No. 11-551

In the Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

RAMAH NAVAJO CHAPTER, ET AL.

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

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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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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-87a) is reported at 644 F.3d 1054. The opinion of the district court (Pet. App. 90a-107a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2011. A petition for rehearing was denied on August 1, 2011 (Pet. App. 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, and the petition was filed on October 31, 2011. The petition was granted on January 6, 2012. The jurisdiction of this Court rests on 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."

The Anti-Deficiency Act, 31 U.S.C. 1341(a)(1)(A), provides, in pertinent part:

> An officer or employee of the United States Government * * * may not * * * make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.

Section 450j-1(b) of Title 25 provides, in pertinent part:

> 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.

Additional pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-33a.

STATEMENT

I. STATUTORY BACKGROUND

A. General Provisions Of The ISDA

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 administra-

tion" of federal programs and services for Indians. 25 U.S.C. 450a(b). Before the ISDA, most federal programs and services for Indians, such as health and educational services, were administered directly by the federal government. See S. Rep. No. 274, 100th Cong., 1st Sess. 2-3 (1987). The ISDA permits tribal organizations to administer such federal programs and services themselves. Under the Act, at the request of an Indian tribe, a tribal organization may enter into a "self-determination contract[]" with the Secretary of the Interior or the Secretary of Health and Human Services, as appropriate, to assume operation of federally funded programs and services that the Secretary would otherwise have provided directly.[1] 25 U.S.C. 450f(a). The Secretary must accept a tribe's request for an ISDA contract except in specified circumstances. See 25 U.S.C. 450f(a)(1) ("The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts[.]"); 25 U.S.C. 450f(a)(2)(A)-(E) (permitted grounds for declination). The Act thus generally permits an Indian tribe, at its initiative, to step into the shoes of a federal agency and administer federally funded services.

The basic parameters of an ISDA self-determination contract are set out in the Act.[2] See generally 25 U.S.C. 450*l*(c) (model agreement). As originally enacted in 1975, the ISDA required the Secretary to give the tribe the

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[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*).

[2] In addition to self-determination contracts, the ISDA also authorizes self-governance "funding agreements" and self-governance "compacts." See 25 U.S.C. 458aa *et seq.* and 458aaa *et seq.* The differences among these schemes are not relevant here.

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"—*i.e.*, expenses 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)). Costs that are eligible for federal funding as "contract support costs" include certain direct costs of administering a program, such as costs of complying with special audit and reporting requirements, and certain indirect costs, such as an allocable share of general overhead expenses not already covered by the secretarial amount. See 25 U.S.C. 450j-1(a)(3)(A). Because contract support costs 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. ISDA Contracts And Federal Appropriations

Federal funding under ISDA contracts, like funding for other federal programs, is contingent upon the availability of appropriations. Congress made that contingency explicit in at least four places in the Act. First, the ISDA declares as a general matter that "[t]he amounts of such contracts shall be subject to the availability of appropriations." 25 U.S.C. 450j(c)(1). The Secretary's authority to obligate federal funds under ISDA contracts

is thus expressly made subject to Congress's annual funding decisions. 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), (5), 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." 25 U.S.C. 450j-1(c).

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

> Notwithstanding any other provision in this [Act], the provision of funds under this [Act] 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 [Act].

25 U.S.C. 450j-1(b). The ISDA thus expressly contemplates that the appropriations provided by Congress may be insufficient to fund the requests of all tribal contractors fully or equally.

C. This Court's Decision In *Cherokee Nation* v. *Leavitt*

In *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005) (*Cherokee*), the Indian Health Service (IHS), an agency of the Department of Health and Human Services, paid only a portion of the contract support costs it had promised to two tribes in ISDA contracts for fiscal years 1994 through 1997. The tribal contractors brought suit to recover the balance. Citing a lack of available appropria-

tions, the government argued that it had no further contractual obligation to the tribes because the Secretary had spent the remaining funds for other purposes, including to support important federal administrative functions. *Id.* at 641-642.

This Court rejected that argument and held that the Secretary could properly be held liable for the promised but unpaid amounts. 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 an otherwise valid 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 acts for the fiscal years in question, the Court emphasized, "contained no relevant statutory restriction," *ibid.*, and the agency had access to "*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 funding under self-determination contracts is "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. *Cherokee*, 543 U.S. at 643.

II. THE BUREAU OF INDIAN AFFAIRS AND ITS ANNUAL APPROPRIATIONS

A. The Bureau Of Indian Affairs And The ISDA

The Secretary of the Interior, through the Bureau of Indian Affairs (BIA), provides a broad range of educational, social, public safety, and economic programs and services to more than 2.2 million Native Americans and Alaska Natives. Almost 40% of the BIA's annual funding for such services is administered directly by tribes and tribal organizations under ISDA contracts. Nearly all of the more than 565 federally recognized Indian tribes have at least one such contract with the Secretary.

The Secretary funds ISDA self-determination contracts, like other BIA programs, from the appropriations provided by Congress each year. Until fiscal year (FY) 1994, the relevant appropriations acts simply provided a lump sum for the operation of Indian programs, including for funding ISDA self-determination contracts. Although the accompanying congressional committee reports designated specific amounts for contract support costs, see, *e.g.*, H.R. Conf. 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, 1993, Pub. L. No. 102-381, 106 Stat. 1374. Compare *Cherokee*, 543 U.S. at 637 (noting that the IHS appropriations for the fiscal years there at issue likewise "contained no relevant statutory restriction").

B. Statutory Appropriations Caps On The BIA's Funding For Contract Support Costs

In FY 1994, however, Congress for the first time imposed a statutory cap on the appropriations available to the Secretary to pay contract support costs under the

ISDA. Of a total appropriation in that fiscal 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.[3] Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 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).

In each fiscal year since FY 1994, Congress has imposed a similar "not to exceed" cap on the appropriations available to the Secretary to pay ISDA contract support costs. See Pub. L. No. 103-332, 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, 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, 114 Stat. 934 (FY 2001); Pub. L. No. 107-63, 115 Stat. 430 (FY 2002); Pub. L. No. 108-7, 117 Stat. 231 (FY 2003); Pub. L. No. 108-108, 117 Stat. 1256-1257 (FY

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[3] Subsequent appropriations acts have used the phrase "contract support costs," which includes both direct and indirect contract support costs. See Pet. App. 6a, 8a.

2004); Pub. L. No. 108-447, 118 Stat. 3055 (FY 2005); Pub. L. No. 109-54, 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, 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, 125 Stat. 151 (FY 2011) (continuing resolution).[4] The relevant portion of each of these appropriations acts is reproduced in the appendix to this brief. App., *infra*, 21a-33a.

Since FY 1999, moreover, Congress has provided in each of the relevant appropriations acts that the statutory cap on contract support cost funding applies "notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended." See, *e.g.*, Pub. L. No. 105-277, 112 Stat. 2681-245. And Congress has included a separate provision in each appropriations act for the BIA since FY 1999 reaffirming that the capped sums provided in previous years' appropriations represented "the total amounts available" for contract support costs in those years. See, *e.g.*, § 314, 112 Stat. 2681-288.

It is undisputed that these statutory appropriations caps have restricted the available funds at a level "well below the sum total" that would be required for the BIA to satisfy all tribal contractors' requests for contract support costs. Pet. App. 2a. As the district court found, in each year since FY 1994, the "BIA has distributed to

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[4] Similarly, Congress has imposed statutory caps on contract support cost funding for IHS programs in every fiscal year since FY 1998 (*i.e.*, after the contract years at issue in *Cherokee*). 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 in excess of the statutory appropriations caps), petition for cert. pending, No. 11-83 (filed July 18, 2011).

tribal contractors the full amount of [contract support cost] funding appropriated for that purpose." *Id.* at 98a. And in each of those years, contractors' total requests for contract support costs "have exceeded the amount of appropriated funds that Congress set aside." *Ibid.*

C. The BIA's Distribution Of Available Appropriations

The BIA responded to the appropriations caps by establishing a system for distributing the available funding among tribal contractors on a "uniform, pro-rata basis," according to notices published annually in the *Federal Register*. Pet. App. 9a (collecting citations); see, *e.g.*, *Distribution of Fiscal Year 1994 Contract Support Funds*, 58 Fed. Reg. 68,694 (Dec. 28, 1993). In the committee reports accompanying Interior's FY 1995 appropriation, the House and Senate both indicated approval of this approach. See H.R. Rep. No. 551, 103d Cong., 2d Sess. 56 (1994) (urging the BIA to "ensure that each [tribe] receives a proportionate share of their fiscal year 1995 contract support costs"); S. Rep. No. 294, 103d Cong., 2d Sess. 57 (1994) (similar). The D.C. Circuit subsequently held that the Secretary was required to allocate the available funding for contract support costs equitably among tribal contractors. *Ramah Navajo Sch. Bd., Inc.* v. *Babbitt*, 87 F.3d 1338, 1347-1349 (1996).

The BIA has therefore adhered to an express policy of distributing the limited appropriations provided by Congress among contractors in an equitable fashion. For most of the period at issue in this case, the BIA employed the pro-rata distribution methodology described by the court of appeals. Pet. App. 9a. Under that methodology, in fiscal years 1994 through 2004, tribal organizations contracting with the BIA were paid between 77%

and 93% of their requested contract support costs. See *id.* at 10a.

In 2006, the BIA adopted a revised national policy for the equitable distribution of funding for contract support costs. See U.S. Dep't of the Interior, Bureau of Indian Affairs, National Policy Memorandum, Contract Support Cost, NPM-SELFD-1 (May 8, 2006) (2006 Policy).[5] The new policy, which was developed with the "active participation of representatives of Indian tribes," *id.* at 3, responds to tribal concerns by seeking to ensure that each tribal contractor receives, as soon as possible in each fiscal year, at least the amount of funding for contract support costs that it received in the previous year, plus a proportionate share of any additional funding provided by Congress. See *id.* at 13-17. The policy also describes in detail how the BIA determines the amount of contract support costs that a tribal contractor "is eligible to receive[,] subject to available appropriations." *Id.* at 8.

The BIA continues to work with Indian tribes to develop the agency's budget priorities in light of the annual appropriations limits on ISDA contract support costs. Each year, for example, as required by the ISDA and consistent with the Executive Branch's policy of consulting with tribal governments on matters having tribal implications, the BIA develops its annual budget requests—including any requests for additional contract support cost funding—in consultation with tribes. See 25 U.S.C. 450j-1(i); see also Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000). In addition, the BIA maintains a joint working group "comprised of Federal and Tribal individuals who possess knowledge of [contract

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[5] Available at http://www.bia.gov/idc/groups/public/documents/text/idc-000691.pdf

support cost] issues" and who are tasked with "provid[ing] advice and guidance to the BIA" on matters concerning ISDA contract support costs. 2006 Policy 4.

III. THE PRESENT CONTROVERSY

A. Background

Respondent Ramah Navajo Chapter is a tribal organization of the Navajo Nation, a federally recognized Indian tribe. J.A. 48. Respondent 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). Consistent with the requirements of the ISDA, each of respondent's contracts and the annual funding agreements thereunder specified that all funding was subject to the availability of appropriations. See, *e.g.*, J.A. 206.

In 1990, respondent filed this class action to challenge the methodology that Interior's Office of the Inspector General used to set indirect cost rates— *i.e.*, the rates that are often used in ISDA funding negotiations as a starting point for determining indirect contract support costs. *Ramah Navajo Chapter*, 112 F.3d at 1459; see Pet. App. 6a; J.A. 48-56. In 1993, the district court certified a nationwide class composed of "those Indian tribes and organizations who have contracted with the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act." J.A. 66-67.[6] The parties

[6] The district court certified the class over the government's objection that most of the unnamed plaintiff class members have not exhausted their claims under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 7101 *et seq.* The district court ruled that "it is not necessary that each member of the proposed class exhaust its administrative reme-

eventually settled respondents' claims concerning the indirect-cost rate formula, see Pet. App. 13a, and those claims are not at issue here.

In 1999, however, the district court granted respondents leave to amend their complaint to add a new class claim for the alleged underpayment of contract support costs due to the statutory appropriations caps. J.A. 68.[7] In their amended complaint, respondents acknowledged that Congress had imposed statutory "not to exceed" caps on the appropriations available to the Secretary to pay contract support costs, see *id.* at 71-72, but they nonetheless asserted that the Secretary's refusal to "pay more than the 'not to exceed' level" of funding constituted a breach of contract, *id.* at 73. The parties cross-moved for summary judgment, and the matter was stayed pending the outcome of the *Cherokee* litigation. See Pet. App. 13a-14a.

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dies." J.A. 64. That ruling was mistaken. See *Arctic Slope Native Ass'n* v. *Sebelius*, 583 F.3d 785, 795 (Fed. Cir. 2009) ("[A]n ISDA claimant that has not presented its claim to a contracting officer pursuant to the CDA cannot be a class member in an ISDA class action."), cert. denied, 130 S. Ct. 3505 (2010). Because many class members have not exhausted their administrative remedies, moreover, their claims are likely time-barred. See *id.* at 795-797 (concluding that the class-action tolling doctrine is inapplicable to CDA claimants who have not exhausted administrative remedies); *Menominee Indian Tribe* v. *United States*, 614 F.3d 519, 528 (D.C. Cir. 2010) (same). Neither the propriety of the class certification nor the timeliness of the unexhausted claims of unnamed class members, however, is before this Court.

[7] The district court also granted the motion of respondent Oglala Sioux Tribe to intervene as a class representative. J.A. 69; see *id.* at 75 (Oglala Sioux complaint). The district court subsequently granted respondent Pueblo of Zuni leave to intervene as well. J.A. 139.

B. The District Court's Decision

Following this Court's decision in *Cherokee*, the district court granted summary judgment for the government. Pet. App. 90a-107a. The court found no material dispute concerning three basic propositions: (i) Congress had imposed statutory appropriations caps on the BIA's funding for contract support costs; (ii) the BIA had distributed "the full amount" of the available appropriations to tribal contractors each year; and (iii) the appropriated and distributed sums were insufficient to satisfy all of the respondent class members' requests for contract support costs. *Id.* at 97a-98a.

The district court observed that the D.C. and Federal Circuits had already rejected tribal demands for ISDA contract support costs in excess of the statutory appropriations caps. See Pet. App. 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), and *Ramah Navajo Sch. Bd.*, *supra*). Agreeing with those decisions, the district court ruled 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 district court rejected respondents' contention that this Court's decision in *Cherokee* requires the government to pay contract support costs irrespective of appropriations limits. Pet. App. 102a-105a. In *Cherokee*, the court noted, the Court "made repeated reference to the lack of legally binding restrictions" in the relevant appropriations acts. *Id.* at 104a. "The obvious implication from the *Cherokee* [] 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." *Id.* at 105a.

Accordingly, the district court granted summary judgment in favor of the government. Pet. App. 106a. The court explained: "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." *Ibid.*

C. The Court Of Appeals' Decision

A divided panel of the court of appeals reversed. Pet. App. 1a-87a. The court of appeals did not dispute that Congress had imposed firm statutory limits on the relevant appropriations available to the Secretary for contract support costs. See *id.* at 7a-8a. The court acknowledged that the Secretary could not pay all of respondents' requests for such costs without exceeding the statutory caps. See *id.* at 2a, 44a-45a. And the court recognized that the phrase "subject to the availability of appropriations," which appears both in the ISDA and in all of the relevant contract documents, could be interpreted in the manner the government urged and the district court held, under which the total amount of BIA funding for contract support costs available for all tribal contractors is subject to the statutory cap. *Id.* at 16a.

Nevertheless, the court of appeals concluded that the government may be liable for amounts in excess of the statutory caps. Because Congress in each fiscal year appropriated sufficient funds to meet the needs of any *one* contractor considered in isolation, the court held, the government must pay *all* of the contract support costs

requested by *every* such tribal contractor—even though the necessary result is to exceed the statutory appropriations limits imposed by Congress. Pet. App. 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."). In the court's view, the sufficiency of the available appropriations for a particular contract must be determined by comparing that particular contract to the total sum appropriated by Congress, without reference to any other contract that the agency must satisfy from the same appropriated sum. *Id.* at 26a. To treat the capped appropriation as the total sum available for *all* ISDA contractors, the court believed, would require "an improper conflation of over 600 tribes and tribal contractors into one amalgamated contractor." *Id.* at 31a. Accordingly, the court rejected the reasoning of the Federal Circuit, which held in a similar case that the government is not liable to ISDA contractors for amounts in excess of the statutory appropriations caps. *Id.* at 34a-38a (discussing *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010) (*Arctic Slope*), petition for cert. pending, No. 11-83 (filed July 18, 2011)).

The court of appeals found no "meaningful distinction" between this case and *Cherokee*, in which there were no statutory appropriations caps, because in both cases the funds "were similarly insufficient to cover all objects for which the appropriation was available." Pet. App. 29a n.8. The court reasoned that this Court's emphasis on the "unrestricted" nature of the appropriations acts at issue in *Cherokee* meant only that the there was no statutory restriction against paying "the individual contractors bringing suit" in that case. See *id.* at 30a.

The court of appeals rejected the government's reliance on the Appropriations Clause of the Constitution, which provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," Art. I, § 9, Cl. 7, and the Anti-Deficiency Act, which provides that a federal officer or employee "may not * * * make or authorize an expenditure or obligation exceeding an amount available in an appropriation," 31 U.S.C. 1341(a)(1)(A). Pet. App. 43a-47a. The court acknowledged that the appropriations caps would prevent the Secretary himself from disbursing more than the appropriated sums. *Id.* at 44a-45a. In the court's view, however, 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 appropriations caps by seeking any excess from the Judgment Fund, it reasoned that "we must consider the legal effect of Congress' intentional acts, and those acts compel [this] result." *Ibid.* The court explained: "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." *Ibid.* The court concluded that, if Congress wished to limit payments from the Treasury for contract support costs, it was required either to amend the ISDA itself or to "limit appropriations on a contract-by-contract basis" for each of the hundreds of tribal contractors nationwide. *Id.* at 46a.

Judge Hartz dissented (Pet. App. 47a-87a), objecting that the majority had "render[ed] futile the spending cap imposed by Congress." *Id.* at 47a. There is no authority, the dissent maintained, for requiring the government to make payments in excess of a statutory appropriations

ceiling: "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 support costs requested by all contractors—"is *compelled* here" by the appropriations caps. *Id.* at 80a.

SUMMARY OF ARGUMENT

Each year for more than 15 years, Congress has imposed an explicit statutory ceiling on the appropriations available to the Secretary of the Interior to pay contract support costs under the Indian Self-Determination and Education Assistance Act. The Secretary has distributed to tribal contractors each year the entire sum appropriated by Congress, but the appropriated sums have never been sufficient to cover all tribal requests for contract support costs. In this nationwide class action, the court of appeals held that all of the respondent tribes and tribal contractors are entitled to recover all of their contract support costs from the Treasury, notwithstanding the appropriations caps imposed by Congress—and that if the Secretary cannot pay their claims, respondents are entitled to recover the difference from the Judgment Fund.

That conclusion is untenable. The United States is not liable, in contract or otherwise, for the Secretary's refusal to pay sums that Congress has not authorized to be paid from the Treasury. Contrary to the court of appeals' view, the ISDA does not create a statutory entitlement to funding for contract support costs without re-

gard to Congress's appropriations decisions. Nor did—or could—the Secretary obligate the Treasury by contract to pay the full amount of respondents' requested contract support costs irrespective of the maximum sums that Congress authorized. The judgment of the court of appeals should be reversed.

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. By reserving to Congress the prerogative to approve or prohibit the payment of money from the Treasury, 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).

Each year since FY 1994, Congress has exercised its constitutional prerogative by imposing explicit "not to exceed" caps on the funds available to the Secretary for ISDA contract support costs. Those caps reflect Congress's judgment that the important federal policies served by underwriting such costs do not justify jeopardizing the funding available for other programs for Indians and Indian tribes—including essential services for tribes that have elected *not* to enter into ISDA contracts. It is difficult to posit a judgment more firmly committed to Congress, and the court of appeals had no warrant to set it aside.

Nothing in the ISDA suggests, let alone expressly provides, that the Secretary is empowered to obligate funds that Congress has not appropriated. There are a handful of federal statutes that confer so-called "contract

authority"—the power to bind the United States to contracts for which Congress has not yet appropriated funds. But the ISDA is not among them. To the contrary, the Act provides that all federal funding contemplated by the ISDA is "subject to the availability of appropriations." 25 U.S.C. 450j-1(b). As this Court has explained, Congress employs statutory language of this kind precisely to make clear that agency officials do *not* have the authority to obligate money Congress has not appropriated. And because the ISDA does not confer such authority, no contract signed by the Secretary could obligate the United States to pay funds from the Treasury in excess of the maximum sums authorized by Congress.

2. The court of appeals articulated no coherent theory on which the government may be held liable for failing to pay amounts that Congress has forbidden to be paid. The court of appeals' decision rests on the fundamentally mistaken premise that the ISDA "guarantee[s]" federal funding for contract support costs, and that the appropriations caps imposed by Congress have therefore caused "an on-going breach of the ISDA's promise." Pet. App. 45a. By its plain terms, however, the ISDA provides no such guarantee. To the contrary, Congress provided that *all* duties imposed under the Act—including both the government's obligation to provide federal funding and tribal contractors' obligation to administer the contracted federal programs—are subject to the availability of appropriations.

Likewise, nothing in respondents' contracts with the Secretary confers a right to receive funding that Congress has not appropriated. The court of appeals believed that, because Congress appropriated sufficient funds each year to pay any *single* contractor considered

in isolation, a federal court may properly order the Treasury to pay *all* of the costs requested by *all* contractors irrespective of the total sum. That approach would nullify the appropriations caps imposed by Congress and would undermine Congress's authority to control the use of public funds in the Treasury. A statutory appropriation of "not to exceed $1 million" is plainly not a license for agency officials to commit the United States to an unlimited number of contracts for $999,999.

Finally, the court of appeals' suggestion that respondents may simply recover from the Judgment Fund any contract support costs that Congress declined to appropriate is without merit. The Judgment Fund is not a back-up source of agency appropriations. Nor is it an invitation to litigants to circumvent express restrictions Congress has imposed on the expenditure of funds from the Treasury. Because of the statutory caps, the United States is not liable to respondents for contract support costs in excess of the appropriated sums. And because there is no liability, there is no basis for a judgment to be paid from the Judgment Fund.

ARGUMENT

I. THE SECRETARY OF THE INTERIOR PROPERLY REFUSED TO PAY CONTRACT SUPPORT COSTS IN EXCESS OF THE FIXED AMOUNTS APPROPRIATED BY CONGRESS FOR THAT PURPOSE

A. Congress Has Plenary Authority Over The Use Of Public Funds

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 conveys a "straightforward and explicit command" that

no money "can be paid out of the Treasury unless it has been appropriated by an act of Congress." *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937)). Indeed, an "appropriation" is simply a license from Congress "to incur obligations and to make payments from [the] Treasury for specified purposes." 1 U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law* 2-5 (3d ed. 2004) (*Red Book*); see also *Andrus* v. *Sierra Club*, 442 U.S. 347, 359 n.18 (1979). By reserving to Congress the right to approve or prohibit the payment of money from the Treasury, 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. at 427-428.

Congress's constitutional authority to prescribe limitations on the use of public money in the Treasury—and its corresponding accountability to the public for its exercise of that authority—is an essential feature of the Constitution's separation of powers. The Appropriations Clause promotes the rule of law and "prevent[s] fraud and corruption" by limiting the ability of Executive Branch officials to commit the federal government to endeavors Congress has not approved. *OPM* v. *Richmond*, 496 U.S. at 427; see *Cincinnati Soap Co.*, 301 U.S. at 321 (Appropriations Clause "was intended as a restriction upon the disbursing authority of the Executive department"); *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 291 (1850) ("However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not * * * previously sanctioned.

Any other course would give to the fiscal officers a most dangerous discretion."); 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342, at 213-214 (1833) (but for the Appropriations Clause, "the Executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure"). James Madison thus described Congress's "power over the purse" as "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance." The Federalist No. 58, at 357 (Clinton Rossiter ed., 1961).

Congress's authority under the Appropriations Clause is, of course, constrained by the Constitution itself. See *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 588 (1998) ("So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities."). Thus, Congress could not use its appropriations power to enact a bill of attainder, *United States* v. *Lovett*, 328 U.S. 303, 315 (1946), to reduce the compensation of Article III judges, *United States* v. *Will*, 449 U.S. 200, 221-226 (1980), to punish disfavored speech, *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 548-549 (2001), or to interfere with the President's constitutional prerogatives, *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 148 (1871) (pardon power). But where no specific constitutional limit is at issue, it is for Congress alone to determine how much of the public's money shall be available from the Treasury to spend for a given purpose. See *OPM* v. *Richmond*, 496 U.S. at 425 (the authority of all federal officials is "limited by a valid reservation of congressional control over funds in the Treasury").

2. Congress has reinforced its power of the purse in a series of statutes that together establish the basic framework of federal appropriations law. See 1 *Red Book* 1-12. Three have particular relevance here. First, Congress has directed that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. 1301(a). Thus, an agency is not free to take money that Congress has appropriated expressly for one purpose and redirect it to another. See also 31 U.S.C. 1532. Second, Congress has provided that a law "may be construed * * * to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states * * * that such a contract may be made." 31 U.S.C. 1301(d). Consequently, a statute permitting (or even directing) the government to enter into contracts normally does not permit agency officials to bind the United States to contracts beyond the amount of the appropriations provided by Congress. *Ibid*; see, *e.g.*, *Sutton* v. *United States*, 256 U.S. 575, 579 (1921) (citing predecessor provision to Section 1301(d)).

Finally, under the Anti-Deficiency Act, "[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 31 U.S.C. 1341, 1350). In pertinent part, the Anti-Deficiency Act provides:

> An officer or employee of the United States Government * * * may not * * * make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.

31 U.S.C. 1341(a)(1)(A); see 31 U.S.C. 1350 (criminal penalties). Congress enacted this provision in the early 20th Century to address the recurring problem of "coercive deficiencies"—the tendency of federal agencies to exhaust their appropriations early in the fiscal year and then return to Congress for supplemental appropriations to cover outstanding commitments that, although not legally binding, Congress nonetheless felt it could not refuse to pay in good conscience. 2 *Red Book* 6-34; see 59 Comp. Gen. 369, 372 (1980). The broad prohibition on deficiency contracts that Congress enacted to put an end to that practice could scarcely be more explicit. "When [an] appropriation is fully expended, no further payments may be made *in any case*." 2 *Red Book* 6-41 (emphasis added). Absent some other unrestricted source of budget authority, an agency's power to "make or authorize" payments from the Treasury expires when the relevant appropriations are exhausted. See, *e.g.*, *Sutton*, 256 U.S. at 579; *Bradley* v. *United States*, 98 U.S. 104, 113-114, 117 (1878).

B. Since FY 1994, Congress Has Expressly Capped The Appropriations Available To The Secretary To Pay ISDA Contract Support Costs

In each fiscal year since FY 1994, Congress has imposed an express statutory cap on the appropriations available to the Secretary to pay contract support costs under the ISDA. See pp. 8-9, *supra*. It has done so by inserting a "not to exceed" proviso into the annual appropriations act for the BIA's administration of Indian programs. In FY 1995, for example, Congress appropriated more than $1.5 billion to the BIA, but stipulated that "*not to exceed $95,823,000*" of that sum "shall be for payments to tribes and tribal organizations for contract sup-

port costs associated with ongoing contracts or grants or compacts authorized by the Indian Self-Determination Act of 1975, as amended." Pub. L. No. 103-332, 108 Stat. 2511 (emphasis added). The specific sums that Congress has appropriated have varied from year to year, but the "not to exceed" language has not.

As the plain meaning of the phrase "not to exceed" makes evident, these are classic statutory appropriations caps. The specified sums are the maximum amounts the Secretary may lawfully obligate for contract support costs in the relevant fiscal year. The Comptroller General has explained that, in the parlance of federal appropriations law, "not to exceed" is "susceptible of but one meaning": the agency "may not expend more than" the specified sum for the purpose designated by Congress, "and any expenditures in excess of that amount would be unlawful." 64 Comp. Gen. 263, 264 (1985); see also 2 *Red Book* 6-32 (describing the phrase "not to exceed" as "the most effective way to establish a maximum" sum available for a specified purpose). Congress has used variants of the same formulation to exercise its authority under the Appropriations Clause since the inception of the Nation: the first general appropriations act, passed in September 1789, appropriated "for the service of the present year," *inter alia*, "a sum not exceeding ninety-six thousand dollars for paying the pensions to invalids." Act of Sept. 29, 1789, 1 Stat. 95.

In each fiscal year at issue, therefore, Congress has prohibited the Secretary from obligating more for contract support costs than the specific sums appropriated. The statutory "not to exceed" caps distinguish this case from *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005) (*Cherokee*), which involved the government's liability for ISDA contract support costs under contracts that were

funded by an ordinary, unrestricted, lump-sum appropriation. *Id.* at 636-637. In holding that the government could properly be held liable for contract support costs the Indian Health Service did "not deny that it promised to pay," the Court repeatedly stressed that Congress had "appropriated sufficient *legally unrestricted* funds to pay the contracts at issue." *Id.* at 636, 637 (emphasis added).

Indeed, the tribes in *Cherokee* highlighted the absence of statutory restrictions in the relevant appropriations acts. In urging that the IHS was liable for their unpaid contract support costs in fiscal years 1994-1997, the tribes specifically contrasted the IHS's unrestricted appropriations with the statutory caps imposed by Congress on the BIA's appropriations during the same period—*i.e.*, the appropriations caps at issue in this case. See *Cherokee*, Nos. 02-1472 & 03-853, Pet. Br. 29 (arguing that "Congress's deliberate use of the term of art 'not to exceed' elsewhere forecloses inferring * * * a comparable legal restriction on IHS's payment of [contract support costs]"); see also *id.*, Pet. Reply Br. 6-7 (arguing that "*only* Congress, acting through annual Appropriations Acts, can alter the Secretary's duty to pay ISDA contracts at the full amounts required by that Act"). In ruling in favor of the tribes, in turn, this Court repeatedly referred to the fact that Congress had placed no statutory restriction on the Secretary's ability to reprogram other funds from within the agency's lump-sum appropriations for the relevant fiscal years to pay the amounts promised.[8]

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[8] See, *e.g.*, *Cherokee*, 543 U.S. at 637 ("These appropriations Acts contained no relevant statutory restriction."); *id.* at 640 (discussing who "should bear the risk that an unrestricted lump-sum appropriation would prove insufficient" to pay all contractors); *id.* at 643 (concluding that the ISDA's availability-of-appropriations provision was irrelevant

Here, by contrast, it is undisputed that Congress has, by statute, "capp[ed] appropriations at a level well below the sum total" of all tribal requests for contract support costs in every fiscal year since 1994. Pet. App. 2a. Those appropriations caps reflect quintessential legislative choices regarding the best use of public funds. Although the policies served by funding contract support costs under the ISDA are important, see 25 U.S.C. 450a, Congress concluded that it was necessary to limit such funding in order to provide for other programs benefitting Indians and Indian tribes. It is difficult to posit a judgment more firmly committed to Congress's discretion. See U.S. Const. Art. I, § 9, Cl. 7; *OPM* v. *Richmond*, 496 U.S. at 428.

The legislative history of the relevant appropriations acts leaves no doubt that Congress exercised precisely that sort of judgment in choosing among competing priorities. The Conference Report accompanying the BIA's appropriation for FY 1994, for example, explained that a statutory cap on contract support costs was warranted 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). Similarly, the Senate Report accompanying the FY 1995 appropriation expressed concern that swelling contract support costs might prevent the BIA from providing adequate services to Indian tribes that had *not* opted to enter into ISDA contracts: "In order to protect the Bureau's ability to provide services to those tribes who do not elect to contract for a part or all of their programs, the Committee has retained bill language which

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because "Congress appropriated adequate unrestricted funds here"); *id.* at 647 (emphasizing that Congress "unambiguously provided unrestricted lump-sum appropriations").

establishes a limit of the amount of funding to be available for contract support." S. Rep. No. 294, 103d Cong., 2d Sess. 57 (1994). And in considering the BIA's FY 1999 budget, the Appropriations Committee in the House of Representatives expressed concern that the continued growth of contract support costs would undermine Congress's ability to provide essential funding for Indian programs: "[T]he Committee cannot afford to pay 100% of contract support costs at the expense of basic program funding for tribes[.]" H.R. Rep. No. 609, 105th Cong., 2d Sess. 125-126 (1998); see also H.R. Conf. Rep. No. 825, 105th Cong., 2d Sess. 1234 (1998) (noting the funding shortfall but expressing concern that the "remedy cannot be a large infusion of additional funding for contract support costs at the expense of either critical health programs or critical construction needs of the [Indian Health] Service."). It is manifestly within Congress's authority both to make such judgments and to enforce them by imposing "not to exceed" caps on agency appropriations.

C. The Secretary Was Without Authority To Obligate The United States To Pay More Than The Statutory Appropriations Caps Allowed

Respondents contend in this litigation that the statutory appropriation caps "do not diminish or eliminate" the government's liability for ISDA contract support costs. Pet. App. 91a (quoting respondents' motion for summary judgment). But respondents do not dispute that, for each fiscal year at issue, the entirety of the fixed sum that Congress appropriated for contract support costs has been expended. As the district court found, the BIA distributed to tribal contractors in each year in question "the full amount" of funding for contract sup-

port costs that Congress authorized. *Id.* at 98a. The available funds were sufficient to cover between 77% and 93% of respondents' requested funding, depending on the year in question. See *id.* at 10a. Under the terms of the relevant appropriations acts ("not to exceed"), the Secretary had no authority to use other agency funds to make up the shortfall. Unlike in *Cherokee*, therefore, there are no other "unrestricted funds" available to the agency. 543 U.S. at 641.

That conclusion is by itself sufficient to resolve this case. The government's liability for contract support costs under the ISDA does not extend beyond the sums Congress authorized for that purpose. As we explain below, the ISDA expressly provides that all funding under ISDA contracts is subject to the availability of appropriations (pp. 36-43, *infra*), and nothing in respondents' contracts with the Secretary even arguably promises that the government will pay contract support costs in excess of the appropriated sums (pp. 43-46, *infra*). Respondents' arguments thus fail under the plain terms of the statute and contracts at issue. But the court of appeals' decision would require reversal even if the ISDA and the relevant contracts made no mention of appropriations. That is because, except in rare circumstances not presented here, federal officials have no authority to obligate the United States to pay money in excess of authorized appropriations.

1. The ISDA does not empower the Secretary to obligate public funds in excess of appropriations

Under settled principles of federal appropriations law, a statute "may be construed * * * to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states * * *

that such a contract may be made." 31 U.S.C. 1301(d). Thus, the official drafting manual of the Senate provides that it is "unnecessary" to specify (as the ISDA does) that obligations imposed by statute are "subject to the availability of appropriations," because "[a] direction to an agency head to carry out a specific program or activity does not create implied direct spending authority." U.S. Senate, Office of Legislative Counsel, *Legislative Drafting Manual* § 130(a)(5), at 43 (1997); see also Anti-Deficiency Act, 31 U.S.C. 1341(a).

Nothing in the ISDA suggests, let alone expressly provides, that the Secretary is empowered to obligate the United States to pay money that Congress has not appropriated. The ISDA is wholly unlike the handful of federal statutes that confer what is known in appropriations law as "contract authority"—the power to bind the United States to contractual obligations irrespective of appropriations. See 2 *Red Book* 6-88. A provision of the Price-Anderson Act, for example, authorizes the Nuclear Regulatory Commission to "make contracts in advance of appropriations and incur obligations without regard to," *inter alia*, the Anti-Deficiency Act. 42 U.S.C. 2210(j). Similarly, Congress has provided an exception to the prohibition against deficiency contracts for purchases by the Secretary of Defense for "for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies," provided that such purchases do "not exceed the necessities of the current year." 41 U.S.C. 6301(b) (Supp. IV 2010). The ISDA, by contrast, expressly provides that "the amounts" of all tribal self-determination contracts "shall be subject to the availability of appropriations," 25 U.S.C. 450j(c), and that "[n]otwithstanding any other provision in this [Act], the provision of funds under this [Act] is subject to the availability of

appropriations," 25 U.S.C. 450j-1(b). As this Court observed in *Cherokee*, Congress enacts provisions of this kind precisely to make clear that agency officials do *not* possess the "special statutory authority needed to bind the Government without regard to the availability of appropriations." 543 U.S. at 643.

Nor is the ISDA among the few statutory programs for which Congress has authorized permanent, indefinite appropriations. 31 U.S.C. 1305. Section 1305 provides open-ended appropriations of all "[n]ecessary amounts" not only for such fundamental objects as the payment of interest on the public debt, 31 U.S.C. 1305(2), but also for specific statutory programs, see, *e.g.*, 31 U.S.C. 1305(10) (permanent appropriation for rental housing assistance contracts under the National Housing Act). As the appropriations caps at issue in this case illustrate, however, Congress has not chosen to place the ISDA outside the annual appropriations process in the same fashion. The ISDA does not authorize the Secretary to obligate the United States to pay more than the amounts that Congress chooses to appropriate.

2. The Secretary consequently could not bind the United States by contract to pay more than the appropriated sums

Because the ISDA does not confer on the Secretary the "special statutory authority needed to bind the Government without regard to the availability of appropriations," *Cherokee*, 543 U.S. at 643, an ISDA contract that purported to do so would be without legal effect. As we explain below (pp. 43-46, *infra*), the Secretary has not in fact made any such contractual commitment to respondents. But it would make no difference if he had. As this Court has consistently held, an *ultra vires* promise by a

government official to pay sums in excess of appropriations does not bind the United States. See *Leiter* v. *United States*, 271 U.S. 204, 206-207 (1926); *St. Louis Sw. Ry. Co.* v. *United States*, 262 U.S. 70, 75-76 (1923); *Sutton*, 256 U.S. at 579; *Hooe* v. *United States*, 218 U.S. 322, 333 (1910); *United States* v. *Jones*, 121 U.S. 89, 100-101 (1887); *Bradley*, 98 U.S. at 113-114, 117; *Reeside*, 52 U.S. (11 How.) at 291. As the Court explained in *Hooe*, if a federal official

> assumes to bind the Government, by express or implied contract, to pay a sum in excess of that limited by Congress for the purposes of such a contract, *the contract is a nullity*, so far as the Government is concerned, and no legal obligation arises upon its part to meet its provisions.

218 U.S. at 334 (emphasis added). Even "the head of the department cannot involve the government in an obligation to pay any thing in excess of the appropriation." *Bradley*, 98 U.S. at 114.

That rule is simply an application of the settled proposition that the United States cannot be bound in contract by agents acting without actual authority. See, *e.g.*, *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 383-384 (1947); *Sutton*, 256 U.S. at 578-581; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Whiteside* v. *United States*, 93 U.S. 247, 256-257 (1876); *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 675-683 (1868). The common principle underlying those decisions is that "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power*

& Light Co., 243 U.S. at 409. As this Court has explained, that rule "does not reflect a callous outlook" toward government contractors, but "merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Merrill*, 332 U.S. at 385.

In *Sutton*, for example, Congress appropriated funds for the improvement of a shipping channel in Florida. 256 U.S. at 577. The Secretary of War signed a contract for the work, and payment was made to the contractor on an installment basis according to progress reports by a government inspector. *Ibid.* Eventually it was discovered that the inspector had underestimated the amount of work done and that, according to the unit rates in the contract, the amount due was "far in excess" of the appropriated sum. *Ibid.* After halting work and collecting partial payment from the available appropriations, the contractor sued for the shortfall, arguing that the government had agreed to the contract terms and that the contract had been valid when entered. *Id.* at 578. The contractor also argued that the inspector's erroneous reports, on which the parties had relied, created "an implied contract for the fair value of the work performed." *Id.* at 580.

In a unanimous opinion by Justice Brandeis, this Court rejected the contractor's arguments and held that the United States was not liable for any amount in excess of the available appropriations. *Sutton*, 256 U.S. at 578-579. Although Congress had authorized the project and had appropriated sums for its completion, the Court reasoned, "by none of these acts was any authority conferred upon the Secretary of War * * * to contract to expend more than the amount then appropriated." *Id.* at 578. Citing the statutory predecessor to 31 U.S.C.

1301(d), the Court reasoned that Congress had not clearly authorized the making of a deficiency contract. "The Secretary of War was, therefore, without power to make a contract binding the Government to pay more than the amount appropriated." *Sutton*, 256 U.S. at 579. Moreover, when it was discovered that the contractor had obtained reimbursement for a portion of the shortfall out of a subsequent year's appropriation, the government recovered that payment from the contractor. This Court upheld that action as well, reasoning that Congress "did not authorize the application of any part of the [subsequent] appropriation to work theretofore done," and "[t]he payment therefrom having been unauthorized, [it] did not bind the government." *Id.* at 579-580. Finally, the Court in *Sutton* rejected the contractor's contention that the inspector's erroneous reports had created an "implied contract" binding the government to pay the "fair value of the work performed" in excess of the appropriated sum. *Id.* at 580. The Court explained: "[T]he short answer to this contention is that since *no official of the government could have rendered it liable for this work by an express contract*, none can by his acts or omissions create a valid contract implied in fact." *Ibid.* (emphasis added).[9]

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[9] The Court in *Sutton* did require, however, that the government pay the contractor nearly $2000 that the War Department had deducted from the appropriation for the agency's administrative expenses, reasoning that "[t]he fund otherwise available for work actually performed should be applied to that purpose." 256 U.S. at 581. It is undisputed that, in this case, the Secretary distributed to respondents "the full amount" of the fixed sums appropriated by Congress for contract support costs. Pet. App. 98a.

II. NEITHER THE ISDA ITSELF NOR ANY CONTRACT THEREUNDER ENTITLES RESPONDENTS TO RECOVER CONTRACT SUPPORT COSTS IN EXCESS OF THE APPROPRIATIONS CAPS

The Tenth Circuit articulated no plausible theory on which the government may be held liable for failing to pay amounts that Congress has forbidden to be paid. The court of appeals suggested at points (*e.g.*, Pet. App. 2a, 4a-8a, 45a-46a) that tribes' purported entitlement to "full funding" of contract support costs irrespective of appropriations springs from the ISDA itself; at other points, it appeared to believe that such an entitlement flows from principles of government contract law (*e.g.*, *id.* at 21a-34a). Neither theory has merit. The ISDA expressly provides that the duties imposed under the Act—including both the government's obligation to provide federal funding and tribal contractors' obligation to administer the contracted federal programs—is subject to the availability of appropriations. And consistent with that statutory scheme, respondents' contracts with the Secretary do not confer a right to receive funding that Congress has not appropriated.

A. Congress Expressly Reserved Its Discretion To Control Appropriations Under The ISDA

1. As originally enacted, the ISDA required the Secretary to provide to a tribal contractor the amount of funding that the "Secretary would have otherwise provided for the operation of the programs" directly by the agency during the fiscal year. 25 U.S.C. 450j-1(a)(1). Congress became concerned, however, that tribes often found it necessary in administering federally funded services to divert program funding or other tribal resources "to pay for the indirect costs associated with programs

that are a federal responsibility." S. Rep. No. 274, 100th Cong., 1st Sess. 9 (1987) (1987 Senate Report). Congress accordingly amended the ISDA to require that, in addition to the secretarial amount, the Secretary must also provide "an amount for" the tribal organization's reasonable "contract support costs," which are costs that tribes must incur but that the Secretary would not incur. 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)) (1988 amendments).

The Tenth Circuit construed the 1988 amendments to "guarantee[] funding" for the contract support costs incurred by tribes. Pet. App. 45a; see also *id.* at 2a (asserting that "Congress has mandated that all self-determination contracts provide full funding" of contract support costs). Even on its face, however, the Act creates no such entitlement: a requirement that the Secretary provide "*an amount for* [a contractor's] reasonable costs," 25 U.S.C. 450j-1(a)(2) (emphasis added), is not naturally read to mean that the government must pay *all* reasonable costs. That inference is reinforced by the following provision, which speaks of "[t]he contract support costs that are *eligible* costs for purposes of receiving funding," 25 U.S.C. 450j-1(a)(3) (emphasis added), rather than the costs that *shall* receive funding.

The court of appeals also relied on 25 U.S.C. 450j-1(g), see Pet. App. 2a, 46a, but that provision does not create a "guarantee" of funding either. Section 450j-1(g) simply 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 rea-

sonable contract support costs, 25 U.S.C. 450j-1(a)(2). The Act nowhere guarantees that every dollar incurred or requested by a tribal organization for contract support costs will be paid, let alone that it will be paid without regard to whether Congress appropriates the necessary funds. Indeed, in enacting Section 450j-1(g), Congress explained that its purpose was to ensure that contract support costs "are continuously available, *unless the Congress reduces such funds by appropriations actions*." 1987 Senate Report 34 (emphasis added).

2. In any event, other provisions of the ISDA confirm that the Act does not "guarantee[]" (Pet. App. 45a) to a tribal contractor any particular level of federal funding. Congress made clear in at least four places in the ISDA that, although the Act would permit tribes to administer federally funded programs, Congress retained complete control over the disbursement of public funds from the Treasury, just as it would if the same programs had continued to be administered by the Secretary.

First, while the Act generally "direct[s]" the Secretary "to enter into a self-determination contract" at the request of an Indian tribe, 25 U.S.C. 450f(a)(1), it provides that "[t]he *amounts* of such contracts shall be subject to the availability of appropriations." 25 U.S.C. 450j(c)(1) (emphasis added). The Act thus contemplates that the initial determination of the government's financial obligation under an ISDA contract in a particular fiscal year—including any "amount for" the tribe's contract support costs—will depend on the amounts made available to the Secretary for that fiscal year by Congress. Cf. 25 U.S.C. 450j(c)(2) (providing that "[t]he amounts of such contracts may be renegotiated annually to reflect changed circumstances and factors").

Second, Congress stipulated that "[e]ach self-determination contract" must "contain, or incorporate by reference," certain standard contract terms. 25 U.S.C. 450*l*(a)(1). Those terms, which Congress set out in the Act itself, 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)). The tribe, moreover, is "not * * * obligated to continue performance" if doing so would "require[] an expenditure of funds in excess of the amount of funds awarded under th[e] Contract." *Ibid.* (model agreement § 1(b)(5)). Thus, if a tribe cannot carry out a contract due to statutory restrictions on the availability of appropriated funds, the options open to the tribe are to decline to enter into the contract, to curtail performance, or to renegotiate the scope of the work—not to seek to recover as damages the additional amounts that Congress has forbidden to be paid.

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). Such a report would be superfluous if, as the Tenth Circuit believed, Congress had "mandated that all self-determination contracts provide full funding" of contract support costs. Pet. App. 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 1988 amendments, § 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"), and it encompasses *all* relevant provisions of the ISDA—including the provisions governing contract support costs. Thus, the "provision of funds" under the ISDA is subject to the availability of appropriations, "[n]otwithstanding any other provision" in the ISDA itself. And lest there be any doubt, in every annual appropriations act for the BIA since FY 1999, Congress has provided that the statutory cap on funding for contract support costs shall apply "notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended." *E.g.*, 112 Stat. 2681-245.

In light of this unequivocal statutory language, the D.C. and Federal Circuits have both rejected the notion that the ISDA guarantees any particular level of federal funding as a matter of right. See *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296, 1304 (Fed. Cir. 2010) (*Arctic Slope*) (Section 450j-1(b) "limits the Secretary's obligation to the tribes to the appropriated amount"), petition for cert. pending, No. 11-83 (filed July 18, 2011);

Babbitt v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1380 (Fed. Cir. 1999) ("The unequivocal statutory language prevents [an ISDA contractor] from asserting that it was entitled to full funding as a matter of right."), cert. denied, 530 U.S. 1203 (2000); *Ramah Navajo Sch. Bd., Inc.* v. *Babbitt*, 87 F.3d 1338, 1345 (D.C. Cir. 1996) ("[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 Pet. App. 82a (Hartz, J., dissenting) ("[T]he ISDA does not require full payment. Full payment is conditioned on the availability of funds.").

3. The court of appeals was therefore mistaken in its premise that Congress "guarantee[d] funding" for contract support costs in the ISDA itself.[10] Pet. App. 45a. To the contrary, Congress expressly retained its discretion to control the funding available under the ISDA through the annual appropriations process. See 25 U.S.C. 450j(c); 25 U.S.C. 450j-1(b). The "apparent contradiction" that the court of appeals perceived between

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[10] The Tenth Circuit has since reaffirmed its 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*, 657 F.3d 1071, 1083 (10th Cir. 2011), petition for cert. pending, No. 11-762 (filed Dec. 19, 2011). In that case, the Indian Health Service declined a tribe's request for an ISDA contract on the ground that, because of a statutory cap, the agency lacked sufficient appropriations to fund the contract. *Id.* at 1075-1076. The Tenth Circuit ruled that the agency was nonetheless required to accept the contract as proposed by the tribe, even though it appeared that the IHS would immediately be in breach of the contract under the same court's ruling in the decision below. See *id.* at 1079-1080. Congress cannot have intended that result.

the ISDA and Congress's funding decisions, Pet. App. 2a, is thus no contradiction at all. Since FY 1994, Congress has appropriated more than $2.3 billion in public funds for ISDA contract support costs. But at the same time, Congress preserved its discretion to decide each year how much of the public's money should be spent for that purpose. And as already discussed (pp. 21-23, *supra*), that is Congress's prerogative: the ISDA serves important federal policies, but those policies remain subject to congressional revision. Respondents do not assert any constitutional entitlement to funding for contract support costs; Congress could repeal the 1988 amendments, or the entire ISDA, if it wished. The amount of funding to be provided under the Act is committed to Congress's discretion, just as the annual budget of the BIA is committed to Congress's discretion. The ISDA simply permits Indian tribes to administer any federal "programs, functions, services, or activities" that the Secretary would otherwise have provided for the benefit of Indians. 25 U.S.C. 450f(a). Those programs and services do not become uniquely immune from the federal appropriations process merely because they are administered by tribal contractors rather than BIA officials.

In reaching the opposite conclusion, the Tenth Circuit found "particularly important" (Pet. App. 15a) the canon of statutory construction providing that legislation concerning Indians and Indian tribes should be construed liberally in their favor. See, *e.g.*, *Chickasaw Nation* v. *United States*, 534 U.S. 84, 93-94 (2001). Likewise, the court of appeals pointed to the ISDA's own policy of liberal construction in favor of tribal contractors. Pet. App. 15a (citing 25 U.S.C. 450*l*(c) (model agreement § 1(a)(2)). As this Court has explained, however, such interpretative principles "are designed to help judges determine

the Legislature's intent as embodied in particular statutory language," and they have no application where the meaning of the relevant statutory text is clear. *Chickasaw Nation*, 534 U.S. at 94. That is particularly true here, where the statutory text merely reinforces what the Constitution itself provides. See pp. 21-23, *supra*. Because the ISDA itself did not mandate—and indeed prohibited—payment of the full amount of contract support costs requested by respondents for the fiscal years in question, respondents have no right to recover damages under the terms of the Act. See *United States* v. *Navajo Nation*, 556 U.S. 287, 290, 296, 301-302 (2009); *United States* v. *Navajo Nation*, 537 U.S. 488, 506 (2003).

B. Respondents Have No Contractual Right To Payment Of Contract Support Costs Irrespective Of Appropriations

The court of appeals also sought to justify its conclusion in terms of government contract law. *E.g.*, Pet. App. 26a-34a. But respondents have no valid claim for breach of contract because the Secretary did not promise to pay contract support costs in excess of the total available appropriations. Indeed, as already discussed (pp. 29-35, *supra*), the Secretary *could not* obligate the United States to pay money in excess of appropriations because his authority to bind the United States expired at the limit of the available appropriations in each fiscal year. See, *e.g.*, *Sutton*, 256 U.S. at 579. The court of appeals' decision effectively imposes on the United States contractual obligations that no federal official had the authority to accept.

1. The Secretary did not promise to pay respondents' contract support costs in excess of appropriations

The court of appeals pointed to no actual contract signed by the Secretary promising to pay respondents'

contract support costs without regard to appropriations. The court's inability to find an unambiguous promise of that kind is hardly surprising, given that "[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. In fact, the Secretary's contracts and annual funding agreements with respondents specified that all funding for contract support costs was "[s]ubject to the availability of appropriations," as the ISDA requires, 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4)). Pet. App. 10a-11a; see, *e.g.*, J.A. 98, 123, 206.

Moreover, as the dissent below explained, other provisions in the parties' agreements "recognized that contract-support costs might not be fully paid." Pet. App. 51a (Hartz, J., dissenting). For example, the Oglala Sioux annual funding agreement for 2001 provided that the tribe's recovery for indirect contract support costs would be calculated by multiplying the amount that the tribe would otherwise receive by a "percentage of rate funded by BIA"—*i.e.*, a funding rate tied to the available appropriations. J.A. 132; see Pet. App. 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 the Ramah Navajo Chapter and the Oglala Sioux Tribe reflected "uncertainty" about the contract support cost funding percentage because the BIA did not determine the percentage until the fiscal year was underway). Like the ISDA itself, the parties' contractual agreements recognized that funding for all contract support costs was *not* guaran-

teed, but was instead contingent upon the availability of appropriations.

2. Respondents' contract claims fail on their own terms

Even if the Secretary could obligate the United States to pay monies that Congress has not appropriated, respondents' contract claims would fail on their own terms. Because Congress capped the appropriations for contract support costs at a level below the total required to satisfy respondents' claims, the "availability of appropriations" contingency in the ISDA itself and in each of the Secretary's agreements with respondents precludes any claim for breach of contract.

The plain import of the "availability of appropriations" contingency is that the Secretary has no contractual duty to pay funds that Congress has not appropriated. Thus, in *Bradley* v. *United States*, *supra*, the government leased a building in Washington, D.C. for the use of the Post Office. The lease provided that the government would pay $4200 per year in rent, but the parties "understood and agreed with each other that the lease was made subject to an appropriation by Congress for the payment of the stipulated rental." 98 U.S. at 112. When Congress appropriated only $1800 for the final year's rent, the lessor brought suit to recover the difference between the amount appropriated and the contract rent. This Court rejected the claim and held that, under the plain terms of the contract, the government was liable only for the amount Congress appropriated. *Id.* at 114. Observing that the contract had been executed against the backdrop of the Appropriations Clause and statutory prohibitions on deficiency contracts that "in one form or another have been in operation without question throughout nearly the whole period since the adop-

tion of the Constitution," the Court reasoned that "the words of the indenture are amply sufficient to effect the object which the person who drafted the instrument intended to accomplish." *Ibid.*

Likewise, in *Sutton*, the contract provided that the government would pay for the work done "within the limits of available funds." 256 U.S. at 577. In rejecting the contractor's claim for amounts in excess of the available funds, the Court noted that the contract itself did not purport to "bind the government for any amount in excess of the appropriation. On the contrary, it limit[ed] to the amount of the appropriation the work which may be done." *Id.* at 579.

The Tenth Circuit stressed (Pet. App. 27a-30a) that this Court rejected the government's reliance on similar contract language in *Cherokee*. See 543 U.S. at 643. But the Court rejected that argument in *Cherokee* because, in that case, there were no statutory restrictions on the Secretary's ability to pay the claims at issue. See *ibid.* Here, by contrast, the relevant appropriations are expressly restricted.

3. The Tenth Circuit's "single contractor in isolation" theory is untenable

The court of appeals believed that the "availability of appropriations" for each individual contract must be determined by comparing that specific contract to the total sum appropriated by Congress, without reference to any other contract to be funded by the Secretary from the same appropriated sum. Pet. App. 26a. Thus, in the court of appeals' view, if an appropriation is sufficient to satisfy the claim of a *single* contractor considered in isolation, the government must pay *all* such contractors, regardless of any overall statutory limit imposed by Con-

gress. *Id.* at 29a-30a. The court of appeals reasoned that, unless it amends the Act itself, Congress must "limit appropriations on a contract-by-contract basis" for each of the hundreds of tribal contractors nationwide if it wishes to restrict the public funds available to pay contract support costs. *Id.* at 46a.

a. That cramped view of Congress's appropriations authority is untenable. As the Federal Circuit explained in rejecting the same theory, the court of appeals' approach would "effectively defeat" the statutory limits imposed by Congress on the withdrawal of money from the Treasury. *Arctic Slope*, 629 F.3d at 1304; see also Pet. App. 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 public funds available to pay ISDA contract support costs. See, *e.g.*, H.R. Rep. No. 609, 105th Cong., 2d Sess. 125-126 (1998) ("[T]he Committee cannot afford to pay 100% of contract support costs at the expense of basic program funding for tribes[.]"). The court of appeals' theory, under which each tribal contractor could recover its requested contract support costs without regard to the total sum that may be drawn from the Treasury for that purpose, is fundamentally inconsistent with that judgment and would render the appropriations caps meaningless. Indeed, it would undermine Congress's ability to control federal expenditures generally through the standard mechanism of "not to exceed" statutory specifications. An appropriations cap of $1 million is plainly not a license for agency officials to commit the United States to a limitless number of contractual obligations of $999,999. Yet that is the apparent consequence of the court of appeals' logic.

b. In embracing that theory, the court of appeals relied on *Ferris* v. *United States*, 27 Ct. Cl. 542 (1892), and *Dougherty* v. *United States*, 18 Ct. Cl. 496 (1883), which the court 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." Pet. App. 31a-32a. In *Ferris*, a contractor hired by the Army to dredge a channel in the Delaware River was directed to halt work for five months; when the contractor was eventually permitted to resume work, he was soon ordered to stop again on the ground that the general appropriation from which the project was funded had been exhausted. 27 Ct. Cl. at 542-543. The Court of Claims ruled that the contractor was entitled to recover his lost profits for the five-month delay. *Id.* at 547. The court observed: "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." *Ibid.*

Similarly, in *Dougherty*, the claimant contracted with the Department of the Interior to deliver beef for the benefit of Indians. 18 Ct. Cl. 496. After the claimant performed, the Secretary refused to pay the entire agreed sum, arguing that the agency's general, lump-sum appropriation had been exhausted by other contracts. *Id.* at 503. The court rejected that contention, explaining that "persons contracting with the Government for partial service under general appropriations are [not] bound to know the condition of the appropriation account at the Treasury or the contract book of the Government." *Ibid.*

Ferris and *Dougherty* are inapposite. First, like this Court's decision in *Cherokee*, which cited both decisions (see 543 U.S. at 641, 643), *Ferris* and *Dougherty* involved government contracts made against the backdrop of unrestricted, lump-sum appropriations. See 2 *Red Book* 6-44 (describing both cases as concerning a contractor's right "to be paid from a general appropriation"); see also *Arctic Slope*, 629 F.3d at 1304 (discussing *Ferris*). Like *Cherokee*, therefore, *Ferris* and *Doughterty* involved the government's contractual liability for discretionary decisions by Executive Branch officials in allocating funds that Congress had appropriated without imposing any relevant statutory restriction.

The Court of Claims consequently had no need to decide in either case whether granting relief would violate an explicit statutory limitation on the use of public funds—or to confront the constitutional questions that would be implicated by holding that a contractor's mere lack of awareness of a statutory prohibition on withdrawing funds from the Treasury was sufficient to overcome an exercise of Congress's authority under the Appropriations Clause. Cf. *OPM* v. *Richmond*, 496 U.S. at 434 ("The rationale of the Appropriations Clause is that if individual hardships are to be remedied by payment of Government funds, it must be at the instance of Congress," such as through private bills). Indeed, in a subsequent case akin to *Dougherty*, this Court ruled that a contract to purchase beef for the benefit of Indians did *not* bind the United States where there was no appropriation available to support the contract. See *Jones*, 121 U.S. at 100 ("[N]o officer of the government was authorized to bind the United States by any contract for the subsistence of Indians not based upon appropriations made by Congress.").

Second, neither *Ferris* nor *Dougherty* involved a contract that was, by its terms, expressly made contingent on the availability of appropriations. As Judge Dyk explained in concluding that "the *Ferris* approach is inapplicable" under the ISDA, availability-of-appropriations clauses in government contracts evolved in part "to overcome the *Ferris* rule." *Arctic Slope*, 629 F.3d at 1304, 1303; see *C.H. Leavell & Co.* v. *United States*, 530 F.2d 878, 892 (Ct. Cl. 1976) (per curiam) (discussing history). This Court has consistently given effect to such clauses, see pp. 45-46, *supra*, and the express funding contingencies in the ISDA itself and in respondents' contracts by themselves provide a sufficient basis for reversing the court of appeals here.

Third, the rationale of *Ferris* and *Dougherty* is inapposite here on its own terms. The Court of Claims reasoned in those cases that the contractors were not barred from recovering because they had no reason to anticipate the insufficiency of funds in a general appropriation. See, *e.g.*, 27 Ct. Cl. at 546. In this case, by contrast, respondents have been well aware since at least FY 1994 of the insufficiency of the appropriations available to the Secretary to pay ISDA contract support costs, as their amended complaint makes clear. See J.A. 72. And as the complaint further acknowledges, beginning in 1993, the BIA annually "published and sent a notice to each contractor" (*ibid.*) describing the shortfalls in funding for contract support costs and the methodology that the agency would use to allocate the available money. Pet. App. 9a (collecting citations); see, *e.g.*, *Distribution of Fiscal Year 1994 Contract Support Funds*, 58 Fed. Reg. 68,694 (Dec. 28, 1993). The "very purpose" of these notices was to "warn[] tribal organizations of the

possibility of insufficient funding." Pet. App. 50a (Hartz, J., dissenting).

Indeed, the BIA has worked closely with affected tribes to develop policies that take account of the annual appropriations caps. In 2006, for example, with the "active participation" of affected tribes, the BIA developed a revised nationwide policy for the equitable distribution of funding for contract support costs in light of the recurring shortfalls. 2006 Policy 3. The agency maintains a joint working group with tribal representatives on matters related to ISDA contract support costs. See pp. 11-12, *supra*. And as required by the ISDA, the BIA has developed its annual budget requests—including any requests for additional contract support cost funding—in consultation with tribes. See 25 U.S.C. 450j-1(i). The inadequacy of available appropriations, in short, has been "no secret" to respondents. Pet. App. 49a (Hartz, J., dissenting). *Ferris* and *Dougherty* consequently provide no basis for respondents to recover against the United States.

c. Finally, as the Federal Circuit observed, *Ferris* and *Dougherty* are inapposite here for an additional reason: Section 450j-1(b) specifically relieves the Secretary of any obligation to make funds available to one contractor by reducing payments to others. See *Arctic Slope*, 629 F.3d at 1304. The Tenth Circuit reasoned that the Secretary is liable to each of the respondents under the *Ferris* principle because the Secretary could in theory have elected to pay any one contractor's entire claim. See Pet. App. 29a (asserting that "Congress capped *total* [contract support cost] spending, but this does not explain why Ramah, Oglala, Pueblo of Zuni, or any one contractor could not be paid [in] full"). But the ISDA provides that, "[n]otwithstanding any other provision" of the

Act, "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]." 25 U.S.C. 450j-1(b).

The Secretary was therefore not obliged to provide funding for tribal contract support costs on a first-come, first-served basis, but had the authority to distribute the available money among all tribal contractors in an equitable fashion, as the BIA has done every year. See pp. 10-11, *supra*. The court of appeals acknowledged that 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." Pet. App. 21a. Yet the court declared the government liable for all tribes' costs precisely because the Secretary *could* have paid the entire amount requested by any individual tribe or 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 from favoring particular tribes in that manner by making clear that the Secretary may adopt an equitable mechanism for distributing among tribal contractors whatever sum Congress elects to appropriate in a given year.

C. The Judgment Fund Does Not Permit Litigants To Circumvent Appropriations Caps Imposed By Congress

Finally, the court of appeals reasoned that neither the Appropriations Clause nor the Anti-Deficiency Act was implicated by its decision because the Judgment Fund, see 31 U.S.C. 1304, is available to compensate respon-

dents for any shortfall in contract support costs resulting from the statutory appropriations caps. See Pet. App. 43a-47a. That conclusion is without merit.

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, Congress provided for the payment of respondents' ISDA contract support costs 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 in turn be paid out of the Judgment Fund.

Nor, in any event, could Congress plausibly have intended for respondents to recover contract support costs in excess of the statutory caps from the Judgment Fund. Breach-of-contract actions under the ISDA are subject to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 7101 *et seq*. (formerly codified at 41 U.S.C. 601 *et seq.*). See 25 U.S.C. 450m-1(d). Although judgments against the government under the CDA are payable from the Judgment Fund, see 41 U.S.C. 7108(a) (Supp. IV 2010),

the CDA specifies that the Judgment Fund "shall be reimbursed * * * by the agency whose appropriations were used for the contract out of available amounts or by obtaining additional appropriations for purposes of reimbursement." 41 U.S.C. 7108(c) (Supp. IV 2010). The Secretary plainly could not reimburse the Judgment Fund "out of available amounts" for judgments predicated on a *lack* of legally available funds. The "not to exceed" appropriations caps imposed by Congress would therefore be pointless, because the Secretary would have no choice but to return to Congress for additional appropriations to make up the shortfall.

The court of appeals acknowledged that "Congress likely did not intend to pay [contract support costs] from the Judgment Fund." Pet. App. 45a. But the court opined that "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." *Ibid.* That assertion encapsulates the error of the decision below. The ISDA does not "guarantee[]" to Indian tribes any particular level of federal funding, and Congress did not "breach" any "promise" by exercising its constitutional authority to control the payment of money from the Treasury.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

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 con-

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

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

(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 ac-

tivity 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, func-

tions, 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 Secre-

tary 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.

10. Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 103-138, Tit. I, 107 Stat. 1390-1391 (FY 1994), provides in pertinent part:

> For operation of Indian programs * * * , $1,490,805,000, * * * *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 fiscal year 1994 and previous years * * *

* * * * *

11. Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, Tit. I, 108 Stat. 2511, provides in pertinent part:

For operation of Indian programs * * * , $1,526,778,000, of which not to exceed $95,823,000 shall be

for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts authorized by the Indian Self-Determination Act of 1975, as amended: *Provided*, That tribes and tribal contractors may use their tribal priority allocations for unmet contract support costs of ongoing contracts, grants or compact agreements * * *

* * * * *

12. Department of the Interior and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, 110 Stat. 1321-170, provides in pertinent part:

> For operation of Indian programs * * * $1,384,434,000, of which * * * not to exceed $104,626,000 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 of Indian Affairs prior to fiscal year 1996, as authorized by the Indian Self-Determination Act of 1975, as amended * * *

* * * * *

13. Department of the Interior and Related Agencies Appropriations Act, 1997, Pub. L. No. 104–208, 110 Stat. 3009-192, provides in pertinent part:

> For operation of Indian programs * * * $1,436,902,000, of which * * * not to exceed $90,829,000 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 1997,

> as authorized by the Indian Self-Determination Act of 1975, as amended * * *

* * * * *

14. Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, Tit. I, 111 Stat. 1554, provides in pertinent part:

> For operation of Indian programs * * * $1,528,588,000, * * * of which * * * 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 * * *

* * * * *

15. Department of the Interior and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681–245, provides in pertinent part:

> For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $1,584,124,000, * * * of which * * * notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $114,871,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants,

compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 1999, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *

* * * * *

16. Department of the Interior and Related Agencies Appropriations Act, 2000, Pub. L. No. 106–113, 113 Stat. 1501A–148, provides in pertinent part:

For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $1,670,444,000, * * * of which * * * notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $120,229,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2000, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *

* * * * *

17. Department of the Interior and Related Agencies Appropriations Act, 2001, Pub. L. No. 106–291, Tit. I, 114 Stat. 934, provides in pertinent part:

> For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $1,741,212,000, * * * of which * * * notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $125,485,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2001, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *

* * * * *

18. Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, 115 Stat. 430, provides in pertinent part:

> For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $1,799,809,000, * * * of which * * * notwithstanding any other provision of law,

including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $130,209,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2002, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *

* * * * *

19. Department of the Interior and Related Agencies Appropriations Act, 2003, Pub. L. No. 108-7, Div. F, Tit. I, 117 Stat. 231, provides in pertinent part:

For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $1,857,319,000, * * * of which * * * notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $133,209,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2003, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect

> costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *
>
> * * * * *

20. Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, Tit. I, 117 Stat. 1256-1257, provides in pertinent part:

> For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $1,916,317,000, * * * of which * * * notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $135,315,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2004, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *
>
> * * * * *

21. Department of the Interior and Related Agencies Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 3055, provides in pertinent part:

> For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $1,955,047,000, * * * of which * * * notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $136,314,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2005, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *

* * * * *

22. Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-54, Tit. I, 119 Stat. 513-514, provides in pertinent part:

> For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $1,991,490,000, * * * of which * * * not-

withstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $134,609,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2006, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect contract support costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *

* * * * *

23. Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5, 121 Stat. 8-9, 27 (continuing resolution), provides in pertinent part:

"SEC. 101. (a) Such amounts as may be necessary, at the level specified in subsection (c) and under the authority and conditions provided in the applicable appropriations Act for fiscal year 2006, for projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise provided for and for which appropriations, funds, or other authority were made available in the following appropriations Acts:

* * * * *

"(4) The Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006.

* * * * *

(c) The level referred to in subsection (a) shall be the amounts appropriated in the appropriations Acts referred to in such subsection, including transfers and obligation limitations * * *

* * * * *

"SEC. 102. Appropriations made by section 101 shall be available to the extent and in the manner that would be provided by the pertinent appropriations Act.

* * * * *

"SEC. 20515. Notwithstanding section 101, the level for 'Bureau of Indian Affairs, Operation of Indian Programs' shall be $1,984,190,000, * * *

* * * * *

24. Department of the Interior, Environment, and Related Agencies Appropriations Act, 2008, Pub. L. No. 110-161, Div. F, Tit. I, 121 Stat. 2110, provides in pertinent part:

For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $2,080,261,000, * * * of which * * * notwithstanding any other provision of law, including but not limited to the Indian Self- Determination Act of 1975, as amended, not to exceed $149,628,000 shall be available for payments for contract support costs as-

> sociated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2008, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet contract support costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *

* * * * *

25. Department of the Interior, Environment, and Related Agencies Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 713-714, provides in pertinent part:

> For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $2,128,630,000, * * * of which * * * notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $147,294,000 shall be available for payments for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2009, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet contract support costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *

* * * * *

26. Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, 123 Stat. 2916, provides in pertinent part:

> For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $2,335,965,000, * * * of which, notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $166,000,000 shall be available for payments for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2010, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet contract support costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *

* * * * *

27. Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, Div. B, Tit. VII, 125 Stat. 102-103, 151, provides in pertinent part:

> "SEC. 1101. (a) Such amounts as may be necessary, at the level specified in subsection (c) and under the authority and conditions provided in applicable appropriations Acts for fiscal year 2010, for projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for, and for which appropriations, funds, or

other authority were made available in the following appropriations Acts:

* * * * *

"(4) The Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (division A of Public Law 111–88)

* * * * *

"(c) The level referred to in subsection (a) shall be the amounts appropriated in the appropriations Acts referred to in such subsection, including transfers and obligation limitations * * *

* * * * *

"SEC. 1102. Appropriations made by section 1101 shall be available to the extent and in the manner that would be provided by the pertinent appropriations Act.

* * * * *

"SEC. 1726. Notwithstanding section 1101, the level for "Department of the Interior, Bureau of Indian Affairs, Operation of Indian Programs" shall be $2,334,515,000: *Provided*, That the amounts included under such heading in division A of Public Law 111-88 shall be applied to funds appropriated by this division as follows: by substituting "$220,000,000" for "$166,000,000" * * *

* * * * *