint to add a new claim for the alleged "underpayment" of contract support costs due to insufficient appropriations. *Id.* No. 347 (Sept. 30, 1999); see C.A. App. 149-151.[6] The parties cross-moved for summary judgment, and the matter was stayed pending the outcome of the *Cherokee* litigation. See App., *infra*, 13a-14a.

Following this Court's decision in *Cherokee*, the district court granted summary judgment for the government. App., *infra*, 90a-107a. Noting that the D.C. and Federal Circuits had already rejected tribal demands for contract support costs in excess of the express statutory caps on the funds available to the BIA to pay such costs, see *id.* at 98a-101a (discussing *Babbitt* v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999), cert. denied, 530 U.S. 1203 (2000) (*Oglala Sioux*), and *Ramah Navajo Sch. Bd., Inc.* v. *Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996)), the district court held that the "ISDA and its model contracts do not create enforceable obligations of the United States for payment of contract support costs in amounts in excess of capped contract support cost appropriations." *Id.* at 106a. The court explained that "Congress has the authority to determine the amount of appropriated funds the agency may obli-

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[5] The parties eventually settled respondents' claims concerning the indirect-cost rate formula, App., *infra*, 13a, and those claims are not at issue here.

[6] The district court also granted the motion of respondent Oglala Sioux Tribe to intervene as a class representative. Docket entry No. 347 (Sept. 30, 1999); see App., *infra*, 13a; C.A. App. 152-156 (Oglala complaint). The district court subsequently granted respondent Pueblo of Zuni leave to intervene as well. Docket entry No. 633 (Mar. 27, 2002).

gate under self-determination contracts, and it has exercised that authority by providing that the amounts of such contracts are 'subject to the availability of appropriations,' and by placing caps in the BIA's appropriation statutes." *Ibid.*

4. A divided panel of the court of appeals reversed. App., *infra*, 1a-87a. The court acknowledged that the phrase "subject to the availability of appropriations" could be interpreted in the manner the government urged and the district court held, under which the total amount of funding for contract support costs available for all tribal contractors was subject to the statutory cap. *Id.* at 16a. But the court nevertheless held that the government could be required to pay *all* of the contract support costs requested by *every* tribal contractor—even though that total amount would exceed the statutory cap—because Congress appropriated sufficient funds to satisfy the demands of any *single* contractor considered in isolation. *Id.* at 29a-30a; see *id.* at 34a ("[T]he insufficiency of a multi-contract appropriation to pay all contracts does not relieve the government of liability if the appropriation is sufficient to cover an individual contract."). The court found no "meaningful distinction" between this case and *Cherokee*, in which there was no appropriations cap, because in both cases the funds "were similarly insufficient to cover all objects for which the appropriation was available." *Id.* at 29a n.8.

Nor, in the court's view, did the Appropriations Clause of the Constitution or the Anti-Deficiency Act, 31 U.S.C. 1341, warrant a different result. App., *infra*, 43a-47a. While the appropriations caps would prevent the Secretary himself from disbursing more than the appropriated sums, the court explained, tribal contractors could simply "recover[] from the Judgment Fund" any

unpaid balance. *Id.* at 45a. Although the court recognized that "Congress likely did not intend" for contractors to avoid the statutory cap by seeking any excess from the Judgment Fund, it reasoned that "we must consider the legal effect of Congress's intentional acts, and those acts compel [this] result. Congress passed the ISDA, guaranteeing funding for necessary [contract support costs], and its appropriations resulted in an ongoing breach of the ISDA's promise." *Ibid.*

In so concluding, the court of appeals expressly disagreed with the contrary holding of the Federal Circuit in *Arctic Slope Native Ass'n* v. *Sebelius,* 629 F.3d 1296 (2010), petition for cert. pending, No. 11-83 (filed July 18, 2011) (*Arctic Slope*). See App., *infra*, 34a (recognizing that *Arctic Slope* addressed "the same issue we confront"). The court further acknowledged that its decision was in conflict with the Federal Circuit's earlier decision in *Oglala Sioux*, *supra*, as well as the D.C. Circuit's decision in *Ramah Navajo School Board*, *supra*. See App., *infra*, 37a n.12.

Judge Hartz dissented from the decision below (App., *infra*, 47a-87a), objecting that the majority had "render[ed] futile the spending cap imposed by Congress." *Id.* at 47a. There was no authority, the dissent maintained, for requiring the government to make payments in excess of a mandatory appropriations limit imposed by Congress: "If such payments are not barred by the Constitution's Appropriations Clause, then the Anti-Deficiency Act should do the trick." *Id.* at 60a. Nor, the dissent continued, was the majority's result required by this Court's decision in *Cherokee*, because "what the Secretary sought *discretion* to do in *Cherokee*"—to allocate among tribal contractors an appropriated sum that was too small to cover the contract sup-

port costs requested by all contractors—"is *compelled* here" by the appropriations cap. *Id.* at 80a. The dissent would have "adopt[ed] the more natural interpretation of the statutory scheme, which * * * has been adopted in three other circuit opinions," including in "a thoughtful opinion by the court most conversant with federal contract law." *Id.* at 75a (citing the Federal Circuit's decision in *Arctic Slope*, *supra*), 78a.

REASONS FOR GRANTING THE PETITION

In this nationwide class action, the Tenth Circuit ruled that the government's liability for contract support costs under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.*, is not bounded by the explicit statutory caps imposed by Congress on the annual appropriations authorized to pay such costs. That decision, which squarely conflicts with decisions of the Federal and D.C. Circuits, warrants this Court's review. Congress expressly reserved in the ISDA its constitutionally rooted authority to control the expenditure of funds from the Treasury in any fiscal year, "[n]otwithstanding any other provision" in the Act. 25 U.S.C. 450j-1(b). And in every fiscal year since 1994, Congress has exercised that expressly reserved authority, imposing statutory caps on the funds available for the Secretary to pay contract support costs at levels insufficient to satisfy all of respondents' requests. It is Congress's prerogative under the Appropriations Clause to impose such limits, and the Tenth Circuit erred in concluding that the government may be held liable for failing to pay sums that Congress has not authorized to be paid.

The Tenth Circuit's decision rests on the fundamentally mistaken notion that Congress, through the exer-

cise of its expressly reserved appropriations power, "breach[ed]" a statutory "guarantee[]" to tribes regarding contract support cost funding. App., *infra*, 45a. Tribally administered federal programs are not uniquely immune from the appropriations process. Congress's refusal for more than 15 years to write a blank check for ISDA contract support costs does not reflect a "breach" of any legal duty, but rather rests on a congressional judgment that the important federal policies served by underwriting such costs do not justify the unlimited disbursement of public funds at the expense of other priorities for the public welfare, including other programs benefitting Indians and Indian tribes. It is difficult to posit a judgment more firmly committed to Congress, as confirmed in the Appropriations Clause, see U.S. Const. Art. I, § 9, Cl. 7, and the Tenth Circuit had no warrant to set it aside. The accumulated tribal demands for unfunded contract support costs are already estimated to exceed $1 billion, and the problem grows worse with each federal budget cycle. This Court's intervention is necessary to correct the Tenth Circuit's erroneous interpretation of the ISDA and resolve this recurring problem of nationwide importance.

A. The Courts of Appeals Are Divided Over Congress's Authority To Limit The Expenditure Of Public Funds Under The ISDA

As the Tenth Circuit itself acknowledged, see App., *infra*, 34a, 37a n.12, the decision below directly conflicts with prior decisions of the D.C. and Federal Circuits, both of which have held that the government is not liable for ISDA contract support costs in excess of a statutory appropriations cap. See *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010), petition for

cert. pending, No. 11-83 (filed July 18, 2011); *Babbitt* v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999), cert. denied, 530 U.S. 1203 (2000); *Ramah Navajo Sch. Bd., Inc.* v. *Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). Until the Tenth Circuit's decision below, no court of appeals had refused to give effect to Congress's express assertion of control over the expenditure of public funds under the ISDA.

In *Ramah Navajo School Board*, the plaintiff tribal organizations challenged the Secretary's plan for allocating funding for ISDA contract support costs among tribal contractors in the face of a statutory appropriations cap in FY 1995. Although the D.C. Circuit panel divided on the question whether the Secretary's preferred method for distributing the available funds was subject to judicial review at all, the panel unanimously agreed that the government had no obligation to pay contract support costs beyond the statutory appropriations limit. As the court explained, "if the money is not available, it need not be provided, despite a Tribe's claim that the ISDA 'entitles' it to the funds." 87 F.3d at 1345; see also *id.* at 1353 (Silberman, J., dissenting) (Congress "unequivocally stated that any tribes' legal entitlement to funds * * * was dependent on Congress making full appropriations" (emphasis omitted)).

Subsequently, in *Oglala Sioux*, *supra*, a tribal contractor under the ISDA brought suit against the Secretary claiming, like respondents here, an entitlement to "full" funding of its contract support costs, notwithstanding statutory appropriations limits. 194 F.3d at 1376. The Interior Board of Contract Appeals agreed with the contractor, but the Federal Circuit reversed, explaining: "the ISDA explicitly makes funding of ISDA contract indirect costs subject to the availability of ap-

propriations," and "Interior had no choice but to comply with the statute." *Ibid.* The language of 25 U.S.C. 450j-1(b), the court explained, is "clear and unambiguous; any funds provided under an ISDA contract are 'subject to the availability of appropriations.'" 194 F.3d at 1378. This "unequivocal statutory language prevents [a tribal contractor] from asserting that it was entitled to full funding as a matter of right." *Id.* at 1380. To hold that a tribal contractor may recover its "full" costs notwithstanding an express appropriations cap, the court concluded, would permit "the general intent underlying the ISDA to trump the express language of the statute" and would "render the subject-to-appropriations language of [Section] 450j-1(b) meaningless." *Id.* at 1378.

Most recently, in *Arctic Slope*, the Federal Circuit reaffirmed its view in the wake of this Court's decision in *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005). The plaintiff in *Arctic Slope* entered into an ISDA self-determination contract with the Indian Health Service for the operation of a hospital in Alaska. The agency paid the tribal organization all of the contract support costs specifically promised in the annual funding agreements, but the organization nonetheless brought suit on the theory that the ISDA guaranteed additional funding of tribal contract support costs. 629 F.3d at 1300-1301. The Civilian Board of Contract Appeals rejected that claim, and the Federal Circuit affirmed. *Id.* at 1298, 1306. "In stark contrast to *Cherokee*," the court explained, "here there is a statutory cap on funding for contract support costs." *Id.* at 1301. The court reasoned that Congress's explicit statement in the ISDA that the provision of funds under a self-determination contract is subject to the availability of appropriations, "coupled with the 'not to exceed' language [in the appropriation acts,] limits

the Secretary's obligation to the tribes to the appropriated amount. The Secretary is obligated to pay no more than the statute appropriates." *Id.* at 1304. To accept the contractor's argument, the court concluded, would "effectively defeat the statutory cap." *Ibid.*

These decisions squarely conflict with the decision below, which rejected the views of the Federal Circuit on "the same issue." App., *infra*, 34a; see *id.* 34a-38a (discussing *Arctic Slope*). Moreover, because the decision below encompasses a nationwide class of all tribes and tribal organizations that have entered into ISDA contracts with the Secretary, see Docket entry No. 96, the likelihood of further legal developments in the courts of appeals is substantially diminished. This Court's review is warranted.

B. The Tenth Circuit's Decision Depends On The Mistaken Premise That The Appropriations Caps Constituted A "Breach" By Congress Of A Legal Duty To Tribal Contractors

The Tenth Circuit declared that the government is liable for the contract support costs requested by every tribal contractor, notwithstanding the appropriations caps, because "Congress passed the ISDA, guaranteeing funding for necessary [contract support costs], and its appropriations resulted in an on-going breach of the ISDA's promise." App., *infra*, 45a. That mismatched combination of statutory and contractual concepts does not provide a coherent basis for requiring the government to disburse public funds in excess of express statutory caps imposed by Congress.

1. The Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9,

Cl. 7. This Court has explained that the Appropriations Clause serves the "fundamental and comprehensive purpose" of assuring "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *OPM* v. *Richmond*, 496 U.S. 414, 427-428 (1990). The authority of Executive officials to administer the laws enacted by Congress is accordingly "limited by a valid reservation of congressional control over funds in the Treasury." *Id.* at 425; see *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 291 (1851).

In this case, Congress has expressly imposed such a "valid reservation"—a cap on the availability of appropriated funds for ISDA contract support costs—in every appropriation for the Department of the Interior since fiscal year 1994. As respondents do not dispute, in the parlance of federal appropriations law, the phrase "not to exceed" in these appropriations acts denotes Congress's intent to designate a maximum amount of funding available for the specified purpose. See 2 U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law* 6-32 (3d ed. 2006); see also 64 Comp. Gen. 263, 264 (1985) ("not to exceed" is "susceptible of but one meaning"); *Arctic Slope*, 629 F.3d at 1301. And as Congress surely understood, "[i]t is a federal crime, punishable by fine and imprisonment, for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress." *OPM* v. *Richmond*, 496 U.S. at 430 (citing the Anti-Deficiency Act, 31 U.S.C. 1341, 1350).

Congress has thus imposed a firm ceiling on the amount of money that may be drawn from the Treasury for ISDA contract support costs each year for more than

15 years. See note 2, *supra*. It is undisputed that all of that money has long since been spent. See App., *infra*, 98a (district court's finding, as an undisputed fact, that "[i]n every fiscal year since 1994, BIA has distributed to tribal contractors the full amount of [contract support cost] funding appropriated for that purpose"). Unlike in *Cherokee*, therefore, there are no "unrestricted funds * * * sufficient to pay the claims at issue." 543 U.S. at 641. Nor has the government allocated elsewhere funds that would otherwise be available to respondents. Cf. *ibid*. While Congress in *Cherokee* "unambiguously provided unrestricted lump-sum appropriations," *id.* at 646-647, here Congress has expressly capped the appropriations available to the Secretary to meet respondents' demands. The BIA is "without power to make a contract binding the Government to pay more than the amount appropriated." *Sutton* v. *United States*, 256 U.S. 575, 579 (1921).

The Tenth Circuit concluded that neither the Appropriations Clause nor the Anti-Deficiency Act was implicated by its decision because the Judgment Fund is available to pay tribal requests in excess of the appropriations caps. App., *infra*, 43a-47a. That notion is untenable. The Judgment Fund is not a back-up source of agency appropriations. Nor is it an invitation to litigants to circumvent express restrictions imposed by Congress on the expenditure of funds from the Treasury. As this Court explained in *OPM* v. *Richmond*, *supra*, "[t]he general appropriation for payment of judgments * * * does not create an all-purpose fund for judicial disbursement." 496 U.S. at 432. The Judgment Fund exists solely to pay "final judgments, awards, compromise settlements, and interest and costs" when "payment is not otherwise provided for." 31 U.S.C. 1304(a).

Here, the appropriations "provided for" the payment of respondents' ISDA contract support costs were those specifically provided in the annual appropriations for the Department of the Interior. The restrictions that Congress imposed on those sums may not be circumvented by seeking additional amounts from the Judgment Fund. By virtue of the statutory caps on the availability of appropriations for contract support costs, the United States is not liable for any costs in excess of those caps. And because there is no liability, there is no basis for a judgment against the United States that could be paid out of the Judgment Fund.

2. Against this background, the court of appeals identified no plausible theory on which the government may be held liable under the ISDA for failing to pay amounts that Congress has forbidden to be paid. The court of appeals suggested at points (*e.g.*, App., *infra*, 2a, 4a-8a, 45a-46a) that tribes' purported entitlement to "full funding" of contract support costs irrespective of the appropriations caps springs from the ISDA itself, and at other points that such an entitlement flows from principles of contract law (*e.g.*, *id.* at 21a-34a). Neither theory has merit. The ISDA does not confer on tribal contractors an unqualified "guarantee[]" (*id.* at 45a) of full funding for contract support costs, especially in the face of express limitations imposed in subsequent Acts of Congress—*i.e.*, the annual appropriations acts. Nor did Congress or the BIA "breach" any "promise" (*ibid.*) when Congress exercised its constitutional authority to control federal spending.

a. As originally enacted, the ISDA required the Secretary to provide only the amount of funding that the "Secretary would have otherwise provided for the operation of the programs" in question during the fiscal year.

25 U.S.C. 450j-1(a)(1). In 1988, Congress amended the ISDA to require that, in addition to that sum, the Secretary must also provide an amount for the tribal organization's reasonable "contract support costs." Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 205, 102 Stat. 2292 (25 U.S.C. 450j-1(a)(2)). That provision does not, even on its face, create an unqualified right to "full" federal funding of contract support costs: "*an amount for* the [contractor's] reasonable costs," 25 U.S.C. 450j-1(a)(2) (emphasis added), is not naturally read to mean "*all* reasonable costs."[7] And in any event, the ISDA as a whole clearly does not "guarantee[]" (App., *infra*, 45a) to a tribal contractor any particular level of federal funding. The Act specifically contemplates that actual funding will be contingent on subsequent appropriations laws, and thus on any restrictions contained in those appropriations laws. Indeed, as noted above (see pp. 3-4, *supra*), Congress made clear in at least four places in the Act that it intended to exercise complete control over the disbursement of funds from the Treasury for federal programs administered by tribes under the ISDA, just

[7] The court of appeals also relied on 25 U.S.C. 450j-1(g) for its belief that "Congress has mandated that all self-determination contracts provide full funding of [contract support costs]." App., *infra*, 2a. But that provision merely provides that, when an ISDA contract is approved, the Secretary "shall add to the contract the full amount of funds to which the contractor is entitled *under subsection (a) of this section*," 25 U.S.C. 450j-1(g) (emphasis added)—that is, the secretarial amount, 25 U.S.C. 450j-1(a)(1), plus "an amount for" the contractor's reasonable contract support costs, 25 U.S.C. 450j-1(a)(2). The Act nowhere guarantees that every dollar requested by a tribal organization in contract support costs will be paid, let alone that such an entitlement exists irrespective of appropriations. See 25 U.S.C. 450j(c), 450j-1(b).

as it would if the same programs were administered by the Secretary directly.

First, the ISDA declares generally that "[t]he amounts of such contracts shall be subject to the availability of appropriations." 25 U.S.C. 450j(c). Second, Congress stipulated that "[e]ach self-determination contract" must "contain, or incorporate by reference," certain standard terms. 25 U.S.C. 450*l*(a)(1). Those terms specify that a lack of sufficient appropriations may excuse performance by *either* party: the Secretary's obligation to provide the agreed sums is "[s]ubject to the availability of appropriations," and the contractor's obligation to "administer the programs, services, functions, and activities identified in th[e] Contract" is likewise "[s]ubject to the availability of appropriated funds." 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4) and (c)(3)). Third, the Act requires the Secretary to submit annual reports to Congress containing, *inter alia*, an accounting of "any deficiency in funds needed to provide required contract support costs to all contractors," 25 U.S.C. 450j-1(c), a provision that would be wholly superfluous if, as the Tenth Circuit believed, Congress had "mandated that all self-determination contracts provide full funding" of contract support costs. App., *infra*, 2a.

Finally, in the same 1988 amendments that added the ISDA's provision concerning contract support costs, Congress simultaneously enacted the Act's most explicit reservation of Congress's appropriations authority:

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

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

25 U.S.C. 450j-1(b) (emphasis added); see § 205, 102 Stat. 2292. The "subchapter" to which this provision refers is Title 25 ("Indians"), Chapter 14 ("Miscellaneous"), Subchapter II ("Indian Self-Determination and Education Assistance"). It therefore encompasses all relevant provisions of the ISDA, including the contract support cost provisions of 25 U.S.C. 450j-1(a)(2).

As the D.C. and Federal Circuits have both recognized, the "unequivocal statutory language" of Section 450j-1(b) forecloses any contention that the ISDA guarantees full funding of contract support costs "as a matter of right." *Oglala Sioux*, 194 F.3d at 1380; see *Arctic Slope*, 629 F.3d at 1304 (Section 450j-1(b) "limits the Secretary's obligation to the tribes to the appropriated amount"); *Ramah Navajo Sch. Bd., Inc.*, 87 F.3d at 1345 ("[I]f the money is not available, it need not be provided, despite a Tribe's claim that the ISDA 'entitles' it to the funds."). See also App., *infra*, 82a (Hartz, J., dissenting) ("[T]he ISDA does not require full payment. Full payment is conditioned on the availability of funds.").

The court of appeals was therefore mistaken in its essential premise that Congress "guarantee[d] funding" for all contract support costs. App., *infra*, 45a. The Tenth Circuit has since reaffirmed this erroneous interpretation of the ISDA, holding that an Indian tribe is "entitled to a contract specifying the full statutory amount" of contract support costs, and that the government is forbidden even from negotiating for the tribe's agreement to accept a lower sum in light of the lack of available appropriations. *Southern Ute Indian Tribe* v. *Sebelius*, Nos. 09-2281 & 09-2291, 2011 WL 4348299, at *11 (10th Cir. Sept. 19, 2011) (*Southern Ute*). The court

of appeals declared in *Southern Ute* that "[a] tribe cannot be forced to enter into a self-determination contract waiving its *entitlement* to full [contract support cost] funding." *Ibid.* (emphasis added).

As the statutory provisions discussed above make clear, the ISDA creates no such unqualified "entitlement." To the contrary, the ISDA expressly reserves Congress's authority to control the expenditure of public funds "[n]otwithstanding any other provision" of the Act, including the provisions governing contract support costs. 25 U.S.C. 450j-1(b). Congress consequently did not "breach" any statutory "promise" to respondents (App., *infra*, 45a) by exercising its statutorily reserved and constitutionally rooted authority to limit the amount of funds in the Treasury available to pay such costs. Because the ISDA itself did not mandate payment in these circumstances, respondents have no right to recover under the terms of the Act. See *United States* v. *Navajo Nation*, 129 S. Ct. 1547, 1555 (2009); *United States* v. *Navajo Nation*, 537 U.S. 488, 506 (2003).

b. The court of appeals also sought to justify its decision in terms of contract law. *E.g.*, App., *infra*, 26a-34a. But the Secretary did not promise to pay respondents' contract support costs irrespective of available appropriations. Indeed, the Secretary could not have bound the government to pay costs in excess of the amounts appropriated by Congress. See *Sutton*, 256 U.S. at 579. Consistent with the model agreement in the ISDA, the Secretary's contracts with respondents specified that all funding was "[s]ubject to the availability of appropriations." 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4)); see App., *infra*, 10a-11a. This Court held that equivalent language in the contracts at issue in *Cherokee* did not relieve the government of liability because, in

that case, "Congress appropriated adequate unrestricted funds" to pay the tribes' claims. 543 U.S. at 643. Here, by contrast, the relevant appropriations are both inadequate and expressly restricted.

Moreover, as the dissent below explained, other provisions in the parties' agreements "recognized that contract-support costs might not be fully paid." App., *infra*, 51a (Hartz, J., dissenting). For example, the Oglala Sioux annual funding agreement for 2001 provided that the tribe's indirect cost recovery would be calculated by multiplying the amount that the tribe would otherwise receive by a "percentage of rate funded by BIA"—*i.e.*, a rate tied to the available appropriations. See *id.* at 51a-53a; see also *id.* at 51a (quoting contract language providing that funding for contract support costs "shall be provided by the Bureau of Indian Affairs, subject to the availability of funding"); *id.* at 12a-13a (majority opinion) (noting that annual funding agreements for Ramah Navajo and Oglala Sioux reflected "uncertainty" about the contract support cost funding rate because the BIA did not determine the rate until the fiscal year was underway). Like the ISDA itself, therefore, the parties' contractual agreements recognized that funding for all contract support costs was *not* guaranteed, but was instead contingent upon the availability of appropriations.

The Tenth Circuit nonetheless believed that the government could properly be held liable under the rationale of *Ferris* v. *United States*, 27 Ct. Cl. 542 (1892), which the court of appeals construed to establish a "bright-line" rule that "[i]f more than one contractor is covered by an appropriation, the failure to appropriate funds sufficient to pay *all* such contractors does not relieve the government of liability." App., *infra*, 31a-32a.

Because Congress here appropriated sufficient funds to meet the contract support funding needs of any *one* tribal contractor considered in isolation, the court reasoned, the government is required to pay *all* of the contract support costs of *every* tribal contractor. *Id.* at 29a-30a.

As the Federal Circuit recognized in rejecting the same contention, that approach would "effectively defeat" Congress's invocation of its expressly reserved authority under the Appropriations Clause to impose binding limits on the disbursement of public funds from the Treasury. *Arctic Slope*, 629 F.3d at 1304; see also App., *infra*, 47a (Hartz, J., dissenting) (explaining that the majority's reasoning "renders futile the spending cap imposed by Congress"). The manifest purpose of Congress in enacting the appropriations caps was to limit the use of public funds for the payment of ISDA contract support costs. The court of appeals' theory, under which *every* tribal contractor could recover its reasonable costs from the Treasury irrespective of the total sum, is fundamentally inconsistent with that intent and would render the appropriations caps meaningless. Significantly, the Secretary has limited authority under the ISDA to decline to enter into additional contracts as a means of controlling costs. See 25 U.S.C. 450f(a)(1) and (2); see also *Southern Ute*, 2011 WL 4348299, at *8 (holding that the government could not decline a new ISDA contract requested by a tribe on the ground that the available appropriations were insufficient to pay the tribe's contract support costs). Congress's only conceivable purpose in enacting the appropriations caps was therefore to limit the amounts distributed by the Secretary under existing self-determination contracts—an

outcome that the text of the ISDA expressly permits. 25 U.S.C. 450j-1(b).

The rationale of *Ferris*, on which the court of appeals relied, is entirely inapposite in this context. *Ferris*, like *Cherokee*, involved a government promise made against the backdrop of an unrestricted, lump-sum appropriation. See *Arctic Slope*, 629 F.3d at 1304. Here, by contrast, "there is a statutory cap and no ability to reallocate funds from non-contract uses." *Ibid.* Moreover, unlike the contractor in *Ferris*, which operated under a general appropriation and was "not chargeable with knowledge of its administration," 27 Ct. Cl. at 546, respondents here have been well aware since FY 1994 of the insufficiency of available appropriations to pay all contract support costs. For more than a decade, the BIA published a notice in the Federal Register each year describing the shortfalls in funding for contract support costs and the methodology the agency would use to allocate the available money. App., *infra*, 9a (collecting citations); see, *e.g.*, 58 Fed. Reg. at 68,694. As the dissent below explained, the "very purpose" of these notices was to "warn[] tribal organizations of the possibility of insufficient funding." App., *infra*, 50a. In 2006, in consultation with tribes, the agency adopted an explicit nationwide policy for the equitable distribution of funding for contract support costs in light of the recurring shortfalls. See note 4, *supra*. And each year the BIA has developed its budget requests—including any requests for additional contract support cost funding—in consultation with the tribes. See 25 U.S.C. 450j-1(i). The inadequacy of available appropriations, in short, has been "no secret." App., *infra*, 49a (Hartz, J., dissenting). The animating concerns of *Ferris* are thus absent here.

Furthermore, as the Federal Circuit observed, *Ferris* is particularly irrelevant in this context because the ISDA relieves the Secretary of any obligation to reallocate available funds among tribes and tribal organizations. 25 U.S.C. 450j-1(b); see *Arctic Slope*, 629 F.3d at 1304. As the majority below acknowledged, allocating inadequate funds under a capped appropriation is inescapably a zero-sum endeavor: "the Secretary *necessarily* takes from one tribe to pay another whenever funding falls short of total need." App., *infra*, 21a. Yet the court declared the government liable for all tribes' costs under *Ferris* precisely because the Secretary *could* have paid the entire amount requested by any individual tribal organization, to the detriment of the others. See *id.* at 30a (asserting that "there is no statutory restriction that would preclude the Secretary from using appropriated funds to pay full [contract support cost] need to the individual contractors bringing suit"). Section 450j-1(b) frees the Secretary to distribute the available funds among contractors in an equitable fashion by making clear that the Secretary is not required to prefer one tribe or tribal organization over another in that manner.

C. The Question Presented Is Important

The Tenth Circuit's decision vitiating limits imposed by Congress on the expenditure of funds from the Treasury warrants this Court's review. The Court has not previously considered the application of Appropriations Clause principles to government contracts in circumstances akin to those at issue here. Indeed, it appears that the Court has not addressed the subject at any length since its 1921 decision in *Sutton*, *supra*. Particularly in an era of increasing federal budgetary pressure, the authority of Congress to impose—and the obligation

of federal courts to respect—mandatory ceilings on the expenditure of appropriated funds for designated purposes is a question of great prospective importance.

As this Court explained in *OPM* v. *Richmond*, the Appropriations Clause ensures "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." 496 U.S. at 427-428. The appropriations caps imposed in this case reflect a judgment by Congress that, although the federal policies that are served by funding contract support costs under the ISDA are important, those policies do not warrant the unlimited disbursement of public money at the expense of other priorities, including other programs benefitting Indians and Indian tribes. Thus, the Conference Report accompanying the first capped appropriation for the BIA in FY 1994 explained that it was necessary to impose a limit because "significant increases in contract support will make future increases in tribal programs difficult to achieve." H.R. Conf. Rep. No. 299, 103d Cong., 1st Sess. 28 (1993). Likewise, legislators explained their decision to continue limiting the appropriations available to the Indian Health Service for contract support costs in FY 2000 on the ground that Congress "cannot afford to appropriate 100% of contract support costs at the expense of basic program funding for tribes." *Arctic Slope*, 629 F.3d at 1306 (quoting H.R. Rep. No. 222, 106th Cong., 1st Sess. 112 (1999)).

It is exactly such "difficult judgments reached by Congress as to the common good" that the Appropriations Clause exists to protect. *OPM* v. *Richmond*, 496 U.S. at 428. Congress in the ISDA explicitly reserved its prerogative to make such judgments, see 25 U.S.C.

450j(c), 450j-1(b), and it has expressed its intent to limit federal spending on contract support costs with unmistakable clarity in the annual appropriation acts for the Department of the Interior each year for more than 15 years. Yet even this was not enough for the court of appeals. In the court's view, if Congress wished to cap federal spending on contract support costs without amending the substantive provisions of the Act, it was required to "limit appropriations on a contract-by-contract basis" for hundreds of tribal organizations nationwide. App., *infra*, 46a. That extraordinary conclusion should not be permitted to stand.

This Court's intervention is additionally appropriate because of the importance of the question presented to the uniform and effective administration of the ISDA. According to agency data, nearly 40% of the BIA's annual budget for social and economic programs for Indian tribes is administered directly by tribal organizations under ISDA self-determination contracts. The decision below has left federal and tribal officials alike uncertain of their respective financial obligations for the maintenance of important federal programs. Meanwhile, the accumulated tribal requests for unfunded contract support costs are estimated to exceed $1 billion, and the problem grows worse with each federal budget cycle. This Court's review is needed.

D. This Case Provides The Preferable Vehicle For The Court's Review

The Solicitor General is filing, simultaneously with this petition, the government's response to the petition for a writ of certiorari in *Arctic Slope*, No. 11-83. The Tenth Circuit's decision below presents a better vehicle for the Court's resolution of the question presented for

at least two reasons. First, because it involves a nationwide class action, the decision below starkly illustrates the fundamental flaw in the tribes' position in these cases: the Secretary could not satisfy the contract support cost demands of all members of the respondent class in any fiscal year without exceeding the statutory appropriations cap imposed by Congress for that year. Granting review in this case would thus permit the Court to resolve the question presented in a factual context that appropriately tests the limits of each party's legal theory.

Second, the plaintiff contractor in *Arctic Slope* received all of the funding for contract support costs specifically contemplated in its annual funding agreements, entirely apart from any question of the sufficiency of appropriations. See 639 F.3d at 1300-1301 (noting that the contractor "does not claim that the Secretary failed to pay the secretarial amount, or the contract support costs specified in the Annual Funding Agreements"). That fact furnishes an additional basis on which the government would be entitled to prevail in *Arctic Slope* that is not necessarily present with respect to the contracts at issue here. The decision below thus presents a better vehicle for the Court to reach and decide the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 08-2262

RAMAH NAVAJO CHAPTER, OGLALA SIOUX TRIBE; PUEBLO OF ZUNI, FOR THEMSELVES AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

v.

KENNETH SALAZAR, SECRETARY OF THE INTERIOR; LARRY ECHO HAWK, ASSISTANT SECRETARY OF THE INTERIOR; MARY L. KENDALL, ACTING CHIEF OF OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF THE INTERIOR;[1] UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES,

AND

THE NATIONAL CONGRESS OF AMERICAN INDIANS, AMICUS CURIAE

[Filed: May 9, 2011]

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[1] Pursuant to Fed. R. App. P. 43(c)(2) Kenneth Salazar is substituted for former Secretary of the Interior, Dirk Kempthorne; Larry Echo Hawk is substituted for former Assistant Secretary of the Interior, Eddie Brown; and Mary L. Kendall is substituted for former Chief of Office of Inspector General, Marvin Pierce.

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:90-CV-00957-LH-KBM)

Before: LUCERO, MCKAY, and HARTZ, Circuit Judges.

LUCERO, Circuit Judge.

We are faced with an apparent contradiction. Pursuant to the Indian Self-Determination and Education Assistance Act ("ISDA"), the United States enters into self-determination contracts with Indian tribes and tribal organizations "for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law." 25 U.S.C. § 450b(j). These agreements include contract support costs ("CSCs") which are the "reasonable costs for activities that must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management," but would not be paid by the Secretary of the Interior if the federal government operated the contracted program directly. § 450j-1(a)(2). Congress has mandated that all self-determination contracts provide full funding of CSCs, *see* § 450j-1(g), but has nevertheless failed to appropriate funds sufficient to pay all CSCs every year since 1994, instead capping appropriations at a level well below the sum total of CSCs. *See, e.g.*, Dep't of the Interior & Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, tit. I, 108 Stat. 2499, 2511 (1994).

These funding shortfalls have threatened tribal programs designed to fulfill the congressionally mandated

goal of the ISDA to "enhance the progress of Indian people and their communities." 25 U.S.C. § 450(a)(1). Contracts for programs absolutely essential to self-government, such as law enforcement, economic development, and natural resource management, have become "unworkable" in the words of a tribal representative. As a result, several tribes and tribal organizations brought suit seeking to collect the promised, but unappropriated, CSCs.

The government urges us to affirm the district court and resolve the ISDA/appropriations contradiction by holding that the phrase "subject to the availability of appropriations," included in both the ISDA, *see* § 450j-1(b), and all self-determination contracts, *see* § 450*l*(c), unambiguously eliminates the government's obligation to pay CSCs unless Congress appropriates funds to pay *all* CSCs on *every* self-determination contract. Plaintiffs counter that the phrase "subject to the availability of appropriations" must be interpreted from the perspective of the individual contractor, not by reference to all contractors who might lay claim to a given appropriation. In other words, only Congressional funding decisions—not discretionary allocation decisions made by an agency—can render an appropriation unavailable.

Following a recent Supreme Court case addressing a nearly identical issue, we conclude that plaintiffs' interpretation is reasonable. As the Court held in *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005), "if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment even if the agency has allocated the funds to another purpose or assumes other obligations that exhaust the funds." *Id.* at 641 (quotation omitted). Fol-

lowing our canon of construction requiring that an act be construed in favor of a reasonable interpretation advanced by a tribe, *see Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997), and the ISDA's requirement that contracts be construed in favor of the contractor, 25 U.S.C. § 450*l*(c), we hold that the government remains liable because the annual CSC appropriations were sufficient to cover any individual contract.

Exercising jurisdiction under 28 U.S.C. § 1291, we reverse the district court's grant of summary judgment in favor the government and remand for further proceedings.

I

This appeal comes after nearly two decades of litigation under the ISDA by Ramah Navajo Chapter ("Ramah"). The statutory and administrative landscape provides an important backdrop for our legal analysis.

A

Prior to the ISDA, educational and governmental services were provided directly by the federal government to the hundreds of federally recognized tribes in the United States. Acknowledging that "Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people," 25 U.S.C. § 450(a)(1), Congress enacted the ISDA to "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," § 450a(b). The ISDA reaffirms the "Federal Government's unique and continuing relationship

with, and responsibility to, individual Indian tribes and to the Indian people as a whole." § 450a(a). It pursues a goal of Indian "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." *Id.*

Pursuant to the ISDA, the Secretary of the Interior and the Secretary of Health and Human Services are directed to enter into self-determination contracts upon the request of a tribe, provided that the request satisfies several statutory criteria. *See* §§ 450b(i), 450f(a). The Secretary must provide the amount that the agency "would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract." § 450j-1(a)(1). These contracts effectively transfer responsibility for various programs from federal agencies to the tribes themselves, while maintaining federal funding of the programs.

Congress soon recognized that providing only the funds the Secretary would have spent operating a given program created a "serious problem" because those funds do not cover "federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements." S. Rep. No. 100-274, at 8 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2627. As a result, tribal resources "which are needed for community and economic development must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility." *Id.* at 9, *reprinted in* 1988 U.S.C.C.A.N. at 2628. Congress accordingly amended the ISDA to

require full funding of CSCs. *See* Indian Self Determination Act Amendments of 1987, Pub. L. No. 100-472, § 205, 102 Stat. 2285, 2292-94 (1988).

CSCs include "direct program expenses for the operation of the Federal program that is the subject of the contract," 25 U.S.C. § 450j-1(a)(3)(A)(i), and "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," § 450j-1(a)(3)(A)(ii). The latter category appears to correspond to "indirect costs" which are defined as the "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." § 450b(f). Indirect costs are generally calculated by multiplying the "contract funding base" by the "indirect cost rate," a negotiated figure. *See* § 450b(b), (g); S. Rep. No. 100-274, at 9, *reprinted in* 1988 U.S.C.C.A.N. at 2628 ("Tribal indirect cost rates are negotiated and approved according to OMB guidelines by the Department of the Interior Office of Inspector General.").

Under the revised ISDA, CSC funding "*shall* be added to the amount" the Secretary would have spent on the program subject to a self-determination contract. 25 U.S.C. § 450j-1(a)(2) (emphasis added). Another section of the ISDA provides 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)]." § 450j-1(g) (emphasis added). However, the ISDA twice states that entitle-

ment to self-determination contract funding is "subject to the availability of appropriations." §§ 450j(c)(1), 450j-1(b). It further provides that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this [Act]." § 450j-1(b).

The phrase "subject to the availability of appropriations" has become highly significant because of Congress' ISDA funding decisions. In 1994, Congress began capping CSC funding. The 1994 appropriations act for the Department of the Interior allocated nearly $1.5 billion to the Bureau of Indian Affairs ("BIA"), but provided that "not to exceed $91,223,000 of the funds in this Act shall be available for payments to tribes and tribal organizations for indirect costs associated with contracts or grants or compacts authorized by the Indian Self-Determination Act." Dep't of the Interior & Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, tit. I, 107 Stat. 1379, 1390-91 (1993). The Conference Report on the appropriations bill suggested Congress was apprehensive about the growth of CSCs:

> The managers remain very concerned about the continued growth in contract support costs, and caution that it is unlikely that large increases for this activity will be available in future years' budgets. It is also a concern that significant increases in contract support will make future increases in tribal programs difficult to achieve.

H.R. Conf. Rep. No. 103-299, at 28 (1993). A Senate Report accompanying the following year's appropriations act noted "that significant shortfalls exist for fiscal year

1994 contract support funding," but advised that the "shortfalls should be treated as one-time occurrences and should not have any impact on determining future indirect cost rates." S. Rep. No. 103-294, at 57 (1994).

Despite this expectation, funding shortfalls for CSCs were repeated every fiscal year from 1994 to 2001. Later appropriations acts, usually passed at the beginning of the fiscal year, used the phrase "contract support costs" rather than "indirect costs," but each included the same "not to exceed" language. *See* tit. I, 108 Stat. at 2511; Omnibus Consol. Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-170 (1996); Omnibus Consol. Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-192 (1996); Dep't of the Interior & Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, tit. I, 111 Stat. 1543, 1554 (1997); Omnibus Consol. & Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-245 (1998); Consol. Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-148 (1999); Dep't of the Interior & Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, tit. I, 114 Stat. 922, 934 (2000).

B

Following the passage of each appropriations act, the BIA issued a notice in the Federal Register discussing the CSC shortfalls. The 1994 notice warned of "a shortfall of at least $ 10,000,000 in FY 1994 and possibly a shortfall as high as $ 25,000,000." Distribution of Fiscal Year 1994 Contract Support Funds, 58 Fed. Reg. 68,694, 68,694 (Dec. 28, 1993). It also reminded tribal contractors that the BIA "can only utilize the amount appropri-

ated for the [CSC] account to meet indirect cost needs." *Id.* Because of the projected shortfall, the BIA requested "a report showing the amounts provided to cover prior year shortfalls, the amounts and percentages funded for current year contracts and a revised detailed need request" from each area office. *Id.* The agency hoped to provide instructions "advising each area of the level to be applied to each contract," around May 1, 1994. *Id.*

Notices published for subsequent years similarly requested interim reports on CSC need at some point during the operative fiscal year. After receiving the reports, and well into the fiscal year for which funding was provided, the BIA would calculate the amount of the shortfall and provide CSC funding on a uniform, pro-rata basis. *See* Distribution of Fiscal Year 1995 Contract Support Funds, 59 Fed. Reg. 55,318 (Nov. 4, 1994); Distribution of Fiscal Year 1996 Contract Support Funds, 61 Fed. Reg. 16,106 (Apr. 11, 1996); Distribution of Fiscal Year 1997 Contract Support Funds, 62 Fed. Reg. 1468 (Jan. 10, 1997); Distribution of Fiscal Year 1998 Contract Support Funds, 63 Fed. Reg. 5398 (Feb. 2, 1998); Distribution of Fiscal Year 1999 Contract Support Funds, 64 Fed. Reg. 2658 (Jan. 15, 1999); Distribution of Fiscal Year 2000 Contract Support Funds, 65 Fed. Reg. 10,100 (Feb. 25, 2000); Distribution of Fiscal Year 2001 Contract Support Funds, 66 Fed. Reg. 15,275 (Mar. 16, 2001).

The Department of Interior appropriation for fiscal year 1995, for example, was passed on September 30, 1994, the last day of fiscal year 1994. The BIA requested initial reports of CSC need by December 1, 1994. Distribution of Fiscal Year 1995 Contract Support

Funds, 59 Fed. Reg. 55,318 (Nov. 4, 1994). After receiving these initial reports, the BIA disbursed 75 percent of the total amount reported. *Id.* It requested a second set of reports by July 10, 1995, and planned a final distribution of the remainder of CSC funds well into the fiscal year—"on or about July 31, 1995 [ten months into the fiscal year], on the basis of these reports." *Id.* "If the reports indicate that [the appropriated sum] will not be sufficient to cover the entire need, this amount will be distributed so that all offices receive the same percentage of their reported need for distribution at this same percentage." *Id.* The BIA funded 91.74 percent of the actual CSCs on each self-determination contract in fiscal year 1995. Between 1994 and 2004, the CSC funding rate ranged from 77 to 93 percent for each fiscal year.

C

Plaintiffs Ramah and the Oglala Sioux Tribe ("Oglala") are parties to long-term "mature" self-determination contracts of indefinite duration with the United States pursuant to the ISDA. *See* 25 U.S.C. § 450b(h). Like all self-determination contracts, plaintiffs' agreements expressly incorporate the ISDA. They further provide that the ISDA and "each provision of this contract shall be liberally construed for the benefit of the contractor." A section titled "FUNDING AMOUNT" states:

> Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the

> Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

The annual funding agreements ("AFAs"), incorporated by reference in the mature contracts, describe attachments containing "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." As their name implies, AFAs are renegotiated each year. Like the main self-determination contracts, AFAs include language discussing the availability of appropriations.

Ramah's 2000 AFA[2] sets out "Tentative FY 2000 Funding" for various programs and activities "using FY 99 funding levels." The AFA also uses a tentative indirect cost rate, adopting the last rate approved by the Office of Inspector General, which occurred in calendar year 1998.[3] The AFA explains:

> Indirect Cost rate[s] for Calendar Year 1999 and 2000 have not been completed yet with the Office of Inspector General. As of the date of submittal of this AFA, neither has the Chapter completed its Calendar Year 2000 Indirect Cost proposal. The last approved IDC rate was for CY 1998 at 86.4%. Based on this last approved rate, Ramah Navajo Chapter requests that the CY 1998 IDC negotiated final rate be

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[2] Oglala's AFAs are substantially similar.

[3] The indirect cost rate is distinct from the CSC funding rate. One, the indirect cost rate, is multiplied by the non-CSC contract amount to reach an estimate of indirect cost CSCs. *See Cherokee*, 543 U.S. at 635. The other, the CSC funding rate, is the percentage of total CSC need for which Congress actually appropriated funds.

used to temporarily fund IDC at 100% level. NOTE*: (Funding of the amount shall be subject to the availability of appropriation. . . .). As soon as funding has been appropriated and sub-allotted to the Ramah Navajo Agency, funds will be added to the AFA.

(i) Direct Contract Support Costs are to be negotiated within the first ninety, (90) days of the new contract term and shall be funded from the BIA's Indian Self-Determination Fund as soon as resources can be made available, but not later than September 30, 2000. The Contractor reserves the right to annually renegotiate its need for Direct Contract Support Costs in accordance with Sec. 106(a)(3)(B) of the Act [25 U.S.C. § 450j-1(a)(3)(B)]. Funding of the amount needed shall be subject to the availability of appropriations.

(ii) Outstanding Indirect Cost issues from past fiscal years which Ramah Navajo Chapter has not received will be subject to continuing discussion until resolved.

. . . .

. . . Funding for additional contract support costs shall be added to the AFA for the Contractor which includes Indian Self-Determination Fund direct and indirect type costs. The amount of Indirect Cost Funding shall be based upon the Contractor's Indirect Cost Agreement which is applicable to this period of performance.

As these provisions make clear, Ramah faced two levels of uncertainty at the time it entered into the AFA.

First, the indirect cost rate was subject to negotiation and approval by the Office of Inspector General, meaning that the amount of the contract was undetermined. Second, even after the amount of the AFA was finalized, the actual payment forthcoming from the BIA was unknown because the agency did not determine the CSC funding rate until the fiscal year was well underway. Ramah did not receive notice of the exact amount of contract funding until the last month of each fiscal year. As an accounting consultant to Ramah and Oglala describes it, this system "allowed one party to the contract, the government, to set the price after the service has been performed by the other party."

D

Ramah originally brought this class action in 1991 seeking to alter the manner in which the BIA calculated indirect cost rates. After this court held in favor of plaintiffs, *see Ramah Navajo Chapter*, 112 F.3d at 1455, the parties entered into several partial settlement agreements, *see Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303 (D.N.M. 2002); *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999). During these settlement negotiations, Oglala intervened as plaintiffs. The Pueblo of Zuni also intervened later in the proceedings.

This appeal arises from a motion for summary judgment filed by plaintiffs in February 2000, seeking a declaration that they are entitled to unpaid CSCs from fiscal year 1994 forward. Plaintiffs sought relief pursuant to the Contract Disputes Act, 41 U.S.C. §§ 601-13, after exhausting their administrative remedies. *See* 25 U.S.C. § 450m-1(d). The government cross-moved for summary

judgment, contending that its CSC obligation was dependent upon Congress appropriating funds sufficient to pay CSCs on every self-determination contract. These competing cross-motions were stayed pending the outcome of *Cherokee Nation of Oklahoma v. Thompson*, 311 F.3d 1054 (10th Cir. 2002), *rev'd sub nom. Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005).

After receiving supplementary briefing on the impact of *Cherokee*, the district court granted the government's motion. It held that "the United States is not liable for shortfalls in contract payments when Congress has specified an insufficient 'not to exceed' lump sum appropriation." Plaintiffs timely appealed.

II

We review the grant of summary judgment de novo. *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000). A party is entitled to summary judgment only if, viewing the evidence in the light most favorable to the non-moving party, the movant is entitled to judgment as a matter of law. *Id.*

A

In construing the statute at issue, we begin with its plain text. *See Chickasaw Nation v. United States*, 208 F.3d 871, 876 (10th Cir. 2000). "If the terms of the statute are clear and unambiguous, they are controlling absent rare and exceptional circumstances." *Id.* "We also take into account the broader context of the statute as a whole when ascertaining the meaning of a particular provision." *Conrad v. Phone Directories Co.*, 585 F.3d 1376, 1381 (10th Cir. 2009) (quotation omitted).

If a statute is ambiguous, we "look to traditional canons of statutory construction to inform our interpretation." *Id.* (citation omitted). One such canon is particularly important in this case: In deciding between two reasonable interpretations, "the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes. . . . The result, then, is that if the [Act] can reasonably be construed as the Tribe would have it construed, it must be construed that way." *Ramah Navajo Chapter*, 112 F.3d at 1462 (quotation and citations omitted). This canon, grounded in the trust relationship between the federal government and Indian tribes, applies with equal force to interpretations of contracts. *See* Felix S. Cohen, Handbook of Federal Indian Law 224-25 (1982 ed.) ("Statutes, agreements, and executive orders dealing with Indian affairs have been construed liberally in favor of establishing Indian rights. . . . These canons play an essential role in implementing the trust relationship between the United States and Indian tribes. . . . "). The ISDA, its legislative history, and the self-determination contracts at issue confirm the applicability of this canon to the present dispute. *See* 25 U.S.C. § 450*l*(c) (terms of model agreement included in all self-determination contracts provide that "each provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor" (model agreement § (a)(2))); S. Rep. No. 100-274, at 3 *reprinted in* 1988 U.S.C.C.A.N. at 2622 ("[F]ederal action toward Indians as expressed in treaties, agreements statutes, executive orders, and administrative regulations is construed in light of the trust responsibility.").

B

We are presented with competing interpretations of the phrase "subject to the availability of appropriations." The government argues that the phrase unambiguously limits the plaintiffs' entitlement to CSC funding to a pro rata share determined by multiplying individual CSC need by the ratio of total CSC appropriations to total CSC need. Plaintiffs contend that "availability" refers to the ability of the government to pay a particular tribe's CSCs, not its ability to pay all tribes' CSCs. Under this construction, the phrase voids the government's obligation on a given contract only if Congress fails to appropriate enough funds to pay that particular contract. In essence, the dispute asks whether we must take into account the Secretary's discretionary funding of other contractors in determining whether the appropriation is "available" for a particular contract.

The terms of the ISDA and the contracts do not definitively answer this question. The phrase "subject to the availability of appropriations" could refer, as the government urges, to whether Congress has appropriated sufficient funds to pay the aggregate of hundreds of self-determination contracts. This formulation would require a court to await an agency's allocation of an appropriation before determining whether funds are available. However, the phrase could also refer, as the tribes contend, to a limitation on an individual contract without reference to other self-determination contracts. Fortunately, although the statutory and contractual language does not dictate one party's position over the other, we do not write on a blank slate.

III

We begin with three principles set down by the Supreme Court. First, a "fundamental principle of appropriations law is that where 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." *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (quotation omitted). Second, there is no merit to the "claim that, because of mutual self-awareness among tribal contractors, tribes, not the Government, should bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay *all* contractors." *Cherokee*, 543 U.S. at 640 (citation omitted). Third, "if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment even if the agency has allocated the funds to another purpose or assumes other obligations that exhaust the funds." *Id.* at 641 (quotation omitted).

A

The first principle relevant to this dispute is that of unfettered agency discretion in distributing appropriations. "A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit." *Lincoln*, 508 U.S. at 192 (quoting *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984)). Although an agency may create ill will by ignoring congressional intent as expressed in legislative history, "[a]s long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives,

. . . the decision to allocate funds is committed to agency discretion by law." *Lincoln*, 508 U.S. at 193 (quotation omitted).

The Court's discussion of "permissible statutory objectives," *id.*, implicates the concept of legal availability. In *In re LTV Aerospace Corp.*, 55 Comp. Gen. 307 (1975), the Comptroller General explained the rule later adopted explicitly by the *Lincoln* Court, *see* 508 U.S. at 192, 193, by reference to this concept:

> If the Congress desires to restrict the availability of a particular appropriation . . . , such control may be effected by limiting such items in the appropriation act itself. . . . In the absence of such limitations an agency's lump sum appropriation is legally available to carry out the functions of the agency.

In re LTV Aerospace Corp., 55 Comp. Gen. at 319.[4]

The General Accounting Office describes "legal availability" as follows:

> [D]ecisions are often stated in terms of whether appropriated funds are or are not "legally available" for a given obligation or expenditure. This is simply another way of saying that a given item is or is not a legal expenditure. Whether appropriated funds are legally available for something depends on three things:
>
> 1. the purpose of the obligation or expenditure must be authorized;

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[4] Comptroller General opinions are not binding, but provide "expert opinions, which we should prudently consider." *Cherokee Nation*, 334 F.3d at 1084 (quotation omitted).

> 2. the obligation must occur within the time limits applicable to the appropriation; and
>
> 3. the obligation and expenditure must be within the amounts Congress has established.

1 U.S. Gen. Accounting Office, Principles of Federal Appropriations Law 4-6 (3d ed. 2004) (the "GAO Redbook").[5]

The import of *Lincoln* to the case at bar is that the Secretary was free to disburse the funds appropriated by Congress in any manner the Secretary chose, provided that the funds were legally available for the expenditures chosen. Thus, for example, the Secretary could have provided CSC funding on a first-come, first-served basis, covering the entire CSC need for those tribes and tribal organizations with the oldest contracts.

Similarly, the Secretary could have selected those contracts that covered the most essential services and paid full CSC need to those contractors. And of course, the Secretary's chosen course of action, disbursing a pro-rata share to all contractors, was permissible because the funds were legally available to be used on CSCs.

We recognize that a divided panel of the D.C. Circuit ruled that the ISDA requires pro-rata funding in the event of limited appropriations. *See Ramah Navajo*

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[5] Like Comptroller General opinions, the GAO Redbook is not binding but offers persuasive agency analysis. *See Star-Glo Assocs., LP v. United States*, 414 F.3d 1349, 1354 (Fed. Cir. 2005) ("In considering the effect of appropriations language both the Supreme Court and this court have recognized that the General Accounting Office's publication, Principles of Federal Appropriations Law (hereinafter the 'GAO Redbook') provides significant guidance." (citations omitted)).

School Board v. Babbitt, 87 F.3d 1338, 1349 (D.C. Cir. 1996). Although the panel majority is somewhat opaque, it appears to hold that pro rata distribution is required because full funding of individual CSCs is mandated when Congress appropriates enough funds to cover all contracts. *See id.* at 1348 ("[T]he Act informs the Secretary exactly how the full funding should be allocated, and that method provides a meaningful standard by which to review the Secretary's dissemination of the *insufficient* funds as well."). We are not persuaded by this reasoning.

The ISDA text simply states that "[t]he Secretary shall add to the contract the full amount of" CSCs, and that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization." 25 U.S.C. § 450j-1(b), (g). To hold that these provisions unambiguously require pro rata funding if Congress fails to provide enough money to pay all CSCs stretches the statutory text far beyond its breaking point. Although a pro rata distribution is attractive as a Solomonic solution to the problem of a statutory mandate and budgetary limitations, viewing it as a requirement runs afoul of *Lincoln*. *See* 508 U.S. at 193.

The dissent in *Ramah Navajo School Board* provides a far more compelling treatment of the issue. It cites *Lincoln* for the proposition that "requiring close adherence to a 'formula' is flatly improper where the Secretary has express statutory discretion over the allocation of a fund." *Ramah Navajo Sch. Bd.*, 87 F.3d at 1355 (Silberman, J., dissenting). Because the ISDA provides no statutory guidance in the event that appropriations fall below total CSC need, *Lincoln* stands for the propo-

sition that the Secretary has "unreviewable discretion" in allocating the funds. *Ramah Navajo Sch. Bd.*, 87 F.3d at 1355 (Silberman, J., dissenting). With respect to 25 U.S.C. § 450j-1(b), which states that the Secretary is not required to reduce funding to one tribe to pay another, the dissent points out that the Secretary *necessarily* takes from one tribe to pay another whenever funding falls short of total need regardless of the selected allocation method. "Obviously, anytime the Secretary is asked to increase his proposed funding for one or more tribes out of a limited appropriation, he necessarily must reduce funding for the rest. There is no escaping the zero sum game." *Ramah Navajo Sch. Bd.*, 87 F.3d at 1354 (Silberman, J., dissenting).

We agree with the *Ramah Navajo School Board* dissent: "the Secretary is under no legal obligation in the event of a shortfall to meet any particular ratio of distribution among the tribes." *Id.* at 1353 (Silberman, J., dissenting).

B

The second concept key to our disposition can be simply stated, but is too easily ignored: The tribes and tribal contractors with ISDA contracts are independent entities with independent rights and entitlements. There are over 600 tribes and tribal entities with self-determination contracts, ranging from small Alaskan villages to the immense Navajo Nation, and including tribal consortiums such as the Great Lakes Indian Fish and Wildlife Commission. They are not a single conglomerated entity simply because each lays claim to a portion of the same appropriation any more than all fed-

eral highway contractors represent a single, undifferentiated mass.

In *Cherokee*, the Supreme Court roundly rejected the government's "claim that, because of mutual self-awareness among tribal contractors, tribes, not the Government, should bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay *all* contractors." *Cherokee*, 543 U.S. at 640 (citation omitted). In rejecting this argument, the Court cited *Ferris v. United States*, 27 Ct. Cl. 542 (1892), a venerable Court of Claims opinion which sets forth the traditional rule regarding the effect of insufficient appropriations:

> 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. An appropriation per se merely imposes limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.

Id. at 546 (citing *Dougherty v. United States*, 18 Ct. Cl. 496 (1883)). *Dougherty*, the case upon which *Ferris* relies, explained the salient distinction between multicontract appropriations and single-contract appropriations:

> [W]hen one contract on its face assumes to provide for the execution of all the work authorized by an appropriation, the contractor is bound to know the amount of the appropriation, and cannot recover beyond it; but we have never held that persons con-

> tracting with the Government for partial service under general appropriations are bound to know the condition of the appropriation account at the Treasury or on the contract book of the Department. To do so might block the wheels of the Government. The statutory restraints in this respect apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the Government.

Dougherty, 18 Ct. Cl. at 503 (citation omitted).

The distinction identified in *Dougherty* remains valid; we now generally refer to appropriations as falling into one of two categories: line-item or lump-sum. "A *lump-sum appropriation* is one that is made to cover a number of specific programs, projects, or items. (The number may be as small as two.) In contrast, a *line-item appropriation* is available only for the specific object described." 2 GAO Redbook at 6-5; *see also id.* at 6-6 ("[A] lump-sum appropriation is simply one that is available for more than one specific object.").

It may be tempting to consider all tribes' claims to an appropriation collectively, to view tribal self-determination contract funds as a single line-item appropriation, and to assume that because funds were insufficient to pay all tribal contractors they were unavailable to each contractor, but *Cherokee*, *Ferris*, and *Dougherty* prohibit such analytical shortcuts.

C

Finally, we must consider *Cherokee*'s guidance that "if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment even if the agency has allocated the funds to another purpose or assumes other obligations that exhaust the funds." 543 U.S. at 641 (quotation omitted).

In *Cherokee*, the Court considered an issue nearly identical to that under review: the *Cherokee* plaintiffs sought to collect CSC payments for contracts funded by appropriations that lacked an annual cap. The government took the position that "it is legally bound by its promises if, and only if, Congress appropriated sufficient funds, and that, in this instance, Congress failed to do so." 543 U.S. at 636. Plaintiffs countered that "as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of 'insufficient appropriations.'" *Id.* at 637. This is true, they argued, "even if the contract uses language such as 'subject to the availability of appropriations,' and even if an agency's total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made." *Id.*

The Court agreed with plaintiffs, quoting the *Ferris* rule. *Cherokee*, 543 U.S. at 637-38 (quoting *Ferris*, 27 Ct. Cl. at 546). It noted that the ISDA "reflects a congressional concern with Government's past failure adequately to reimburse tribes' indirect administrative costs and a congressional decision to require payment of those costs in the future." *Cherokee*, 543 U.S. at 639.

Turning to the "subject to the availability of appropriations" language, the Court stated:

> Language of this kind is often used with respect to Government contracts. This kind of language normally makes clear that an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become binding unless and until Congress appropriates funds for that year. It also makes clear that a Government contracting officer lacks any special statutory authority needed to bind the Government without regard to the availability of appropriations.

Id. at 643 (citations omitted).

Relying on *Ferris*, the Court held that the "subject to the availability of appropriations" language did not help the government "[s]ince congress appropriated adequate unrestricted funds here." *Cherokee*, 543 U.S. at 643. It rejected the government's argument that appropriations were "unavailable to pay contract support costs because the Government had to use those funds to satisfy . . . the costs of inherent federal functions, such as the cost of running the Indian Health Service's central Washington office." *Id.* at 641-42 (quotation omitted). "This argument cannot help the Government," the Court determined, "for it amounts to no more than a claim that the agency has allocated the funds to another purpose, albeit potentially a very important purpose." *Id.* at 642.

Cherokee accordingly held that an agency's decision to allocate legally available funds to some other permissible purpose does not render an appropriation unavailable with respect to an ISDA contract.

IV

In light of the foregoing principles, there are two potential interpretations of the effect of the "subject to the availability of appropriations" proviso. The first option would be to hold that funds are unavailable to an individual ISDA contractor because the Secretary spent to the CSC cap. In other words, the availability of appropriations would be determined *after* the Secretary, under his discretion, allocated CSC appropriations, and thus availability would turn on the Secretary's decisions. Under this interpretation, as long as the Secretary spends to the CSC cap, the Secretary may determine whether and to what extent the appropriation is available for each individual contractor.

Our second option would be to hold that the availability of appropriations to fund a specific contract must be determined without reference to the Secretary's discretionary allocation. If an appropriation is legally available to fund a particular contract, then the "subject to the availability of appropriations" condition is satisfied with respect to that contract. On this reading, each tribe is bound only by congressional funding choices as to its contract, not by the Secretary's allocation choices.

We conclude that the latter interpretation is reasonable and most consistent with *Cherokee*.

A

The appropriations at issue in *Cherokee* and those under consideration in this case share important characteristics. First, they are lump-sum appropriations because they were "made to cover a number of specific programs, projects, or items." 2 GAO Redbook at 6-5.

As the GAO Redbook discusses, the Comptroller General has applied this interpretation of "lump-sum" even when an appropriation covers only two, closely- related items.[6] The key legal principle applicable to lump-sum appropriations is that "as long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives," federal law "gives the courts no leave to intrude. To that extent, the decision to allocate funds is committed to agency discretion by law." *Lincoln*, 508 U.S. at 193 (quotations and alteration omitted). In *Cherokee*, the lump-sum appropriation included the entire budget for the Department of the Interior; in this case, it includes the CSCs for more than 600 contracts.

Second, although the appropriations under consideration in this case explicitly cap a category of spending (CSCs), the appropriations at issue in *Cherokee* did the same. Unlike the "not to exceed" language regarding CSCs, *e.g.*, tit. I, 108 Stat. at 2511, the appropriations considered in *Cherokee* provided that a certain amount was appropriated "[f]or expenses necessary to carry out" various programs, *e.g.*, tit. II, 107 Stat. at 1408. But

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[6] In *Newport News Shipbuilding & Dry Dock Co.*, 55 Comp. Gen. 812 (1976), the Comptroller General concluded that an appropriation covering expenditures for only two ships constituted a lump-sum expenditure. *Id.* at 821-22. According to the GAO,

> [t]he terms "lump-sum" and "line-item" are relative concepts. The $244 million appropriation in the *Newport News* case could be viewed as a line-item appropriation in relation to the broader "Shipbuilding and Conversion" category, but it was also a lump- um appropriation in relation to the two specific vessels included. *This factual distinction does not affect the applicable legal principle.*

2 GAO Redbook at 6-15 (emphasis added).

in both instances, the legal effect of the language is to cap appropriations for the authorized expenditures at a certain level. "Words like 'not more than' or 'not to exceed' are not the only ways to establish a maximum limitation. If the appropriation includes a specific amount for a particular object (such as 'for renovation of office space, $100,000'), then the appropriation establishes a maximum that may not be exceeded." 2 GAO Redbook 6-29 (citing 36 Comp. Gen. 526 (1957); 19 Comp. Gen. 892 (1940); 16 Comp. Gen. 282 (1936)).

Third, with respect to the availability of the appropriations, the government argues as it did in *Cherokee* that the appropriation is not available because the funds were exhausted by other objects for which the appropriation was legally available. In *Cherokee* the government claimed that it could not pay full CSC need to the Shoshone-Paiute and Cherokee Nation because "the costs of inherent federal functions, such as the cost of running the Indian Health Service's central Washington office," 543 U.S. at 641-42 (quotation omitted), had consumed the appropriation. In the present case, the government contends it cannot pay full CSC need to Ramah, Oglala, and Pueblo of Zuni because CSC payments to other tribes have used up the entire appropriation.

But the Supreme Court rejected this argument in *Cherokee*, deeming the government's position "no more than a claim that the agency has allocated the funds to another purpose, albeit potentially a very important purpose." *Id.* at 642. As the Court made clear, "if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment even if the agency has allocated the funds to another

purpose or assumes other obligations that exhaust the funds." *Id*. at 641 (quotation omitted).

The government does not advance a compelling argument suggesting the result in this case must be different. It notes that Congress capped *total* CSC spending, but this does not explain why Ramah, Oglala, Pueblo of Zuni, or any one contractor could not be paid full CSC need. In *Cherokee*, the Court rejected the argument that the Secretary's discretionary allocation of funding for objects for which an appropriation was legally available rendered the appropriation unavailable for other objects. *See* 543 U.S. at 641. Yet that is precisely the argument advanced by the government. In both instances, the government claims that an appropriation is unavailable for a particular plaintiff's contract because the Secretary used the funds on other permissible expenditures.[7] The other expenditures at issue in *Cherokee* were less similar to the plaintiffs' contracts than the other expenditures in this case. But nothing in *Cherokee* suggests that the similarity between two objects for which an appropriation is legally available controls the issue under consideration, nor do we see a basis in logic for treating such similarity as dispositive.[8] The govern

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[7] Although, in contrast to *Cherokee*, the other permissible expenditures in this case are also statutorily mandated, *see* 25 U.S.C. § 450j-1(a)(2), the government cannot escape liability for one mandatory expenditure by appealing to its obligation to pay another without rendering the term "mandatory" meaningless.

[8] Although the dissent takes issue with our interpretation of *Cherokee*, it does not provide a meaningful distinction between the present situation and that considered by the Supreme Court in that case. (*See* Dissenting Op. 32-36.) It notes that the appropriations here are insufficient to cover all ISDA contracts, but the funds in *Cherokee* were

ment focuses on the *Cherokee* Court's use of the term "unrestricted appropriation," but we read this phrase as referring to restrictions that would render funds legally unavailable to pay the plaintiff's specific contracts. In this case, as in *Cherokee*, there is no statutory restriction that would preclude the Secretary from using appropriated funds to pay full CSC need to the individual contractors bringing suit.

The government also cites the ISDA's language that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this [Act]." § 450j-1(b). But as discussed in Section III.A, *supra*, the Secretary always reduces funding from one tribe to pay another when appropriations fall short of total CSC need. Under the present pro rata system, each tribe's CSC funding is reduced by a certain percentage and made available to other tribes. The appropriations acts under consideration plainly required

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similarly insufficient to cover all objects for which the appropriation was available.

The dissent suggests that our interpretation must be incorrect because the *Cherokee* Court might have avoided some of the government's arguments more easily otherwise. (Dissenting Op. 33.) But the Court's selection of one doctrinal path does not lend itself to the inference that all other paths to the same result are infirm. "The authority of the case cannot properly be overthrown by showing, even if it could be shown, that the court might have reached the same result upon some other ground than that which in truth it adopted as the basis of its decision." *Union Tank Line Co. v. Wright*, 249 U.S. 275, 293 (1919) (Pitney, J., dissenting); *see also United States v. Mitchell*, 271 U.S. 9, 14 (1926) ("It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have been raised and considered.").

such reductions regardless of the discretionary decisions made by the Secretary. "There is no escaping the zero sum game." *Ramah Navajo Sch. Bd.*, 87 F.3d at 1354 (Silberman, J., dissenting).[9]

At base, the government's argument rests on an improper conflation of over 600 tribes and tribal contractors into one amalgamated contractor. For example, it argues that "in the face of a congressionally-capped appropriation, the agency simply could not lawfully pay plaintiffs the full amount of their CSCs." But this is incorrect. The Secretary possessed the discretion to pay any individual plaintiffs full CSC need. For example, in fiscal year 1998, Congress appropriated "not to exceed $105,829,000" for CSCs. Tit. I, 111 Stat. at 1554. The largest individual CSC entitlement that year was less than $14 million, and the second largest was under $4 million. It appears the government is relying on the fact that the appropriations were insufficient to pay all contractors, but as *Cherokee* held, there is no merit to the "claim that, because of mutual self-awareness among tribal contractors, tribes, not the Government, should bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay *all* contractors." 543 U.S. at 640 (citation omitted).

Ferris and *Dougherty* provide a bright-line formula that avoids uncertainty in government contracting: If more than one contractor is covered by an appropriation, the failure to appropriate funds sufficient to pay *all* such contractors does not relieve the government of lia-

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[9] Although the dissent relies on this provision for its contrary interpretation, it does not grapple with the fact that § 450j-1(b) is necessarily violated whenever Congress appropriates less than total CSC need. (*See* Dissenting Op. 32-33.)

bility. As *Dougherty* held, determining whether liability attaches based on such unfettered discretion in the disbursing agent sows uncertainty among contractors that could "block the wheels of the Government." 18 Ct. Cl. at 503. Instead of considering the discretionary actions of the disbursing agency, the availability of appropriations is determined by congressional action. As the Supreme Court explained in *Cherokee*, by signing contracts "subject to the availability of appropriations," the tribes agreed "that the contract will not become binding unless and until *Congress* appropriates funds for that year." 543 U.S. at 643 (emphasis added). In other words, the tribes agreed to be bound by congressional funding choices. But government contractors do not agree to be bound by the allocation choices of the disbursing agency or the contracts formed with other tribes and tribal entities

No case cited by the government contravenes the *Ferris*/*Dougherty* doctrine. Although the government relies upon several cases in which the government escaped liability, each involved a single-contract appropriation. *See Sutton v. United States*, 256 U.S. 575, 577-79 (1921) ($20,000 appropriation for a specific dredging project proved insufficient to pay the sole contractor); *Bradley v. United States*, 98 U.S. 104, 111-12 (1878) (line-item appropriation to pay lease for a post office); *Shipman v. United States*, 18 Ct. Cl. 138, 146 (1883) (single contractor appropriation for a road project which specified "that the work to be done and the materials to be furnished under this agreement shall be restricted to the amount allowed by Congress for this purpose" (emphasis omitted)).

We are also cognizant of the close parallel between the plaintiffs' interpretation of the phrase "subject to the availability of appropriations," and the well-established concept of legal availability. *See* 1 GAO Redbook at 4-6. Legal availability does not depend on the appropriation of funds sufficient to cover all similar expenditures. The GAO Redbook does not ask whether total obligations and expenditures are within congressionally established limits, it asks whether "the obligation and expenditure" at issue is "within the amounts Congress has established." *Id.* The Court's acceptance of the Cherokee Nation's understanding of appropriations law strongly supports this construction: "as long as Congress has appropriated *sufficient legally unrestricted funds to pay the contracts at issue*, the Government normally cannot back out of a promise to pay on grounds of 'insufficient appropriations,' even if the contract uses language such as 'subject to the availability of appropriations.'" *Cherokee*, 543 U.S. at 637 (emphasis added).

Newport News illustrates this point. That case considered the amount that was legally available for construction of a certain ship, the DLGN 41. The Navy requested $152.3 million for the ship, and $92 million for a second ship, the DLGN 42. *Newport News*, 55 Comp. Gen. at 816. Congress appropriated the full amount, $244.3 million, without specifying the breakdown between the two ships. *Id.* The Navy subsequently authorized an expenditure of $30.4 for the DLGN 42. *Id.* Despite the apparent intent of subdividing the expenditure between the two ships, and the fact that the Navy had already authorized a portion of the funds to be used on the DLGN 42, the Comptroller General held that the

entire $244.3 million was legally available for the DLGN 41. *Id.* at 821.

This result could not have occurred if the concept of legal availability depended on the sufficiency of an appropriation to cover all expenditures authorized by it; money spent on the DLGN 42 obviously cannot also be spent on the DLGN 41. But the federal courts have consistently guarded the integrity of the federal contracting system by holding that the insufficiency of a multi-contract appropriation to pay all contracts does not relieve the government of liability if the appropriation is sufficient to cover an individual contract. *See Ferris*, 27 Ct. Cl. at 546; *Dougherty*, 18 Ct. Cl. at 503.

B

The Federal Circuit, recently considering the same issue we confront, concluded that a plaintiff in the same position as Ramah, the Arctic Slope Native Association ("ASNA"), could not recover unpaid CSCs because the "availability of funds provision coupled with the 'not to exceed' language limits the Secretary's obligation to the tribes to the appropriated amount." *Arctic Slope Native Ass'n v. Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010).[10] The court recognized the plaintiff's argument that the government's liability remained "because the total appropriation is sufficient to satisfy the obligation to the [plaintiff], even though insufficient to satisfy the combined obligations to all the tribes," *id.* at 1303, but as the foregoing quote demonstrates, it nevertheless analyzed the issue as the Secretary's ability to pay *all* contrac-

[10] Following publication of this opinion, we requested supplemental briefing from the parties.

tors, discussing only the "Secretary's obligation to the *tribes*," *id.* at 1304 (emphasis added).

Rather than answering the question of whether the availability of appropriations must be considered from the perspective of individual tribes and tribal contractors, the Federal Circuit's analysis presumes from the outset that the answer is no. The court distinguishes *Cherokee* on the ground that "here there is a statutory cap and no ability to reallocate funds." *Arctic Slope Native Ass'n*, 629 F.3d at 1304. But this assertion only begs the question. Although it is true that the Secretary cannot reprogram funds from a more general appropriation once the CSC funding cap is reached, it is equally true that the Secretary was empowered to fund all of ASNA's CSCs by reallocating away from other contractors. In the same vein, the court concluded that the appropriations were not available to ASNA because "the appropriated amount has been paid to the tribes." *Id.* But ASNA's full CSC need was legally available to be paid from the relevant appropriations. Whether those funds were paid to "the tribes" does not tell us whether ASNA was entitled to payment.[11]

The Federal Circuit briefly discusses the ISDA's statement that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization." *Arctic Slope Native Ass'n*, 629 F.3d at

[11] The dissent replicates this error. It would hold that Ramah's contractual obligation depends on "the availability of sufficient appropriations to pay for contract support costs on *all* the Secretary's ISDA contracts." (Dissenting Op. 28 (emphasis added).) But this is precisely the theory of "mutual self-awareness among tribal contractors" rejected in *Cherokee*. 543 U.S. at 640.

1304 (quoting 25 U.S.C. § 450j-1(b)). But the court does not grapple with the logical impossibility of complying with this provision in the event of insufficient funding. *See Arctic Slope Native Ass'n*, 629 F.3d at 1304-05. Regardless of the manner in which the Secretary chooses to allocate less than full CSC funding among the tribes and tribal contractors, some tribes will be paid at the expense of others. *See Ramah Navajo Sch. Bd.*, 87 F.3d at 1354 (Silberman, J., dissenting). That is, the plaintiffs' preferred allocation method and the government's pro rata method result in exactly the same level of compliance with § 450j-1(b).

Arctic Slope Native Association also attempts to distinguish *Ferris* because the *Ferris* contract did not include a "subject to the availability of appropriations clause." *Arctic Slope Native Ass'n*, 629 F.3d at 1303-04. The Federal Circuit concluded that this clause was inserted into contracts to overcome the rule of *Ferris*. *Arctic Slope Native Ass'n*, 629 F.3d at 1303. This conclusion is curious in light of the Supreme Court's repeated citations to *Ferris* in *Cherokee*. *See* 543 U.S. at 637, 640, 641, 643. In particular, we cannot square the Federal Circuit's conclusion with the Court's reliance on both *Ferris* and *Lincoln* for the proposition that "if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment even if the agency has allocated the funds to another purpose or assumes other obligations that exhaust the funds." *Cherokee*, 543 U.S. at 641 (quotation omitted, citing *Lincoln*, 508 U.S. at 192; *Ferris*, 27 Ct. Cl. at 546). By citing *Lincoln*'s discussion of unfettered agency discretion in allocating an appropriation among objects for which an appropriation is legally available, 508 U.S. at

192, and *Ferris*'s rule that a "contractor who is one of several persons to be paid out of an appropriation" cannot have "his legal rights . . . affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects," 27 Ct. Cl. at 546, the Court strongly suggested that the Ferris rule applies to lump sum appropriations even if the contracts for which the appropriation is legally available contain "subject to the availability of appropriations" clauses.[12]

Finally, we note that *Arctic Slope Native Association* suggested a third potential general rule regarding the effect of "subject to the availability of appropriations" clauses with respect to lump-sum appropriations. *See Arctic Slope Native Ass'n*, 629 F.3d at 1305 n.8. The court cites *Winston Bros. Co. v. United States*, 130 F. Supp. 374 (Ct. Cl. 1955), a Court of Claims trial court decision which held "where the agency authorized to spend the appropriation allocates the funds on a rational and non-discriminatory basis and they prove insufficient, the Government is not liable for harm resulting from the shortage." *Id.* at 380. Under this interpretation, an agency's disbursement of a lump-sum appropriation could render an appropriation unavailable, but only if the agency's allocation is not irrational or discrimina-

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[12] One other circuit decided the issue presented in the same manner as the Federal Circuit. *See Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1345 (D.C. Cir. 1996). And the Federal Circuit previously held consistently with *Arctic Slope Native Association*. *See Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1378 (Fed. Cir. 1999). Both of these prior cases, however, predate *Cherokee*, and neither mentions *Ferris*. Because neither case contains a persuasive analysis of *Cherokee* or *Ferris*, which are strongly probative if not controlling, and because the reasoning in those cases is very similar to that of *Arctic Slope Native Association*, we do not address them separately.

tory. But as the Federal Circuit seemed to recognize, *Arctic Slope Native Ass'n*, 629 F.3d at 1305 n.8, such an interpretation is flatly inconsistent with *Lincoln*'s holding that an agency's discretionary allocation of a lump-sum appropriation is non-reviewable. 508 U.S. at 191-92.

V

For the foregoing reasons, we conclude that a "subject to the availability of appropriations" clause frees the government of liability only when congressional decisions standing alone—not discretionary agency actions—make funds unavailable for a specific contract. As the *Cherokee* Court made clear, we must be hesitant to stray from the usual definition of "subject to the availability of appropriations" without very good reason. It is "important to provide a uniform interpretation of similar language used in comparable statutes, lest legal uncertainty undermine contractors' confidence that they will be paid, and in turn increase the cost to the Government of purchasing goods and services." *Cherokee*, 543 U.S. at 644. Nevertheless, in exceptional cases, courts have given the phrase unique import. In *Blackhawk Heating & Plumbing Co. v. United States*, 224 Ct. Cl. 111 (1980), the court was faced with one such "convincing argument for a special, rather than ordinary, interpretation," *Cherokee*, 543 U.S. at 644.

In *Blackhawk*, the government and plaintiff entered into a settlement agreement intended to resolve disputed claims with respect to the construction of a Veterans Administration hospital. 224 Ct. Cl. at 115-16. As is common, the government's obligation was made "contingent upon the availability of appropriated funds from

which payment in full can be made." *Id.* at 118. Unlike the case at bar, however, the government presented substantial evidence regarding the negotiation of the agreement, and the parties' understanding of specific terms. The parties and their attorneys engaged in several discussions of the above-quoted contingency, and at the execution of the settlement agreement, the government's attorney explained that "if there were an affirmative action by the Congress that would prevent the Administrator from paying," the government's obligation would not attach. *Id.* at 120. The plaintiff shrugged and signed the agreement. *Id.* Later, Congress did take affirmative action to prevent payment of a portion of the settlement agreement. *Id.* at 123. Based on the powerful parol evidence of the parties' intent, the court interpreted the ambiguous contingency term to free the government from liability. *Id.* at 134.

In *Arctic Slope Native Association*, the Federal Circuit cited another case in which a court deviated from the traditional rule: *C. H. Leavell & Co. v. United States*, 530 F.2d 878 (Ct. Cl. 1976). *See Arctic Slope Native Ass'n*, 629 F.3d at 1303. That case considered a contract with a lengthy appropriations condition that, like *Blackhawk*, may have provided a reason to stray from the general rule. The contract at issue in *C. H. Leavell* contained a subsection (b) indicating that "[f]rom funds heretofore appropriated, the sum of $ 75,000.00 is available for payments to the Contractor." 530 F.2d at 894. It further stated:

> [if] it becomes apparent to the Contracting Officer that the balance of this allocation and any allocation for this and any subsequent fiscal years during the period of this contract is less than that required to

> meet all payments due and to become due the Contractor because of work performed or to be performed under this contract, the Contracting Officer may provide additional funds for such payments if there be funds available for such purpose. The Contractor will be notified in writing of any additional funds so made available. However, it is distinctly understood and agreed that the amount of funds stated in (b) above is the maximum amount the Government insures will be available during the current fiscal year and the Government is in no case liable for payments to the Contractor beyond this amount prior to having notified the Contractor in writing of any additional funds that can be made available. Accordingly, no progress schedule will be approved . . . which contemplates progress requiring funds in excess of the amounts stated to be available in (b) above for the current fiscal year and no progress schedule will be approved for any ensuing fiscal year which contemplates progress requiring funds in excess of the amount allocated by the Contracting Officer from funds subsequently made available.

Id. The *C. H. Leavell* contract may have conditioned the contractor's entitlement on the discretionary decisions made by the contracting officer based on the repeated references to the officer's allocations. In this case, the government does not point to any language suggesting the plaintiffs agreed to be bound by the Secretary's choices.

Indeed, the government does not identify any compelling factors that would militate in favor of straying from the usual rule here. Nothing in the self-determination contracts or the AFAs that appear in the

record unambiguously dictate the government's position; they merely repeat the phrase "subject to the availability of appropriations," or similar terms such as "subject to the availability of funding." One provision in the 2001 AFA requires Oglala to bill the BIA in an amount discounted by the actual CSC funding rate. But this provision is nothing more than an acknowledgment that the BIA would not provide full funding in that year, not an indication that the tribes were agreeing to limit the government's liability.[13]

The Ramah 2000 AFA is more illuminating. It includes an explicit acknowledgement that whether the tribe would receive funding for prior years' shortfalls was an open question. By 2000 and 2001, the Oglala and Ramah contractors knew the BIA would not pay their costs in full during the relevant fiscal year, but as a Ramah plaintiff representative explained by affidavit, her tribe "always understood that the contract amount represents an entitlement under the Self-Determination Act, even if payment is delayed until Congress makes the necessary appropriation." Unlike the shrug of the shoulders by the contractor in *Blackhawk*, Ramah has been vigorously shaking its head for over a decade now.[14]

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[13] Perhaps even this much cannot be read into the billing provision. The most logical reading is that it is simply referring to the 75 percent to be paid up front by the BIA, established earlier in the agreement. The earlier reference is followed by the promise that the "balance of funds will be added as soon as it becomes available subject to congressional appropriation."

[14] The dissent repeatedly suggests that the tribes knew or should have known that they would not receive full CSC funding. (Dissenting Op. 28, 29, 32.) The former contention is contradicted by tribal officials' statements in the record. The latter is unsupportable in light of the

The government also argues that *Cherokee* is distinguishable from this case and a "special" reading is required because Congress indicated its intent to underfund CSCs across the board. *See Cherokee*, 543 U.S. at 634 ("The Government refers to legislative history, but that history shows only that Executive Branch officials would have liked to exercise discretionary authority to allocate a lump-sum appropriation too small to pay for all the contracts that the Government had entered into; the history does not show that Congress granted such authority." (citation omitted)). The government contends that, here, the allocation of too small a lump-sum to fund all CSCs was an affirmative act by Congress indicating its intent to curtail full payment of valid CSCs. Although the legislative history suggests some congressional concern with the growth of CSCs,[15] *see* H.R. Conf. Rep. No. 103-299, at 28, the inference drawn by the government is too weak to overcome the strong preference for giving words a consistent meaning in order to ensure stability of government contracting. *See Cherokee*, 543 U.S. at 644; *Dougherty*, 18 Ct. Cl. at 503.

This is particularly true in light of the canons discussed *supra*. The traditional rule is that parties are presumed to contract with knowledge of existing law. *See, e.g., In re Doctors Hosp. of Hyde Park, Inc.*, 337 F.3d 951, 959 (7th Cir. 2003); *Williams v. Stone*, 109 F.3d 890, 896 (3d Cir. 1997); *Storts v. Hardee's Food*

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principles of appropriations and contracts law discussed herein.

[15] For an investigation into the efficiency of tribal utilization of CSCs, *see* Bureau of Indian Affairs and National Congress of American Indians, Report of the BIA/Tribal Work Group on Tribal Need Assessment (June 1999).

Sys., Nos. 98-3285 & 98-3320, 2000 U.S. App. LEXIS 6307, at *45 (10th Cir. Apr. 6, 2000) (unpublished); *Gen. Accident Ins. Co. v. First Nat'l Bank & Trust Co. of Tulsa*, Nos. 90-5259 & 91-5009, 1993 U.S. App. LEXIS 26789, at *13 (10th Cir. Oct. 12, 1993) (unpublished). The reasonableness of the expectations of the parties must be viewed in light of the trust doctrine and the canon in favor of the tribes' construction, the *Ferris* rule, the traditional meaning of "legal availability," and the *Cherokee* Court's interpretation of identical language. We hold that the tribes' interpretation of the contracts and the statute is quite reasonable.

VI

Lastly, we address the government's appeal to the Appropriations Clause and the Anti-Deficiency Act. The Anti-Deficiency Act provides:

> An officer or employee of the United States Government . . . may not—
>
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or]
>
> (B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. . . .

31 U.S.C. § 1341(a)(1). The government claims that these provisions bar the Secretary from paying total CSCs, and that they strip the United States of liability to individual contractors above the contractor's pro rata share. We agree with the first proposition, but disagree with the second.

As to liability, the ISDA permits the Secretary to enter into self-determination contracts prior to Congress appropriating funds, although the contracts are made subject to the availability of appropriations. The statute explicitly provides that "[t]he 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." 25 U.S.C. § 450f(a)(1). The ISDA further states that "the provision of funds under this Act is subject to the availability of appropriations." § 450j-1(b). The model contract portion of the ISDA, § 450*l*, indicates that self-determination contracts "become effective upon the date of the approval and execution by the Contractor and the Secretary," and repeats the "[s]ubject to the availability of appropriations" language with respect to funding amount. *Id.* (model contract § (b)(2), (4)).

Reading these provisions together, it is clear that the Secretary is "authorized by law" to "involve [the] government in a contract or obligation for the payment of money before an appropriation is made." 31 U.S.C. § 1341(a)(1)(B). The "subject to the availability of appropriations" language would be rendered meaningless unless the contract was signed prior to congressional appropriations. Of course, the United States' liability is made contingent upon the availability of appropriations, but as discussed above, that condition was satisfied in each of the years at issue because Congress appropriated enough funds to pay CSCs on any individual contract. *See* Part IV, *supra*.

We agree with the government that the appropriations bills prohibit the Secretary from paying the sum

total of all CSCs from the agency appropriations. But the United States' liability is not coterminous with the Secretary's ability to pay. As explained in *Dougherty*, the Anti-Deficiency Act restrains "the official, but [it does] not affect the rights in this court of the citizen honestly contracting with the Government." 18 Ct. Cl. at 503 (citing the original Anti-Deficiency Act, Rev. Stat. § 3679).

This brings us to the Appropriations Clause, which states: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. 1, § 9, cl. 7. If the plaintiffs' CSCs cannot be paid from the annual agency appropriations, the government argues, how can plaintiffs collect without violating the Appropriations Clause? The answer is straightforward: By recovering from the Judgment Fund established pursuant to 31 U.S.C. § 1304. *See* 25 U.S.C. § 450m-1(d) (Contracts Disputes Act applies to self-determination contracts); 41 U.S.C. § 612 (a) (judgments arising under Contract Disputes Act paid from Judgment Fund).

The government contends that Congress could not have intended this inefficient system of compensation. On one level, it is true that Congress likely did not intend to pay CSCs from the Judgment Fund. But we must consider the legal effect of Congress' intentional acts, and those acts compel the result. Congress passed the ISDA, guaranteeing funding for necessary CSCs, and its appropriations resulted in an on-going breach of the ISDA's promise. The Court in *Cherokee* recognized the possible remedy urged by plaintiffs, noting that agencies faced with insufficient appropriations must sometimes exhaust the appropriation and "leav[e] the

contractor free to pursue appropriate legal remedies [including the Judgment Fund] arising because the Government broke its contractual promise." 543 U.S. at 642-43 (citations omitted).[16]

This result leaves Congress with several options to avoid liability. *See* U.S. Gen. Accounting Office, Indian Self Determination Act: Shortfalls in Indian Contract Support Costs Need to be Assessed 54-63 (1999) (discussing potential congressional solutions to the CSC shortfall dilemma). Congress can revise the ISDA to remove the guarantees of full CSC funding contained in 25 U.S.C. § 450j-1(a)(1) and (g). *See N.Y. Airways, Inc. v. United States*, 177 Ct. Cl. 800, 808 (1966) (cited with approval in *Cherokee*, 543 U.S. at 642) (Congress could avoid liability caused by insufficient appropriations "by changing the substantive law under which the [contractual obligation was set], rather than by curtailing appropriations"). Alternatively, Congress could limit appropriations on a contract-by-contract basis. *See Dougherty*, 18 Ct. Cl. at 503 ("[W]hen one contract on its face assumes to provide for the execution of all the work authorized by an appropriation, the contractor is bound to

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[16] The government also argues that the Judgment Fund is not an appropriate remedy because the Secretary will be required to reimburse the fund for any judgment resulting from a self-determination contract. But this argument ignores the full text of the reimbursement provision, which requires an agency to reimburse the fund "out of available funds *or by obtaining additional appropriations for such purposes*." 41 U.S.C. § 612(c) (emphasis added); *see also* 2 GAO Redbook at 6-41 to 42 ("If an agency finds itself [unable to pay a contract], unless it has transfer authority or other clear statutory basis for making further payments, it has little choice but to seek a deficiency or supplemental appropriation from Congress, and to adjust or curtail operations as may be necessary." (footnote omitted)).

know the amount of the appropriation, and cannot recover beyond it. . . . "). What the government cannot do is breach its contractual obligations and avoid liability based on an improper reading of the phrase "subject to the availability of appropriations."[17]

VII

For the foregoing reasons, we **REVERSE** the grant of summary judgment in favor of the government and **REMAND** for further proceedings consistent with this opinion.

HARTZ, Circuit Judge, dissenting:

I respectfully dissent. There is much in the majority opinion with which I agree. And the result advocated by the government is not easy to swallow—the BIA hands over programs to tribal organizations but then does not reimburse the organizations for the full costs of running the programs. But in my view congressional intent is clear, all parties should have understood (and indeed did understand) that intent, and we must construe the contracts at issue in accordance with that understanding. The majority opinion's approach strikes me as too formalistic in relying on a sharp division between line-item and lump-sum appropriations. It renders futile the spending cap imposed by Congress. And to the extent that the majority opinion relies on *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), for support, it fails to explain why the Supreme Court found it necessary to ad-

[17] Plaintiffs raise additional arguments, several of which are considered in the dissent. (*See* Dissenting Op. 12-15, 39-42.) Although we do not disagree with much of that discussion, we need not reach the remaining issues given our holding as to the meaning of the phrase "subject to the availability of appropriations."

dress in its opinion so many issues that would be irrelevant if the Court had embraced the view of government contracts that the majority opinion adopts.

I. BACKGROUND

The majority opinion provides a thorough discussion of the relevant statutory and administrative background. In this section I will focus on the statutory context and a few facts that illuminate the parties' necessary understanding of their contractual relationship.

First, beginning in fiscal year 1994, Congress set a maximum limit on how much the BIA could allocate from its budget for contract-support costs (termed "indirect costs" in that appropriations act, and "contract-support costs" thereafter). This was a change from prior-year appropriations, which had provided a designated amount for contract-support costs but had not prohibited the BIA from supplementing that amount with unrestricted funds available in the remainder of the appropriation to the BIA. (The appropriations-bill language at issue in *Cherokee Nation* was essentially the same as in the pre-1994 BIA appropriations.) Ordinarily, there would be no great difficulty in an agency's complying with such a spending cap. The agency could simply refuse to enter into more contracts than it had the money to pay for. But that course was unavailable to the BIA under the ISDA. If a tribal organization wished to take over an eligible program from the BIA, the BIA had to relinquish its control and fund the organization's takeover, except in quite limited circumstances. *See* 25 U.S.C. § 450f(a)(2).[1] And the BIA's contract with the tribal or

[1] I should note, however, that for fiscal year 1999, Congress prohibited new or expanded ISDA contracts. *See* Pub. L. No. 105-277, § 328,

ganization to fund the program could not exclude contract-support costs. *See id.* § 450j-1(a). The congressional limitation on contract-support costs could therefore be effectuated by the BIA only by refusing to pay costs that would otherwise be mandated by statute. In other words, when Congress capped contract-support expenditures, it necessarily understood that the cap must override what would otherwise have been statutory commands to pay contract-support costs in full on each contract mandated by the ISDA.

Second, there was no secret that the BIA planned to pay only a portion of contract-support costs on each ISDA contract. As set forth in the majority opinion, some months after enactment of each of the relevant appropriations bills, the BIA would publish a notice in the Federal Register stating the amount of contract-support appropriations that it had received and explaining the allocation method should that amount be insufficient to pay for all contract-support costs negotiated in its ISDA contracts. The notice for fiscal year 1994 also forecast the magnitude of the potential shortfall in contract-support funding:

> Using FY 1993 experience which resulted in a total CSF [contract-support fund] need of approximately $85,000,000, we project a shortfall of at least $10,000,000 in FY 1994 and possibly a shortfall as high as $25,000,000. It is important to restate that the Bureau can only utilize the amount appropriated for the CSF account to meet indirect cost needs. That is, the Bureau can no longer reprogram funds from other Bureau accounts to cover CSF shortfalls.

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112 Stat. 2681, 291-92.

58 Fed. Reg. at 68694. Notices in later years did not project the amount of shortfalls; but their language (indeed, their very purpose) warned tribal organizations of the possibility of insufficient funding.

All notices described essentially the same method for distributing contract-support funds in the event of a shortfall. A specified sum (or nothing at all, *see* 64 Fed. Reg. at 2659 (fiscal year 1999)) was set aside for new or expanded contracts; such contract-support funds were usually to be distributed on a first-come, first-served basis. *See, e.g.*, 62 Fed. Reg. at 1470 (fiscal year 1997). For ongoing or existing contracts, in the event of a shortfall "the amount available shall be distributed pro rata, so that all contractors and compactors receive the same percentage share of their reported need." 66 Fed. Reg. at 15276 (fiscal year 2001).

The notices further advised that the BIA would not distribute the tribal organizations' final contract-support payments until about July 31, well after they were supposed to have begun performance under their contracts.[2] In practice, the tribal organizations often were not told precisely how much each would be paid in contract- support funds until late September. Between fiscal years 1994 and 2001, the tribal organizations were paid 77% to 92% of their contract-support costs.[3]

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[2] *See, e.g.*, 59 Fed. Reg. at 55318 (fiscal year 1995); 63 Fed. Reg. at 5399 (fiscal year 1998); 66 Fed. Reg. at 15276 (fiscal year 2001). *But see* 58 Fed. Reg. at 68694 (notice for fiscal year 1994, stating that the final distribution of contract-support funds will be made "around May 1").

[3] It is worth noting that even if there had been no statutory cap on contract-support costs, full payment would likely not have been made until well after performance of the contract had begun. The contract-support costs were typically expressed as a percentage of an agreed-on

The AFAs recognized that contract-support costs might not be fully paid. Although the template for AFAs may have changed over the years and the AFAs in the record may not be representative in various respects, they are illustrative of how tribal organizations and the BIA dealt with the tentativeness of contract-support funding. The Oglala AFA for calendar year 2001 is quite explicit. Its section entitled "Program and Budget" includes the following paragraph:

> Contract Support Funds shall be provided by the Bureau of Indian Affairs, *subject to the availability of funding*, in accordance with the Indirect Cost Negotiation Agreement between the Contractor and the

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base amount rather than in dollar terms. The percentage—called the indirect-cost rate—was negotiated with the Inspector General of the Department of the Interior. *See* 25 U.S.C. § 450b(g) ("'indirect cost rate' means the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency"); S. Rep. No. 100-274, *as reprinted in* 1988 U.S.C.C.A.N. at 2628 ("Tribal indirect cost rates are negotiated and approved according to OMB guidelines by the Department of Interior Office of Inspector General."). The product of that rate and the base amount is intended to be the best approximation of what the indirect contract-support costs are. *See* 2 C.F.R. pt. 225 (OMB Guidelines). The negotiation to establish the indirect-cost rate was ordinarily conducted after execution of the AFA. Ramah's controller explained:

> Our indirect cost rates are usually not determined by agreement until well after the commencement of the federal fiscal year and sometimes not until after it is concluded. The principal reason is that indirect cost proposals must be accompanied by single agency audits for the year ending two years prior to the fiscal year for which the application is being made. However, in practice it has proven impossible for us to finalize our audits prior to the commencement of the federal fiscal year in question.

J. App., Vol. II at 266—67.

> Office of the Inspector General, and in accordance with Bureau of Indian Affairs policies and procedures pertaining to the distribution of Contract Support Funds.

J. App., Vol. IV at 900 (emphasis added). A paragraph entitled "Billings for Indirect Cost" in the "Administration Data" section explicitly recognizes that Oglala may be reimbursed for only a percentage of the indirect contract-support costs computed by using the indirect-cost rate. It states:

> The contractor shall bill for Indirect Cost earned on his voucher\invoice showing the following, for the period covered by the voucher\invoice:
>
> 1. Total direct cost expenditures.
>
> 2. Less Exclusions.
>
> 3. Times Indirect Cost Rate.[4]

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[4] The preceding paragraph, which is entitled "Negotiated Indirect Cost Rates," describes how the parties are to arrive at a rate:

> 1. The allowable indirect costs under this contract shall be obtained by applying negotiated indirect cost rates to bases agreed upon by the parties, as specified below.
>
> 2. Negotiation of indirect cost rates by the Contractor and the cognizant audit agency shall be undertaken as promptly as practicable after receipt of the Contractor's indirect cost proposal.
>
> 3. Allowability of cost and acceptability of cost allocation methods shall be determined in accordance with OMB Circular A-87.
>
> 4. The results of each negotiation shall be set forth in an Indirect Cost Negotiation Agreement, such agreement shall become a part of this contract by reference. The agreement shall specify:
>
> (a) The agreed indirect cost rate(s);
>
> (b) The base to which to the rate(s) apply;

4. *Times percentage of rate funded by BIA.*

5. Indirect Cost earned for the period covered. (1)-(2) X (3) X (4) = (5).

Id. at 920 (emphasis added). In other words, the full amount of indirect contract-support costs will be reduced by multiplying it by a "percentage of rate funded by BIA." This computation follows the same steps as those for indirect-contract-support-cost computations set forth in the BIA's notice of "Distribution of Fiscal Year 2001 Contract Support Funds." *See* 66 Fed. Reg. at 15276.

Not only were the tribal organizations on notice that contract-support costs may not be fully funded, but their representatives may even have acquiesced in the shortfall, recognizing that in light of limited willingness of Congress to fund programs benefitting Native Americans, other needs should take priority over contract-

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(c) The periods for which the rate(s) apply; and,

(d) The specific items treated as exclusions or any changes in the items previously agreed to be treated as exclusions.

5. The Contractor is to be reimbursed for all allocable and allowable indirect costs incurred in performance of this contract, subject to any statutory limitations applicable.

6. Any failure by the parties to agree on any indirect cost rate(s) or applicability of the rate(s) to the bases under this provision shall be considered a dispute concerning a question of fact for decision by the Awarding Official within the meaning of the clause of the contract entitled "Disputes".

J. App., Vol. IV at 919-20. The indirect-cost rate is not an issue in this appeal.

support costs. A study by the GAO reported that there were two reasons for underfunding contract-support costs:

> First, it is difficult for [the BIA and the Indian Health Service] to predict what the total need for indirect cost funding will be in advance. The agencies do not know which tribes will be contracting which programs, at what level the contracted programs will be funded, and what a tribe's indirect cost rates will be. Second, in addition to the difficulty of predicting the future contract support requirements, the agencies have had other funding priorities in recent years. For example, BIA's priorities have been to seek additional appropriations for law enforcement to reduce crime on the reservations and for Indian education.

J. App., Vol. III at 541. Those priorities are to be set after consultation with the Native American community. *See* 25 U.S.C. § 450j-1(i) ("On an annual basis, the Secretary shall consult with, and solicit the participation of, Indian tribes and tribal organizations in the development of the budget for the . . . Bureau of Indian Affairs (including participation of Indian tribes and tribal organizations in formulating annual budget requests that the Secretary submits to the President for submission to Congress . . .).").[5]

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[5] It is also worth noting that the contracts give tribal organizations the right to suspend performance if they become insecure about payment:

> The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this

Another good indication that everyone understood, or should have understood, that the appropriations cap would require reductions in contract-support payments in all the BIA's ISDA contracts can be found in a brief submitted some 16 years ago by one of the law firms representing Plaintiffs in this appeal. In *Ramah Navajo School Board., Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996), the school board successfully challenged how the Secretary of the Interior apportioned to the tribes the restricted contract-support appropriations for fiscal year 1995. (The plaintiffs in that case did not challenge, as in this case, the failure to pay full contract-support costs.) The Secretary had set a June 30, 1995, deadline for submitting proposals for indirect-cost rates. Tribal organizations that missed the deadline would receive only 50% (instead of 75%) of full funding on the first round of distribution. *See* 59 Fed. Reg. at 55318 (fiscal year 1995). In the second round the remaining funds would be apportioned pro rata to the deadline-compliant tribal organizations, who ultimately received more than 90% of full funding. *See Ramah Navajo Sch. Bd.*, 87 F.3d at 1343. The brief submitted by counsel for the school board asserted: "Congress in the [ISDA] and the contemporaneous appropriation statutes clearly intend-[ed] an even, across-the-board reduction in all tribal contracts in the event of an appropriations shortfall."

Contract or a specific activity conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the Contract until such time as additional funds are awarded.

25 U.S.C. § 450*l*(c) (Model Agreement § 1(b)(5)).

Appellant's Brief at 27, *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, Nos. 95-5334, 95-5348) (D.C. Cir. Nov. 15, 1995) (footnote omitted).

II. ANALYSIS

Given the obvious intent of Congress, which was communicated by the BIA to tribal organizations receiving ISDA funds and was surely understood by them, affirmance of the district court is required unless some legal doctrine overrides congressional intent. In my view, however, the governing doctrine confirms the need for affirmance.

A. Congressional Appropriations and Government Contractual Liability

The Appropriations Clause of the United States Constitution states, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. 1, § 9, cl. 7. To prevent the Executive from forcing its hand by incurring contractual debts on behalf of the United States, Congress has enacted the Anti-Deficiency Act which, with certain limited exceptions, prohibits federal agencies from contracting for more than what Congress appropriates. *See* 31 U.S.C. § 1341(a)(1)(A), (B). The Act states in part:

An officer or employee of the United States Government . . . may not—

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

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

Id. § 1341(a)(1). Consequently, government contracts generally are not binding until Congress appropriates the necessary funds. *See Cherokee Nation*, 543 U.S. at 643.

On occasion, however, a law may grant a government officer or employee what is known as "contract authority"—that is, the authority to enter into a contract that is binding regardless of whether Congress appropriates sufficient money to cover the contract. *See Train v. City of New York*, 420 U.S. 35, 39 n.2 (1975); *see generally* I General Accounting Office, Principles of Federal Appropriations Law p. 2-6 (3d ed. 2004) (GAO Redbook). In that event, if the appropriation turns out to be inadequate, the contractor can sue the government for underpayment. *See* GAO Redbook at p. 2-7. A grant of contract authority, however, must be clear. As stated in 31 U.S.C. § 1301(d): "A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made."

Plaintiffs make two principal arguments in support of their claim to full payment of ISDA contract-support costs: They assert (1) that the Secretary had contract authority to bind the government to pay contract-support costs regardless of the sufficiency of appropriations, and (2) that even if the Secretary lacked contract authority, the congressional appropriation for contract-

support costs was sufficient for each separate contract, so that the government is bound even if there were insufficient funds to pay the total of such costs for all ISDA contracts. I first address contract authority.

B. Did the BIA have Contract Authority for Contract-Support Costs?

Plaintiffs contend that Congress granted the Secretary contract authority to enter into ISDA contracts when it directed the Secretary to pay in full the contract-support costs on ISDA contracts (regardless of the adequacy of appropriations for those costs). They acknowledge the following language of 25 U.S.C. § 450j-1(b) that limits the provision of funds to what is appropriated:

> *Notwithstanding any other provision in this subchapter* [the entire ISDA]*, 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.

(Emphasis added). They argue, however, that this language does not limit the government's financial obligation for contract-support costs.

To begin with, Plaintiffs remind us that the ISDA's legislative history reflects congressional intent that tribes not be penalized by government underpayment of contract-support costs. *See* S. Rep. 100-274, *as reprinted in* 1988 U.S.C.C.A.N. at 2628 ("the Committee believes strongly that Indian tribes should not be forced

to use their own financial resources to subsidize federal programs."). They then point to two ISDA provisions suggesting a categorical government obligation. The first is § 450j-1(a)(2), which states:

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

(Emphases added). The other is § 450j-1(g) (added to the ISDA six years after enactment of the subject-to-availability language of § 450j-1(b)), which speaks of contract-support costs as an entitlement:

> 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.

(Emphasis added).[6] In light of this mandatory language, Plaintiffs contend that the subject-to-availability restriction on "the provision of funds under this subchapter," § 450j-1(b), must limit only payments by the Secretary, not the government's ultimate liability. Under their construction of the statute, "*payment* of the full amount by the Secretary is subject to available appropriations to make those payments, but if such appropriations are not available then the underpaid contract *obligation* remains in place and the government remains liable in damages." Aplt. Br. at 49-50.

Plaintiffs' argument is interesting, but unpersuasive. They do not explain why there would be any reason to include in the ISDA a provision saying that the Secretary cannot pay out money that has not been appropriated. Such a provision would seem superfluous. If such payments are not barred by the Constitution's Appropriations Clause, then the Anti-Deficiency Act should do the trick. One could also wonder what good Congress

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[6] In addition, Plaintiffs rely on § 450j-1(d)(2), which states: "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." But this provision explicitly applies only to subsection (d) of § 450j-1. *See id*. § 450j-1(d)(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."). The provision does not purport to have any effect on the subject-to-availability language of § 450j-1(b). Thus, I fail to see any relevance of § 450j-1(d)(2) to the present dispute.

thought it would accomplish by restricting payments by the Secretary but not the liability of the government. The effect on the overall federal budget would be the same whether the money comes from the Secretary's budget or from the fund used to pay judgments for the government's breach of contractual duties. *See* 31 U.S.C. § 1304 (judgment fund). When Congress says that "the provision of funds under this subchapter [the ISDA] is subject to the availability of appropriations," 25 U.S.C. § 450j-1(b), it must mean that the government's *obligation* on ISDA contracts is limited by the amount appropriated.

As for the addition of § 450j-1(g) several years after enactment of the subject-to-availability language in § 450j-1(b), if subsection (g) were intended to limit the reach of that language in subsection (b), one would expect Congress to have been explicit about it, as required by 31 U.S.C. § 1301(d) (contract authority must be "specifically state[d]"). Yet Congress did not bother to amend § 450j-1(b) to say that the subject-to-availability provision that otherwise applies to the entire ISDA does not apply to contract-support costs.

Most importantly, Plaintiffs' construction of the subject-to-availability provision is contrary to the Supreme Court's view. Referring to § 450j-1(b), *Cherokee Nation* said:

> Language of this kind is often used with respect to Government contracts. This kind of language normally makes clear that an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become binding unless and until Congress appropriates

> funds for that year. *It also makes clear that a Government contracting officer lacks any special statutory authority needed to bind the Government without regard to the availability of appropriations.*

543 U.S. at 643 (citations omitted; emphasis added). I therefore conclude that the Secretary did not have contract authority to bind the government to pay full contract-support costs regardless of the adequacy of appropriations.

I now turn to Plaintiffs' argument that there were available funds to pay each tribal organization's contract-support costs in full.

C. Were Funds Available for Full Payment of Contract-Support Costs?

Plaintiffs' principal argument is not predicated on the Secretary's alleged contract authority to bind the government to pay contract-support costs in full. Rather, they contend that sufficient appropriations were "available" to pay each individual tribal organization's contract-support costs in full, so the government cannot escape liability by relying on the insufficiency of appropriations to pay the total of such costs for all tribal organizations. Aplt. Br. at 1.

Before addressing the decisions relied upon by Plaintiffs, I would note two classic Supreme Court opinions on the enforceability of unfunded contracts. They establish that a contractual subject-to-availability provision ordinarily forecloses recovery of otherwise promised payment in excess of appropriations; that is, by agreeing that payment is subject to the availability of appropria-

tions, the contractor accepts the risk of congressional underfunding.

Bradley v. United States, 98 U.S. 104 (1878), concerned the lease of a building for government use. In accordance with statutes barring federal agencies from entering into contracts for amounts exceeding appropriations, *see id.* at 107-08, the three-year lease stated that it was "subject to an appropriation by Congress for the payment of the rental herein stipulated for, and that no payment shall be made to [Bradley] on account of such rental until such appropriation shall be available," *id.* at 105-06 (internal quotation marks omitted). During the first two full years of the lease term, Congress appropriated $4,200, the full contract price, specifically for the lease; but in the last year it appropriated only $1,800. See *id.* at 108 (the first-year appropriation also included rental for the first three weeks of the lease, which were in the prior fiscal year). The Court rejected the claim for the balance by Bradley's successor. It said that the parties' intent, as evidenced by the lease's availability provision, was that the lessor would not be paid until appropriations became available. *See id.* at 112. That provision placed the underfunding risk on the lessor:

> Public officers, . . . having no funds in the treasury and being without authority to bind the United States, can only agree to pay the stipulated rental, provided the money is appropriated by Congress, and if the lessor, voluntarily and without any misrepresentation or deception, enters into a lease on those terms, he must rely upon the justice of Congress.

Id. at 117.

Sutton v. United States, 256 U.S. 575 (1921), teaches a similar lesson. The government contracted with the Hillsboro Dredging Company (whose assets were later assigned to Sutton as bankruptcy trustee) to conduct dredging and excavation work for a harbor-improvement project. *See id.* at 577. Hillsboro was to be paid at unit rates. *See id.* Congress appropriated $23,000 for the project. *See id.* "The appropriation was ample to defray the cost at [the agreed-on unit] rates, assuming that the quantities of material to be removed did not greatly exceed the estimates presented by the specifications." *Id.* A statute limited the government's contractual obligations to the amount of appropriations. *See id.* at 579 ("'No act of Congress hereafter passed shall be construed to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such act shall in specific terms declare an appropriation to be made or that a contract may be executed.'" (quoting 34 Stat. 697, 764 (1906); ellipses omitted)). Accordingly, the contract provided that "within the limits of available funds the United States reserves the right to require the removal of such yardage as will complete the work, be it more or less than the quantities above estimated." *Id.* at 577 (ellipses and internal quotation marks omitted). When it was discovered that the government inspector had underestimated the amount of work performed, work was halted. *See id.* But by that time the amount owed at unit rates substantially exceeded the congressional appropriation. *See id.* Sutton sued for the balance. *See id.* at 578. The Court held that "the contractor cannot recover for work done in excess of the appropriation." *Id.* at 581. "The Secretary of War was . . . without power to make a contract binding the government to pay more than the amount

appropriated. Those dealing with him must be held to have had notice of the limitations upon his authority." *Id*. at 579.

Plaintiffs argue that *Bradley* and *Sutton* are distinguishable because they concern only "restricted single-purpose appropriations" in which Congress has "designate[d] a specifically-appropriated sum for a given undertaking." Aplt. Br. at 28. This case, they say, concerns instead a "lump-sum appropriation[]," *id*., which, although "capped at some level," is "without limitation available for multiple projects or contractors . . . and is thus 'unrestricted,'" *id*. at 30. They contend that "[i]n the lump-sum situation . . . , an agency's exhaustion of an appropriation without fully paying the contract at issue . . . does not bar the contractor from recovering damages for the non-payment." *Id*. at 26-27 (emphasis omitted). In other words, "the government may be held liable for failing to pay a contractor in full out of an appropriation sufficient to pay that contractor, even though the appropriation is insufficient to pay all of the contracts the agency has made." *Id*. at 27.

For support of their position, Plaintiffs rely in part on the Supreme Court's decision in *Cherokee Nation*, 543 U.S. 631, which awarded the plaintiffs in that case their full contract-support costs for ISDA contracts with the Secretary of Health and Human Services (HHS). I will discuss *Cherokee Nation* more fully later. For now, suffice it to say that the holding in that case is not helpful to Plaintiffs' argument. True, the contracts were, as here, subject to the availability of appropriations. *See id.* at 640-41. And, as here, the government argued that Congress did not appropriate enough money to cover the full contract-support costs for all ISDA contracts. *See*

id. at 636. But unlike our case, the appropriations acts had not used restrictive not-to-exceed language with respect to contract-support costs. (The acts were like the pre-1994 BIA appropriations acts.) Thus, the HHS Secretary's contract-support spending was not statutorily restricted. And because there were sufficient unrestricted funds (in addition to the funds specifically appropriated for contract-support costs) available to cover the contract-support costs on the HHS Secretary's ISDA contracts with the plaintiffs, the Court held that the subject-to-availability provision did not limit the government's liability. *See id*. at 643 ("Since Congress appropriated adequate unrestricted funds here, [the] phrase ['subject to the availability of appropriations'], if interpreted as ordinarily understood, would not help the Government."). To be sure, Plaintiffs here rely not just on the holding in *Cherokee Nation* but also on some of the Court's language regarding the government's liability on contracts paid for out of lump-sum appropriations. Before I turn to that language, however, it will be helpful first to analyze other relevant case law and to review the specific context of the dispute before us.

Most helpful to Plaintiffs is the holding in a lower-court decision cited with approval by *Cherokee Nation*. In summarizing propositions not disputed by the parties in that case, the Supreme Court cited *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892), for its statement that "[a] contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects." *Cherokee Nation*, 543 U.S. at 637-38. Plaintiffs argue

that under this *Ferris* doctrine, each tribal organization is entitled to full payment of its contract-support costs because the congressional appropriation for contract-support costs was many times greater than their individual amounts, and it is irrelevant to any particular tribal organization that the Secretary may have overcommitted the total appropriation by entering into other contracts. In my view, however, this argument takes *Ferris* too far.

Ferris considered a contract between the government and Ferris to dredge 100,000 cubic yards of material from the Delaware River. *See* 27 Ct. Cl. at 542-43, 545. When the contract was executed, the agency allotted to it $37,000 out of a congressional appropriation for improvement of the river. *See id.* at 542-43. But the government halted work when only 35,494 cubic yards of material had been removed because the appropriation had been exhausted. *See id.* at 545—46. Ferris was fully paid $9,500 for the work performed; but he sought lost profits for the work that he was prevented from performing by the order to stop. *See id.* at 543, 545-46. The court awarded him $6,510 in damages. *See id.* at 547. Exhaustion of appropriated funds, it explained,

> justified the officer in charge, but does not justify the [government] in not providing funds for carrying out and discharging [its] legal obligations. *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.* An appropriation *per se* merely imposes limitations upon the Government's own agents; it is a defi-

> nite amount of money intrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.

Id. at 546 (emphasis added).

This quoted proposition might appear to control the result here. After all, each tribal organization executing an ISDA contract would know that the congressional appropriation for contract-support costs was far more than sufficient to cover those costs for its own contract, and the organization would not be "chargeable with knowledge of [the] administration [of that appropriation], nor c[ould] [its] legal rights be affected or impaired . . . by its diversion . . . to other objects." *Id.*

But one must not read too much into *Ferris*. It is, in essence, simply a case about contract interpretation. The legality of the contract was not at issue. Nor was there any doubt that the officer in charge was forbidden from making additional payments to Ferris once the appropriation was exhausted; the court noted that the officer was "justified" in stopping the work. *Id.* The sole question was the extent to which the government was bound on its contract with Ferris. To answer that question, courts follow the dictum 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 Assocs. v. United States*, 536 U.S. 129, 141 (2002) (internal quotation marks omitted). Context, of course, is critical in interpreting contracts. What *Ferris* said is that in the circumstances of that case, where the

government contracted to pay for certain work and sufficient funds to pay for the work had been appropriated (and even allocated to the contract), then the contractor could take the contractual promise as binding; the contractor did not need to worry about whether the funds would be reallocated while it was performing the contract. This would have been a reasonable assumption by the parties; and ordinarily it would be a reasonable construction of such a contract even if it contained subject-to-availability-of-appropriations language. *See Cherokee Nation*, 543 U.S. at 637.

In other contexts, however, a court could properly interpret similar language differently. The effect of context is well-illustrated by the opinion of the Court of Claims in *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539 (1980), an opinion cited repeatedly by the Supreme Court in *Cherokee Nation*. It is worthwhile to describe *Blackhawk* in detail. The case concerned an agreement between the Veterans Administration (VA) and a contractor to resolve a dispute regarding cost overruns for construction of a hospital. *See id*. at 541. The parties settled on a compromise payment of $10.3 million. *See id*. The amount was to be paid in two installments: $8 million within 40 days of settlement, and $2.3 million within 90 days of settlement. *See id*. at 544. To pay the settlement, the VA needed to transfer ("reprogram") funds that had been earmarked for other projects. *See id*. at 542. This was done, and the VA then sent letters notifying some congressional committees (those involved in VA appropriations) of the reprogramming. *See id*. at 543. But several members of Congress, after reviewing a GAO report on the settlement, wrote to the VA expressing concern about the payments. *See*

id. at 544. When the VA decided to go forward with the settlement anyway, Congress enacted legislation retroactively barring any VA settlements exceeding $1 million absent an independent audit (which had not been prepared for the Blackhawk settlement), although the conference report on the legislation agreed that up to $6 million could be advanced on settlements that predated the law's effective date. *See id*. at 544-45. The law was enacted on January 3, 1974; and on the same day the VA paid $6 million of the initial $8 million installment required by the settlement, about three weeks after it was due. *See id*. at 543, 545. The VA made no further payments. *See id*. at 546.

Blackhawk sued the VA for the unpaid settlement amounts plus interest. *See id*. The lawsuit turned on the meaning of Article 8 of the agreement, which stated: "The Government's obligation hereunder is contingent upon the availability of appropriated funds from which payment in full can be made." *Id*. at 542 (internal quotation marks omitted). The parties agreed on the meaning to some extent. They both thought that Article 8 at least made the agreement contingent on the VA's reprogramming funds initially earmarked for other construction purposes, although it was everyone's understanding that the contingency was highly likely to occur. *See id*. at 542-43, 546-47.

The VA contended, however, that Article 8 further limited its liability in two ways: (1) its obligation was contingent on approval of the reprogramming by congressional committees notified of it beforehand, *see id*. at 546-47, and (2) it was conditioned on there being no "affirmative action by the Congress that would prevent the [VA] from paying," *id*. at 550. After examining the

relevant statutory and regulatory framework, the parties' course of dealing, and communications between the parties, the court disagreed with the VA on the first limitation but agreed on the second.

In rejecting the VA's claim that Article 8 made payment to the contractors conditional on approval of reprogramming by the pertinent congressional committees, the court observed that no statute required such approval, no VA regulation stated that reprogramming would not go forward without congressional-committee consent, and no practice or policy of the VA prohibited unconsented-to programming. The court said that notification to the committees was merely a courtesy to maintain good relations with Congress. Moreover, it found that no one representing the VA had ever told Blackhawk that committee approval was necessary for reprogramming, and in none of the prior settlement agreements between Blackhawk and the VA had committee approval of reprogramming been raised as a consideration. *See id*. at 547-50.

As for the VA's contention that Article 8 made payment conditional on Congress's not acting to prevent payment, the court found the issue a close one, but sided with the VA. Crucial to this conclusion was evidence of what happened at the meeting to execute the settlement. At the meeting a VA attorney mentioned that Article 8 would limit the government's liability should Congress affirmatively prevent the agency from paying. *See id*. at 543. To this statement the contractor merely shrugged and said nothing. *See id*. The parties then signed the agreement. *See id*. The court said that the contractor's shrug "was both an acknowledgment of understanding and a dismissal of concern." *Id*. at 551.

The court's ultimate ruling gave each party a partial victory. Article 8 relieved the VA of liability on the second installment of $2.3 million, which came due after Congress enacted the legislation limiting the VA's settlement payments; but the VA remained liable on the balance of the first installment of $8 million because it came due before the legislative enactment, when the agency had funds available with which to pay. *See id.* at 552-53.

For present purposes, the lesson of *Blackhawk* is that the court did not confine its analysis to the abstract meaning of "contingent upon the availability of appropriated funds"; it construed the language in light of the relevant statutes and (nonexistent) regulations, the policies and practices of the agency, and the communications between the parties.

Adopting this perspective, I now turn to Plaintiffs' ISDA contracts. First, consider the statutory context. As discussed above, congressional enactments alerted tribal organizations to the likelihood of shortfalls. The appropriation for every pertinent year set an upper limit on what could be provided for contract-support costs. Whereas in *Ferris* the government presumably could have avoided overcommitting its limited appropriation by refusing to execute additional contracts, the Secretary had no such discretion. The ISDA requires the Secretary (1) to approve all tribal requests to execute ISDA contracts (unless certain narrow statutory grounds justify refusal), *see* 25 U.S.C. § 450f(a)(1), (2); and (2) to pay (subject to the availability of appropriations) the full amount of contract-support costs for each such contract, *see id.* § 450j-1(a)(2), (b). Because the amount of contract-support costs was thus a matter over which the

Secretary had essentially no control, the only purpose for capping those costs would be to reduce them below what would otherwise be required by the ISDA.

Moreover, the Secretary gave tribal organizations repeated official notices that the restricted appropriations for contract-support costs had not been adequate and were expected to be inadequate for full funding, so that contingency plans had been made regarding how to apportion funds if they turned out to be inadequate. An annual notice in the Federal Register advised that the BIA would need to determine whether the appropriated funds for contract support would suffice to pay contract-support costs for all ISDA contracts and, if not, the BIA would pay only a pro rata portion of the costs. Every contracting organization well knew that its contract-support costs had not been paid in full for the prior year; and the notices would have had scant purpose had the BIA expected the appropriation to be adequate. Thus, unlike Ferris, the tribal organizations knew what to expect. I am not saying that giving notice can by itself relieve an agency of an obligation to pay. If the money is there, the agency must pay, as in *Cherokee Nation*. Rather, the point is that if legislation precludes full payment, the contractor cannot rely on *Ferris* if the contractor has proper notice of the problem.

In short, even though a government contractor ordinarily may not be chargeable with knowledge of the administration of the appropriation that funds the contract, it cannot close its eyes to the clear implication of statutory funding restrictions, official information publicly promulgated on the subject, and the historical course of dealing. Whether an appropriation can be viewed as a line item or a lump sum is a relevant part of

the context, but only a part. Given the context here, a reasonable person construing the AFAs at issue would understand that the Secretary was promising to pay only the portion of contract-support costs that could be funded by the restricted congressional appropriation for such costs on all ISDA contracts. To be sure, ambiguities in contracts with Indian tribes should be resolved in favor of the tribes. *See* 25 U.S.C. § 450*l*(c) (Model Agreement § 1(a)(2)). But that rule does not apply here because of the clarity of the meaning of "subject to the availability of appropriations" in the present context. That language means that the government's contract-support-cost obligation is subject to the availability of sufficient appropriations to pay for contract-support costs on all the Secretary's ISDA contracts.

My view is supported by three opinions of two other circuits regarding the availability of contract-support costs in light of the not-to-exceed language in the appropriation acts. Two opinions predate *Cherokee Nation*; but I see nothing in them contrary to the Supreme Court's analysis. And what is most important about the decisions is not so much their ultimate conclusions as their construction of the legislation, which was what I have said would be the reasonable interpretation by a tribal organization entering into an ISDA contract with the BIA.

I have already mentioned *Ramah Navajo School Board*, 87 F.3d 1338. In that opinion the court interpreted the ISDA's subject-to-availability provision to mean that "each Tribe had a right only to the amount of CSF [contract-support funding] it would have received under a legal allocation plan." *Id*. at 1346. It then held that the allocation plan would be legal only if it were pro

rata for all tribal organizations. *See id*. at 1349. It found support in "[t]he legislative history of the 1995 Act[, which] indicates that Congress, aware that it had appropriated an insufficient amount for full CSF funding, intended for the agency to deal with the shortfall through a *pro rata* reduction." *Id*. I agree that organizations contracting with the Secretary would have understood that none of them would receive full contract-support-cost funding if the restricted appropriation was insufficient to pay full costs for all of them. And, as I said earlier, the plaintiffs in *Ramah Navajo School Board* so understood the law. *See* Appellant's Brief at 27, *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, Nos. 95-5334, 95-5348 (D.C. Cir. Nov. 15, 1995).

In *Babbitt v. Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999), the court addressed, and rejected, a claim seeking the same relief as in our case—full payment of contract-support costs despite a not-to-exceed appropriation and a subject-to-availability proviso. The plaintiff raised an estoppel argument, asserting that it had detrimentally relied on § 450j-1(g)'s entitlement language. But the court said that it was unreasonable for the plaintiff to expect full payment of indirect contract-support costs because the subject-to-availability provisos in § 450j-1(b) and the model contract unequivocally informed it otherwise. *See id*. at 1380.

The third opinion, of course, is *Arctic Slope Native Assn'n, Ltd. v. Sebellius*, 629 F.3d 1296 (Fed. Cir. 2010). In a thoughtful opinion by the court most conversant with federal contract law, the identical issue raised in this case was resolved in favor of the government.

In sum, I conclude that in the context of the appropriation statutes for the years in question, the ISDA, and the parties' course of dealing, the subject-to-availability language of Plaintiffs' ISDA contracts meant that the contract-support costs for each would need to be reduced if the appropriation for contract-support costs was inadequate to pay such costs on all ISDA contracts.

I disagree with Plaintiffs' contention that the *Cherokee Nation* opinion requires otherwise. In that case the plaintiffs successfully sued for full payment of their contract-support costs for ISDA contracts with the Indian Health Service (IHS) (under the HHS Secretary) for fiscal years 1994 through 1997. *See Cherokee Nation*, 543 U.S. at 634. Congress had appropriated between $1.277 billion and $1.419 billion each year for the IHS "to carry out" the ISDA. *Id.* at 637 (internal quotation marks omitted). "These appropriation Acts contained no relevant statutory restrictions," *id.*, in contrast to appropriations to the BIA for ISDA purposes during those years, which contained caps on contract-support funding.

As Plaintiffs read *Cherokee Nation*, it stands for the proposition that because the appropriation for contract-support costs was more than adequate to pay those costs for any particular tribal organization, the subject-to-availability requirement was satisfied for each individual contract and the government is liable. But, as I have previously noted, *Cherokee Nation* does not so hold. In that case the available funds sufficed to pay the total of contract-support costs for all contracts at issue.

I must acknowledge, however, that the *Cherokee Nation* opinion did endorse the general proposition (which, the Court observed, the government had not contested) relied on by Plaintiffs—that "as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of 'insufficient appropriations,' even if the contract uses language such as 'subject to the availability of appropriations,' and even if an agency's total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made." *Id.* Accordingly, said the Court, the government was bound in that case unless it could "show something special about the promises . . . at issue," *id.* at 638, keeping in mind the importance of "provid[ing] a uniform interpretation of . . . language [similar to 'subject to the availability of appropriations'], lest legal uncertainty undermine contractors' confidence that they will be paid, and in turn increase the cost to the Government of purchasing goods and services," *id.* at 644.

But what compels a different outcome here is the presence of "something special," *id.* at 638, that was not present in *Cherokee Nation*—namely, the context discussed at length above to show that tribal organizations must have understood that caps in the appropriation acts could (and almost certainly would) require a percentage reduction in payment of contract-support costs. Recall that the ISDA does not give the Secretary discretion to refuse to enter into an ISDA contract or to refuse to pay contract-support costs. Thus, the language of the annual appropriations acts that set a limit on the funds available for contract-support costs could have no purpose other than to require underpayment of contract-

support costs in ISDA contracts. And because the Secretary could not beggar one tribal organization (by reducing its contract-support costs) to pay the full contract-support costs for another organization, *see* 25 U.S.C. § 450j-1(b) ("[T]he 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 [the ISDA]."), Congress must have contemplated a reduction for all tribal organizations. Indeed, if we were to apply to the present context the *Ferris* doctrine as interpreted by Plaintiffs, the dollar limitations in the appropriations acts would be empty gestures. Because the government would still owe full contract-support costs on each ISDA contract, the caps would be irrelevant. We should refrain from interpreting statutory language in a way that renders it impotent. *See Fed. Trade Comm'n v. Accusearch, Inc.*, 570 F.3d 1187, 1198 (10th Cir. 2009) ("Under a long-standing canon of statutory interpretation, one should avoid construing a statue so as to render statutory language superfluous." (internal quotation marks omitted)). I would adopt the more natural interpretation of the statutory scheme, which, as noted above, has been adopted in three other circuit opinions and even endorsed by the plaintiffs in one of the cases.

Moreover, *Cherokee Nation* does not preclude my interpretation. On the contrary, the discussion in that opinion of several arguments made by the government suggests that the Court was unwilling to endorse the rigid view of *Ferris* adopted by Plaintiffs here—namely, that so long as the appropriation for contract-support costs was greater than the amount of such costs in an individual ISDA contract, the subject-to-availability con-

dition is not triggered and the government is liable. If *Cherokee Nation* had, as Plaintiffs contend, embraced their view of *Ferris*, it would have been unnecessary for the Court to address those arguments by the government; after all, the *Ferris* doctrine, as understood by Plaintiffs, would have guaranteed the Cherokee Nation's victory regardless of the merits of the other arguments. It is therefore instructive to examine some of the grounds on which the Court rejected the government's arguments against applying the general *Ferris* rule in that case, because the things that the Court found missing in *Cherokee Nation* are present here.

First, in concluding that ISDA contracts should be treated like ordinary procurement contracts, the Court wrote that it had "found no indication that Congress believed or accepted the Government's current claim that, because of mutual self-awareness among tribal contractors, tribes, not the Government, should bear the risk that an *unrestricted* lump-sum appropriation would prove insufficient to pay *all* contractors." *Cherokee Nation*, 543 U.S. at 640 (emphasis added). Here, however, we confront *restricted* lump-sum appropriations that set a maximum expenditure for contract-support costs; and, perhaps more importantly, the context (as I have previously explained) unambiguously shows that Congress intended, and the tribal organizations were on notice and understood, that the restriction would reduce the contract-support costs to which each was otherwise entitled, thereby imposing on them the risk of an inadequate appropriation.

Second, the Court rejected the government's reliance on the language in § 450j- 1(b) that "the Secretary is not required to reduce funding for programs, projects, or

activities serving a tribe to make funds available to another tribe or tribal organization under [the ISDA]," because no such reduction was necessary. The Court observed that the plaintiff tribes' claims could be paid out of unrestricted funds that had gone for government, not tribal, operations. *See id.* at 641-42. In stark contrast, here the funds necessary to pay one tribal organization's contract-support costs in full would have to come from money that would otherwise go to another contractor because of the appropriations cap on contract-support costs.

Third, the Court rejected the government's argument that the subject-to-availability language of § 450j-1(b) gave the Secretary "authority . . . to adjust funding levels based on appropriations"; it observed that the government could point to no supporting statutory language and that the legislative history merely showed that "Executive Branch officials would have liked to exercise discretionary authority to allocate a lump-sum appropriation too small to pay for all the contracts that the Government had entered into[, but] the history does not show that Congress granted such authority." *Id.* at 643-44 (internal quotation marks omitted). True, the appropriations caps in this case likewise do not confer discretion on the Secretary. But what the Secretary sought *discretion* to do in *Cherokee Nation* is *compelled* here. The Secretary is forbidden to use for contract support any funds in the BIA lump-sum appropriations above the capped amounts.

Fourth, and finally, the Court said that the government could not rely on a 1999 statute setting limits on contract-support costs based on earlier committee reports. The statute said:

> Notwithstanding any other provision of law the amounts appropriated to or earmarked in committee reports for the Indian Health Service for payments to tribes for contract support costs are the total amounts available for fiscal years 1994 through 1998 for such purposes.

Id. at 645 (brackets, ellipses, emphasis, and internal quotation marks omitted). The Court said that it would be reasonable to interpret this language to forbid payment to the plaintiff tribes; but it adopted another interpretation to avoid construing the statute as having a retroactive effect. In the case before us, however, restrictions in the appropriations acts are not being applied retroactively.

To be sure, *Cherokee Nation* does not definitively endorse the government's position in this case. But it certainly did not adopt Plaintiffs' position, either. If it had, the Supreme Court could have short-circuited much of its discussion by simply saying that the government's arguments were beside the point, because even granting all those arguments, there was certainly a sufficient appropriation to pay the contract-support costs of any single tribal organization. As just one example, it would not have had to decide whether to interpret the 1999 statute to apply retroactively, because the plaintiffs in that case would have prevailed anyway.

Accordingly, I reject Plaintiffs' contention that language in *Cherokee Nation*, even if not the holding, compels judgment in their favor.

I now turn to Plaintiffs' two remaining arguments that their ISDA contracts require full payment of their contract-support costs. One argument is that their

ISDA contracts incorporate the provisions of the ISDA; and because the ISDA requires full payment of contract-support costs, each contract does so as well. I reject this argument because, as already explained at length, the ISDA does not require full payment. Full payment is conditioned on the availability of funds. *See* 25 U.S.C. §§ 450j(c)(1), 450j-1(b).

Plaintiffs' other argument is that their construction of the ISDA contracts is compelled by an admission in a government brief in another case. The issue in *Southern Ute Indian Tribe v. Leavitt*, 497 F. Supp. 2d 1245 (D.N.M. 2007), was whether the IHS could be compelled to enter into a new ISDA contract with the Southern Utes even though all funds appropriated for contract-support costs for the year had already been contractually committed. In a brief filed on December 19, 2005, the government made the following statements: (1) "[T]he issue here is whether IHS is potentially liable for contract support costs once it signs on the dotted line. Given the decision in *Cherokee* [*Nation*], IHS at a minimum was reasonable in its belief that by entering a new self-determination contract with plaintiff, it might be implicitly promising to pay contract support costs in excess of Congressional appropriations," J. App., Vol. VII at 1670 (Reply in Support of Defendants' Motion for Summary Judgment at 6, *Southern Ute*, 497 F. Supp. 2d 1245); (2) "According to the [Supreme] Court [in *Cherokee Nation*], the language [of 25 U.S.C. § 450*l*(c) (Model Agreement § 1(b)(4))] gave IHS 'no legal right to disregard its contractual promises,' even in the absence of available appropriations," *id.* at 4; and (3) "Thus, contrary to [Southern Ute's] claim, defendants might be held liable for plaintiff's contract support costs despite

the inclusion of the [subject-to-availability] clause in their contract," *id*. Plaintiffs contend that these statements amount to an admission that their interpretation of their ISDA contracts is plausible, even reasonable, and that therefore we must adopt that interpretation because of the rule that we interpret ambiguities in ISDA contracts in favor of the tribes. *See* 25 U.S.C. § 450*l*(c) (Model Agreement § 1(a)(2)).

I disagree. The contract-interpretation issue in *Southern Ute* was quite distinct from what confronts us. The context of the dispute was as follows: The IHS had informed the Southern Utes that there were no more funds available for contract-support costs. *See Southern Ute*, 497 F. Supp.2d at 1248-49. The IHS was willing to enter into a contract with the tribe for new services but only if the tribe waived its rights to contract-support costs. *See id*. at 1250. The tribe refused to execute a waiver. *See id*. The question then became whether the IHS could therefore refuse to enter into a contract with the tribe. *See id*. at 1252. The IHS was concerned that its executing the standard contract in that context would amount to a binding promise to pay contract-support costs despite the absence of appropriated funds to pay for those costs. *See id*. The quoted statements from the government's brief were to explain why the IHS was concerned. In my view, the context of the contract-interpretation issue before us is sufficiently different that nothing in the government's *Southern Ute* brief amounts to a concession of ambiguity regarding our issue.

D. Are Plaintiffs Entitled to Recovery Because of Executive's Failure to Request Adequate Appropriation?

Plaintiffs' final argument is that the government is liable for full payment because the executive failed to request the needed funding from Congress. They rely on *S. A. Healy Co. v. United States*, 576 F.2d 299 (Ct. Cl. 1978). The holding in *Healy*, however, is quite fact-specific; and the general rule stated in the opinion would not apply here. In that case, Healy and the government executed a fixed-price construction contract in November 1970, before Congress appropriated funds. *See id.* at 300-02. The contract contained the following subject-to-availability clause:

> Under the contract to be entered into under these specifications, the liability of the United States is contingent on the necessary appropriations being made therefor by the Congress and an appropriate reservation of funds thereunder. Further, the Government shall not be liable for damages under this contract on account of delays in payments due to lack of funds.

Id. (internal quotation marks omitted). The contract was also governed by the Reclamation Project Act of 1939, which provided that "'the liability of the United States [on its project contracts] shall be contingent upon appropriations being made therefor.'" *Id.* at 303 (quoting 43 U.S.C. § 388).

On December 22, 1970, Healy (as required by the contract) submitted a proposed schedule of forecasted earnings that set forth, among other things, $4,887,000 for fiscal year 1972. *See id.* at 301. The contracting offi-

cer approved this schedule in February 1971 and Healy promptly began construction. *See id.* Meanwhile, in late January 1971 the President sent his proposed budget to Congress; but he requested only $1,800,000 for Healy's contract for fiscal year 1972. *See id.* at 302. Not until July 1971 did the contracting officer notify Healy how much had been requested. *See id.* Healy protested that the requested amount was "'totally inadequate'" and, on inquiring about the possibility of a supplemental appropriation, was told that prospects were bleak. *Id.* Nevertheless, Healy decided to proceed to the extent possible and continued with construction until September 22, 1971, when funds were exhausted. *See id.* Three months later, Congress approved a supplemental appropriation request that provided enough money to cover Healy's earnings for fiscal year 1972. *See id.* In January 1972 the government notified Healy that more money was available, and construction resumed. *See id.*

Despite the contractual and statutory subject-to-availability provisions, the court awarded damages to Healy. *See id.* It reasoned that the contract did not unambiguously state that the contractor had to bear "the full risk of a funds shortage" when the shortage was the agency's fault; and it found that the government agency was at fault for not requesting a sufficient appropriation to pay the contractor. *Id.* at 304; *see id.* at 305. Consequently, the contractor was entitled to damages caused by the work stoppage between when appropriated funds were exhausted and when a supplemental appropriation bill was enacted. *See id.* at 302, 307-08.

The court described its holding as a narrow one. It said that it was not suggesting that the "executive branch was contractually obligated to request from

[Congress] appropriations adequate to fund continued performance." *Id.* at 307. Rather, it held

> only that (a) a contract will not be construed to throw all the cost and loss necessarily incident to such a decision on the contractor, and none of it on the party whose decision caused the loss, unless clauses of the contract require that result without ambiguity, and (b) . . . a government agency that claims a right to do this is under an implied obligation to assist its contractor, by timely and candid information to take the measures that the latter may deem best to diminish and mitigate its loss.

Id.

The situation presented on this appeal is quite distinguishable from the egregious conduct in *Healy*. Healy was not informed that it might be underpaid until well after the contract was executed and performance had begun. Indeed, the contracting officer approved the contractor's budget even though the President had already requested less than 40% of that sum from Congress, and the officer did not notify the contractor of that request for another five months. Here, in contrast, Plaintiffs do not dispute the government's contention that "the tribes have participated in annual budget consultations with BIA." Aplee. Br. at 48 n.16; *see* 25 U.S.C. § 450j-1(i) (requiring the Secretary to solicit tribes' participation in formulating the BIA's budget requests). And, as I have already explained, the statutory context and the historical course of dealing made it clear to tribal organizations that annual shortfalls were likely and that contract-support costs would be underpaid.

III. CONCLUSION

For the foregoing reasons, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 08-2262

RAMAH NAVAJO CHAPTER, OGLALA SIOUX TRIBE; PUEBLO OF ZUNI, FOR THEMSELVES AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

v.

KENNETH L. SALAZAR, SECRETARY OF THE INTERIOR; EDDIE BROWN, ASSISTANT SECRETARY OF THE INTERIOR; MARVIN PIERCE, CHIEF OF OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF THE INTERIOR; UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES,

AND

NATIONAL CONGRESS OF AMERICAN INDIANS, AMICUS CURIAE

[Filed: May 9, 2011]

JUDGMENT

Before: LUCERO, MCKAY, and HARTZ, Circuit Judges.

This case originated in the District of New Mexico and was argued by counsel.

The judgment of that court is reversed. The case is remanded to the United States District Court for the District of New Mexico for further proceedings in accordance with the opinion of this court.

Entered for the Court,

/s/ ELISABETH A. SHUMAKER
ELISABETH A. SHUMAKER, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV No. 90-957 LH/WWD ACE

RAMAH NAVAJO CHAPTER, OGLALA SIOUX TRIBE AND PUEBLO OF ZUNI, FOR THEMSELVES AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED, PLAINTIFFS,

v.

GALE NORTON, SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, ET AL., DEFENDANTS

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Plaintiffs' Amended Motion for Partial Summary Judgment or in the Alternative to Strike Defense (Docket No. 570).[1] Also under consideration is Defendants' document that contains both a cross-motion for partial summary judgment and a response to Plaintiffs' motion (Docket No. 592).[2]

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[1] This amended motion supercedes the original motion, filed on February 23, 2000 (Docket No. 397).

[2] Defendants' motion has the burdensome title, "Defendants' Cross-Motion for Partial Summary Judgment and Opposition to Plaintiffs' Amended Motion for Partial Summary Judgment or in the Alternative to Strike Defense and Opposition to *Amicus* Pueblo of Zuni's Brief in Support of Plaintiffs' Amended Motion for Partial Summary Judgment"

Plaintiffs' amended motion seeks "judgment in their favor declaring that annual appropriations limitations for FY 1994 forward inserted by Congress as to the amount which the Secretary may use to reimburse contract support costs ("CSC") under contracts with Class members entered pursuant to The Indian Self-Determination and Education Assistance Act of 1975, as amended, 25 U.S.C. Section 450 through 450n ("ISDA"), do not diminish or eliminate (either alone or coupled with ISDA) the obligation of the United States to reimburse CSC at the full level mandated by ISDA otherwise owed to Plaintiffs." (Docket No. 570 at 1).[3] Footnote 1 of the motion specifically states that the appropriations acts at issue are: Public Law 103-138, Public Law 103-272, Public Law 104-134, Public Law 104-208, Public Law 105-83, Public Law 105-277, Public Law 106-113, and Public Law 106-291.

This motion clarifies it applies to the claims, not yet settled for the years FY 1994 and thereafter, including the original cause of action upheld in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), and the Class's second cause of action added by amendment (*see* Docket No. 352) and by complaint in intervention (*see* Docket No. 353).

(Docket No. 594), referred to herein simply as "Defendants' Cross-Motion" or "Defendants' Response." Defendants also filed a separate response to Plaintiffs' statement of facts (Docket No. 596).

[3] This motion relies upon materials that accompanied the original motion (Docket No. 397), Attachments A-H, as well as those attached to this amended motion, Attachments I-S. The motion also incorporates by reference Plaintiffs' Attachments to their Motion for Partial Summary Judgment (Docket No. 58).

The second cause of action added by amendment is entitled a "Claim for Underpayment of Indirect Costs for Alleged Insufficiency of Appropriations" (Docket No. 352). This claim specifically states that it applies to the indirect cost shortfalls that have occurred in each fiscal year since FY 1994, when Congress began inserting the phrase "not to exceed" before the specific dollar amount for contract support under ISDA contracts or compacts. Paragraph 29 of this claim states that shortfalls in indirect cost payments to the Class caused by alleged insufficiency of appropriations are different from but also encompass the underpayment of indirect costs to the Class caused by under-calculation of indirect cost rates as pled and litigated to this point in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). This claim asserts that the United States owes to Plaintiff and the members of the Class the difference between the contract amount for contract support set by each applicable contract or annual funding agreement for each fiscal year since the beginning of 1994, and the level of reimbursements received (Docket No. 352, ¶ 36).

In its complaint in intervention (Docket No. 353), the Oglala Sioux Tribe states that it seeks to intervene for the purpose of expanding its original claim to encompass all class-wide shortfalls. (*Id.*, ¶ 1). Specifically, in this complaint, Plaintiff-in-Intervention states that it seeks damages for all shortfalls during and since FY 1994, caused by Defendants' assertion that they did not have sufficient funds from annual appropriations to cover 100% of their "need." *Id.*

Defendants filed a cross-motion for partial summary judgment (Docket No. 592), arguing that this Court should hold that Defendants are entitled to judgment as

a matter of law on all of Plaintiffs' claims for FY 1994 to the present, based on the conclusion that the ISDA limits the liability of the government to pay Plaintiffs' contract support costs based upon available United States Department of Interior appropriations.

The Court, having read the cross motions for partial summary judgment, as well as all supporting and opposing briefs, including supplementary briefs, the full court record, relevant statutes and case law, for the reasons that follow, concludes that Plaintiffs' motion shall be denied and the Government's motion shall be granted insofar as it opposes Plaintiffs' motion for partial summary judgment.[4]

Procedural Background

This class action arises under the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 450, *et seq*. This statute authorizes the Bureau of Indian Affairs ("BIA"), a component of the United States Department of the Interior ("DOI"), to contract with and fund Indian tribes and tribal organizations that choose to take over the operations of programs and services formerly operated by the BIA.

Plaintiffs are tribal contractors who have sued DOI and several of its officials (collectively referred to herein as "Defendants"), alleging violations of the ISDA. In essence, Plaintiffs claim that, as tribal contractors, they

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[4] The real focus of Defendants' cross-motion is its opposition to Plaintiffs' motion for partial summary judgment. Given the result contained in this Memorandum Opinion and Order, it is unnecessary for the Court to reach the alternatives alluded to in the title of Defendants' cross-motion, *i.e.,* the striking of a defense or of an *amicus* brief.

are entitled to receive full payment of all contract support costs they seek under their ISDA contracts.

The motions now under consideration were briefed in 2001 and stayed in 2002 (Docket 671), pending completion of the appeal of *Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054 (10th Cir. 2002). The appeal was ultimately decided by the United States Supreme Court in March 2005, in *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005)("*Cherokee Nation*"). The stay was lifted on May 6, 2005, and supplemental briefing was concluded on October 21, 2005.

Statutory Language

As in any case of statutory interpretation, the Court will begin with the language of the relevant statutes. The ISDA's stated purpose is to allow Native American tribes to operate their own federal programs directly. Under the ISDA, a tribe and the Secretary of Interior enter into a "self-determination contract," which incorporates the provisions of the model contract contained in the ISDA text. *See* 25 U.S.C. § 450*l*(a), (c) (1994).

The Act specifies that the Government must pay a tribe's costs, including administrative expenses. *See* 25 U.S.C. §§ 450j-l(a)(1) and (2). Administrative expenses include: (1) the amount that the agency would have spent "for the operation of the progra[m]" had the agency itself managed the program, *id*. § 450j-1(a)(1); and, (2) "contract support costs," the costs at issue in this case. *id*. § 450j-1(a)(2).

The Act defines "contract support costs" as other "reasonable costs" that a federal agency would not have incurred, but which nonetheless "a tribal organization"

acting "as a contractor" would incur "to ensure compliance with the terms of the contract and prudent management." *id*. § 450j- 1(a)(2). "Contract support costs" can include indirect administrative costs, such as special auditing or other financial management costs, *id*. § 450j-1(a)(3)(A)(ii); they can include direct costs, such as workers' compensation insurance, *id*. § 450j-1(a)(3)(A)(i); and they can include certain startup costs, *id*. § 450j-1(a)(5). Most contract support costs are indirect costs "generally calculated by applying an 'indirect cost rate' to the amount of funds otherwise payable to the Tribe." *Cherokee Nation*, 543 U.S. at 635 (citation omitted); *see* 25 U.S.C. §§ 450b(f)-(g).

Section 25 U.S.C. § 450j-1 is entitled "Contract funding and indirect costs." Subsection (a) describes the amount of funds to be provided. For example, DOI is obligated to provide direct costs "not less than the appropriate Secretary would have otherwise provided for the operation of the programs . . . for the period covered by the contract." 25 U.S.C. § 450j-1(a)(1). In addition, DOI must supply "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. . . . " *Id*. § 450j-1(a)(2). The next subsection, 450j-1(b), describes reductions and increases in the amount of funds provided. This subsection concludes with the unequivocal statement that: "Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations. . . . " *id*. § 450j-1(b). *See also* 25 U.S.C. § 450-

j(c)(1)("The amounts of [self-determination] contracts shall be subject to the availability of appropriations.")

Section 450*l* of the ISDA contains a model agreement that provides that the "[f]unding amount" of the contracts are "subject to the availability of appropriations." See Section 1(b)(4) of the Model Contract, 25 U.S.C. § 450*l*(c). Plaintiffs' actual self- determination contracts contain similar language. (*See* Ex. B to Defs.' Suppl. Mem.). Such provisions make clear that the contractual liability of the Government is subject to the availability of appropriations, and that disbursement of those available funds will be made according to the BIA's "policies and procedures," including procedures for the pro rata distribution of available funds. *Id.*; *see also* Smith Decl., ¶ 4 (*See* Ex. E to Defs.' Suppl. Mem.)(explaining that the BIA sends out notices each fiscal year that set forth the procedures for the pro rata distribution of contract support costs).

The Court has examined the relevant BIA Appropriations Acts. (*See* Ex. A to Defs.' Suppl. Mem.). The first "not to exceed" language, or "cap", was inserted in the appropriation Act for FY 1994, Public Law 103-138: " . . . Provided further, that not to exceed $91,223,000 of the funds in this Act shall be available for payments to tribes and tribal organizations for indirect costs associated with contracts or grants or compacts authorized by the Indian Self-Determination Act of 1975, as amended, for FY 1994 and previous years. . . . "[5] The FY

[5] Congress was well aware that there might be shortfalls in contract support costs for ISDA contracts, and it provided for consideration of the shortfalls within the appropriations process. In particular, section 450j-1(c) requires the Secretary to provide an annual report to Congress, including "(2) an accounting of any deficiency in funds needed to

1995 appropriation act, Public Law 103-332, included similar cap language but substituted the phrase "contract support costs" for "indirect costs," as has every appropriation act since then. The later language covers both indirect and direct contract support payments. (*See* Pls.' Mem. in Supp. of Amend. Mot. for Partial Summ. J., Docket No. 571, n.4).

The language in each of these acts generally follows the same pattern. For example, the 1998 appropriations act, 111 Stat. 1543 (Nov. 14, 1997), provides that nearly $1.53 billion will be provided for the operation of a wide variety of Indian programs, and that the funds will remain available until September 30, 1999. Of this appropriated amount, the Act provides that "not to exceed $105,829,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts entered into with the Bureau prior to fiscal year 1998, as authorized by the Indian Self-Determination Act of 1975, as amended. . . . "

Material Facts Not in Dispute

These facts appear to be undisputed:

1. For every fiscal year since 1994, Congress has placed a cap in the annual appropriations acts for BIA

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provide required contract support costs to all contractors for the fiscal year in which the report is being submitted; . . . . " Pursuant to its reporting requirements, each fiscal year, BIA prepares a table setting forth the shortfalls in CSC. *See* Declaration of Harry Rainbolt ("Rainbolt Decl."), ¶¶ 3-6 (Ex. C to Defs.' Cross-Mot. for Partial Summ. J. This table is included in the annual President's Budget Request to Congress each fiscal year to aid Congress in the appropriation process. *Id*.¶¶ 5-6.

limiting the amount of funding the Secretary could expend from the appropriations.

2. In every fiscal year since 1994, BIA has distributed to tribal contractors the full amount of CSC funding appropriated for that purpose in Public Laws 103-138, 103-332, 104-134, 104-208, 105-83, 106-113, 106-291.

3. The amounts needed by tribal contractors for CSC each year have exceeded the amount of appropriated funds that Congress set aside each year since 1994 for that purpose. For example, in 2001, CSC needs exceeded Congress's $125,209,000 CSC cap by $16 million. (*See* Rainbolt Decl., ¶ 6, Ex. C to Defs.' Cross-Mot. for Partial Summ. J).

Legal Discussion

Both the Federal and D.C. Circuits have addressed the issue in this case, ruling that caps on appropriations, in conjunction with the "availability of appropriations" language in the ISDA, limit the liability of the government to pay additional amounts of contract support costs, even if this means that the amount provided is less than the amount negotiated in the self-determination contracts. Congress has the authority to determine the amount of appropriated funds the agency may obligate under self-determination contracts, and it has exercised that authority by providing that the amounts of such contracts are "subject to the availability of appropriations," and by placing caps in appropriations statutes. These cases have concluded that the ISDA and its model contracts do not create enforceable obligations of the United States for payment of contract support costs ("CSC") in amounts in excess of "capped" CSC appropriations.

Babbitt v. Oglala Sioux Tribal Public Safety Dept., 194 F.3d 1374 (Fed. Cir. 1999), is the Federal Circuit case that examined this issue. That case involved the Oglala Sioux Tribal Public Safety Department, a tribal organization operating an ISDA contract for public safety on the Pine Ridge Reservation in South Dakota for the Oglala Sioux Tribe. In the lawsuit, for fiscal year 1995, Oglala sought reimbursement of the difference between the originally negotiated amount and what it actually received from the Secretary of Interior, a difference of $108,506.00. For fiscal year 1995, Congress appropriated $1.5 billion for the operation of Native American programs, "of which not to exceed $95,823,000 shall be for payments . . . for contract support costs" for contracts authorized by the ISDA. *See* Interior Appropriations Act of 1995, Pub.L.No. 103-332, 108 Stat. 2499, 2511 (1994).

The Federal Circuit concluded that the language of § 450j-1(b) is clear and unambiguous and that any funds provided under an ISDA contract are "subject to the availability of appropriations." That Court noted that the clause preceding this limitation, "[n]otwithstanding any other provision in this subchapter," further clarifies that other language in the ISDA[6] cannot "trump" this express restriction on ISDA funding. *Id.* at 1378. The

[6] *See* 450-j-1(f): "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)."

Court went on to rely on §§ 450j(c)[7] and 450*l*(c)[8], as indicators of congressional intent to make ISDA funding subject to the availability of funding.

The *Oglala Sioux* Court also concluded that the general intent underlying the ISDA could not trump the express language of the statute. It noted that in the face of congressional under-funding, an agency can only spend as much money as has been appropriated for a particular program. Relying on various canons of statutory construction, the *Oglala Sioux* Court also rejected an argument that Congress intended ISDA indirect costs to be fully funded, noting that such an interpretation of congressional intent would render the "subject-to" appropriations language of § 450j-1(b) meaningless. The Court stated that it would exceed its judicial function if it were to repeal the unambiguous language of § 450j-1(b) in such a fashion, and that it must assume that Congress "says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, . . . 'judicial inquiry is complete.'" *Id.* at 1378, quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (internal citations omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

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[7] This section sets the term of self-determination contracts and states "[t]he amounts of such contracts shall be subject to the availability of appropriations."

[8] As mentioned above, this section sets out language of the model agreement referred to in each self-determination contract under the ISDA, which specifies that "[s]ubject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement . . . "

The *Oglala Sioux* Court distinguished *New York Airways, Inc. v. United States*, 369 F.2d 743 (1966), noting that that case involved a situation in which the Government, as a contracting party, had simply failed to appropriate and pay its unqualified contractual obligation. The *Oglala Sioux* Court noted that the situation before it "differs fundamentally in that the ability of Interior to bind the Government contractually was expressly conditioned on the availability of appropriations." *Oglala Sioux* 194 F.3d at 1379. Accordingly, that Court found the *New York Airways* analysis and conclusion unpersuasive.

The *Oglala Sioux* Court noted that the D.C. Circuit "found the language of 450-j-1(b) as clear as we do," and reached the same conclusion in the case of *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996)("*Ramah I*"). *Oglala Sioux*, 194 F.3d at 1379. *Ramah I* discussed § 450-j-1(b) of the ISDA in its analysis of how much discretion the Secretary had to allocate indirect funds with respect to the 1995 congressional cap on the appropriation amount available for ISDA contract support costs. The *Ramah I* Court noted that the Secretary is "not required to distribute money if Congress does not allocate that money to him under the Act. The first part of the provision [§ 450-j-1(b)] says just that. . . . " *Ramah I*, 87 F.3d at 1345. The Court then concluded that despite a Tribe's claim that it is entitled to the funds under the ISDA, if the money is not available, it need not be provided. *Id*.[9]

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[9] The ultimate outcome in *Ramah I* turned on the validity of the Secretary's 1995 allocation plan for the limited amount of indirect cost money available.

***Cherokee Nation* is Distinguishable from this Case**

This Court agreed to stay the parties' cross-motions for partial summary judgment, based on its stated belief that it was substantially likely that the issues before the Court in these motions would be addressed in a case that was then pending in the Tenth Circuit Court of Appeals[10] and that was ultimately appealed to the Supreme Court in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). In fact, as noted by Plaintiffs in their supplemental memorandum (Docket No. 962), filed following entry of the Supreme Court opinion, the *Cherokee Nation* case did not reach pivotal issues that remain to be decided by this Court.

Specifically, while arguing that *Cherokee Nation* "affirmed the sanctity of ISDA contracts," Plaintiffs acknowledge that the Supreme Court did not reach the issue as to whether the United States remains liable for shortfalls in contract payments, when Congress has specified an insufficient "not to exceed" lump sum appropriation. (Pls. 'Mem. in Supp. of Amend. Mot. for Partial Summ. J. at 2). They also note that the Supreme Court failed to reach the issue as to whether the phrase "subject to availability of appropriations" speaks to the Secretary's expenditure authority or to the liability of the United States. Finally, they note that the Supreme Court did not reach the issue of whether or not the United States remains liable for the full contract amount if the agency fails to request an adequate appropriation and the contract does not clearly impose the risk of an inadequate request on the contractor.

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[10] *See Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054 (10th Cir. 2002).

The Supreme Court granted certiorari and consolidated two Court of Appeals cases[11] that contained identical claims yet reached opposite results. In these cases, the United States and two Indian Tribes had entered into agreements in which the Government promised to pay certain "contract support costs" that the Tribes incurred during fiscal years 1994 through 1997. The Tribes made claims for $3.5 million (Shoshone-Paiute) and $3.4 million (Cherokee Nation) in the first case, and $8.5 million (Cherokee Nation) in the second case. In *Cherokee Nation*, the Supreme Court addressed the Government's liability for contract under-payments in years when Congress did not limit the amount of funds available to the agency to pay the contracts. The parties colloquially call such claims the "lump sum" claims, because the agency simply had a large "lump sum" appropriation from which to pay the contracts.

The Supreme Court phrased the question before it as being "whether the Government's promises are legally binding," and concluded that they are, under the circumstances then before the Court. *Cherokee Nation*, 543 U.S. at 634. In *Cherokee Nation*, Plaintiffs' claims were for far less than the amounts appropriated by Congress (between $1.277 billion and $1.419 billion) for the Indian Health Service to "carry out," the Indian Self-Determination Act. *See* 107 Stat. 1408 (1993); 108 Stat. 2527-2528 (1994); 110 Stat. 1321-189 (1996); *id*. at 3009-212 to 3009- 213 (1996). According to the Supreme Court opinion, "*[T]hese appropriations Acts contained no relevant*

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[11] *See Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054 (10th Cir. 2002) and *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003).

statutory restriction." Cherokee Nation, 543 U.S. at 637 (emphasis added).

All four of the statutes that were before the Supreme Court in the *Cherokee Nation* case contain language similar to each other. For example, the earliest statute, 107 Stat. 1408 (Nov. 11, 1993) appropriated approximately $1.646 billion for services furnished by the Indian Health Service. Of these funds, approximately $3.61 million were specifically allocated or restricted to the following uses: $12 million for the Indian Catastrophic Health Emergency Fund; $337.8 million for contract medical care; and, $11.52 million for a loan repayment program. The amount of *unrestricted* funds in this statute is approximately $1.28 billion. The other three statutes provide restrictions for the same categories, but with different amounts for each fiscal year. These other statutes provide for unrestricted funds that range from $1.43 billion to $1.37 billion.

The Supreme Court concluded: "Since Congress appropriated *adequate unrestricted funds* here, [the subject to the availability of appropriations language], if interpreted as ordinarily understood, would not help the Government." *Id.* at 643 (emphasis added). In its opinion, *Cherokee Nation* made repeated reference to the lack of legally binding restrictions in the IHS lump-sum appropriations, implicitly making the distinction between the type of lump-sum appropriations without legal restriction in that case, and the restrictive appropriation statutes now before this Court, containing statutory earmarks and caps. *Id.* at 639-643. The Supreme Court noted that a "fundamental principle of appropriations law [is] that where 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. . . . " *Id.* at 637 (internal quotations omitted).

As acknowledged by Plaintiffs, the Supreme Court did not directly address the liability of the Government when there is a capped appropriation that bulks together funds owed to hundreds of contracts, as in the immediate case. This is a very different statutory scheme from that considered by the *Cherokee Nation* court. The obvious implication from the *Cherokee Nation* case is that, where there are legal restrictions in the agency's appropriations, the "subject to the availability of appropriations" language serves to limit governmental liability under the contracts to the amount of those restricted funds.

Conversely, the "subject to the availability of appropriations" language, given its ordinary meaning, "normally makes clear that an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become *binding* unless and until Congress appropriates funds for that year. It also makes clear that a Government contracting officer lacks any special statutory authority needed to bind the Government without regard to the availability of appropriations." *Cherokee Nation*, 543 U.S. at 643 (citations omitted).

Conclusion

This case, like the *Oglala Sioux* and *Ramah I* cases, involves the issue of congressional under-appropriations of funds. This Court is persuaded by the logic of the *Oglala Sioux* and *Ramah I* cases, and reaches the same conclusion that the United States is not liable for short-

falls in contract payments when Congress has specified an insufficient "not to exceed" lump sum appropriation. This language does not speak to the Secretary's expenditure authority, but ultimately to the lack of liability of the United States to pay contract support costs in excess of the appropriated, capped dollar amounts. The ISDA and its model contracts do not create enforceable obligations of the United States for payment of contract support costs in amounts in excess of capped contract support cost appropriations.

Congress has the authority to determine the amount of appropriated funds the agency may obligate under self-determination contracts, and it has exercised that authority by providing that the amounts of such contracts are "subject to the availability of appropriations," and by placing caps in the BIA's appropriations statutes. These appropriations were made with Congressional knowledge of the potential for CSC shortfalls for ISDA contracts and it provided for consideration of the shortfalls within the appropriations process.

WHEREFORE, for the reasons stated herein, Plaintiffs' Amended Motion for Partial Summary Judgment or in the Alternative to Strike Defense (Docket No. 570) is **denied**; and Defendants' Cross-Motion for Partial Summary Judgment and Opposition to Plaintiffs' Amended Motion for Partial Summary Judgment or in the Alternative to Strike Defense and Opposition to *Amicus* Pueblo of Zuni's Brief in Support of Plaintiffs' Amended Motion for Partial Summary Judgment (Docket No. 594) is **granted** to the extent that it opposes Plaintiffs' amended motion for partial summary judgment.

FURTHERMORE, the Court notes that this Memorandum Opinion and Order resolves all remaining pending motions before the Court. The parties are hereby instructed to inform the Court, in writing, within fifteen (15) days, whether or not any issues remain in this matter that require the further attention of the Court, prior to entry of a Final Judgment.

IT IS SO ORDERED.

/s/ LEROY HANSEN
LEROY HANSEN
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 08-2262

RAMAH NAVAJO CHAPTER; OGLALA SIOUX TRIBE; PUEBLO OF ZUNI, FOR THEMSELVES AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

v.

KENNETH L. SALAZAR, SECRETARY OF THE INTERIOR; LARRY ECHO HAWK, ASSISTANT SECRETARY OF THE INTERIOR; MARY L. KENDALL, ACTING CHIEF OF OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF THE INTERIOR;* UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES,

AND

THE NATIONAL CONGRESS OF AMERICAN INDIANS, AMICUS CURIAE

[Filed: Aug. 1, 2011]

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* Pursuant to Fed. R. App. P. 43(c)(2) Kenneth Salazar is substituted for former Secretary of the Interior, Dirk Kempthorne; Larry Echo Hawk is substituted for former Assistant Secretary of the Interior, Eddie Brown; and Mary L. Kendall is substituted for former Chief of Office of Inspector General, Marvin Pierce.

ORDER

Before: LUCERO, MCKAY, and HARTZ, Circuit Judges.

Appellees' petition for rehearing is denied.

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, that petition is also denied.

Entered for the Court,

/s/ ELISABETH A. SHUMAKER
ELISABETH A. SHUMAKER, Clerk

APPENDIX E

1. 25 U.S.C. 450b provides in pertinent part:

Definitions

For purposes of this subchapter, the term—

* * * * *

(e) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C.A. § 1601 *et seq.*], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

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

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

* * * * *

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

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

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

* * * * *

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

* * * * *

[1] So in original. Probably should be "provided in".

2. 25 U.S.C. 450f provides in pertinent part:

Self-determination contracts

(a) Request by tribe; authorized programs

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

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

Notwithstanding any other provision of law, the Secretary may extend or otherwise alter the 90-day period specified in the second sentence of this subsection,[1] if before the expiration of such period, the Secretary obtains the voluntary and express written consent of the tribe or tribal organization to extend or otherwise alter such period. The contractor shall include in the proposal of the contractor the standards under which the tribal organization will operate the contracted program, service, function, or activity, including in the area of construction, provisions regarding the use of licensed and qualified architects, applicable health and safety standards, adherence to applicable Federal, State, local, or tribal building codes and engineering standards. The standards referred to in the preceding sentence shall ensure structural integrity, accountability of funds, adequate competition for subcontracting under tribal or other applicable law, the commencement, performance, and completion of the contract, adherence to project plans and specifications (including any applicable Federal construction guidelines and manuals), the use of proper materials and workmanship, necessary inspec-

[1] So in original. Probably should be "paragraph".

tion and testing, and changes, modifications, stop work, and termination of the work when warranted.

(3) Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract.

(4) The Secretary shall approve any severable portion of a contract proposal that does not support a declination finding described in paragraph (2). If the Secretary determines under such paragraph that a contract proposal—

(A) proposes in part to plan, conduct, or administer a program, function, service, or activity that is beyond the scope of programs covered under paragraph (1), or

(B) proposes a level of funding that is in excess of the applicable level determined under section 450j-1(a) of this title,

subject to any alteration in the scope of the proposal that the Secretary and the tribal organization agree to, the Secretary shall, as appropriate, approve such portion of the program, function, service, or activity as is authorized under paragraph (1) or approve a level of funding authorized under section 450j-1(a) of this title. If a tribal organization elects to carry out a severable portion of a contract proposal pursuant to this paragraph, subsection (b) of this section shall only apply to the portion of the contract that is declined by the Secretary pursuant to this subsection.

(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.

* * * * *

3. 25 U.S.C. 450j(c) provides:

Contract or grant provisions and administration

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.

* * * * *

4. 25 U.S.C. 450j-1 provides in pertinent part:

Contract funding and indirect costs

(a) Amount of funds provided

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities

which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—

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

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

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

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

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

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

(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.

(4) For each fiscal year during which a self-determination contract is in effect, any savings attributable to the operation of a Federal program, function, service, or activity under a self-determination contract by a tribe or tribal organization (including a cost reimbursement construction contract) shall;—

(A) be used to provide additional services or benefits under the contract; or

(B) be expended by the tribe or tribal organization in the succeeding fiscal year, as provided in section 13a of this title.

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

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

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

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

(b) Reductions and increases in amount of funds provided

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

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

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

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

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

(C) a tribal authorization;

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

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

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

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

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

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

(c) Annual reports

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

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

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

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

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

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

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

(d) Treatment of shortfalls in indirect cost recoveries

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

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

* * * * *

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

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

* * * * *

5. 25 U.S.C. 450*l* provides in pertinent part:

Contract or grant specifications

(a) Terms

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

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

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

* * * * *

(c) Model agreement

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

"SECTION 1. AGREEMENT BETWEEN THE SECRETARY AND THE _____TRIBAL GOVERNMENT.

"(a) AUTHORITY AND PURPOSE.—

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

"(2) PURPOSE.—Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 *et seq.*) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractable under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: (List functions, services, activities, and programs).

"(b) TERMS, PROVISIONS, AND CONDITIONS.—

"(1) TERM.—Pursuant to section 105(c)(1) of the Indian Self-Determination and Education Assistance

Act (25 U.S.C. 450j(c)(1)), the term of this contract shall be _____ years. Pursuant to section 105(d)(1) of such Act (25 U.S.C. 450j(d)), upon the election by the Contractor, the period of this Contract shall be determined on the basis of a calendar year, unless the Secretary and the Contractor agree on a different period in the annual funding agreement incorporated by reference in subsection (f)(2).

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

"(3) PROGRAM STANDARD.—The Contractor agrees to administer the program, services, functions and activities (or portions thereof) listed in subsection (a)(2) of the Contract in conformity with the following standards: (list standards).

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

"(5) LIMITATION OF COSTS.—The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that

the total amount required for performance of this Contract or a specific activity conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the Contract until such time as additional funds are awarded.

* * * * *

"(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).

* * * * *

"(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."

6. 25 U.S.C. 450m-1 provides in pertinent part:

Contract disputes and claims

(a) Civil actions; concurrent jurisdiction; relief

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims,

over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

* * * * *

(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).

* * * * *

7. 31 U.S.C. 1304(a) provides:

Judgments, awards, and compromise settlements

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

(1) payment is not otherwise provided for;

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

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

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

(B) under section 3723 of this title;

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

(D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 20113 of title 51.

8. 31 U.S.C. 1341(a)(1)(A)-(B) provides:

Limitations on expending and obligating amounts

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

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

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

9. 41 U.S.C. 7108(a)-(c) [formerly codified at 41 U.S.C. 612] provides:

Payment of claims

(a) Judgments

Any judgment against the Federal Government on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of title 31.

(b) Monetary awards

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

(c) Reimbursement

Payments made pursuant to subsections (a) and (b) shall be reimbursed to the fund provided by section 1304

of title 31 by the agency whose appropriations were used for the contract out of available amounts or by obtaining additional appropriations for purposes of reimbursement.