

In the Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH
AND HUMAN SERVICES, ET AL., PETITIONERS

v.

SOUTHERN UTE INDIAN TRIBE

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Each year since 1998, Congress has imposed an express statutory cap on the annual appropriations available to the Secretary of Health and Human Services to pay tribal contract support costs under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.*

The question presented is whether the Secretary must accept an Indian tribe's proposal for a new ISDA self-determination contract, notwithstanding that the Secretary lacks sufficient appropriations under the statutory cap to pay the tribe's proposed contract support costs.

PARTIES TO THE PROCEEDING

Petitioners are Kathleen Sebelius, Secretary of Health and Human Services; Regina M. Benjamin, Surgeon General; Yvette Roubideaux, Director, Indian Health Service; Richie Grinnell, Director, Albuquerque Area Office, Indian Health Service; Indian Health Service; Public Health Service; and the Department of Health and Human Services.

Respondent is the Southern Ute Indian Tribe.

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In the Supreme Court of the United States

No. 11-762

KATHLEEN SEBELIUS, SECRETARY OF HEALTH
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v.

SOUTHERN UTE INDIAN TRIBE

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

PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is reported at 657 F.3d 1071. The opinion of the district court (App., *infra*, 32a-45a) is unreported. An earlier opinion of the district court (App., *infra*, 46a-69a) is reported at 497 F. Supp. 2d 1245.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

Relevant provisions of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, and the Anti-Deficiency Act, 31 U.S.C. 1341 *et seq.*, are reproduced in the appendix to this petition (App., *infra*, 70a-91a).

STATEMENT

1. a. Congress enacted the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.*, to promote “effective and meaningful participation by the Indian people in the planning, conduct, and administration” of federal programs and services for Indians. 25 U.S.C. 450a(b). The Act “direct[s]” the Secretary of the Interior or the Secretary of Health and Human Services, as appropriate, to enter into a “self-determination contract” at the “request of any Indian tribe” to permit a tribal organization to administer federal programs that the Secretary would otherwise provide directly for the benefit of Indians.¹ 25 U.S.C. 450f(a). The Act thus generally permits a tribe, at its

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).

request, to step into the shoes of a federal agency and administer federally funded services.

The basic parameters of an ISDA contract are set out in the Act. See generally 25 U.S.C. 450*l*(c) (model agreement). As originally enacted in 1975, the ISDA required the Secretary to provide the amount of funding that the “Secretary would have otherwise provided for the operation of the programs” by the federal government 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 “contract support costs,” which are costs that a tribe must incur to operate a federal program but that the Secretary would not incur. See Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 205, 102 Stat. 2292 (25 U.S.C. 450j-1(a)(2)). Such costs may include certain direct costs of administering a program, such as costs of complying with special audit and reporting requirements, and indirect costs, such as an allocable share of general overhead. See 25 U.S.C. 450j-1(a)(3)(A). Because this amount may vary over time, 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)). Once a tribal contractor has received a particular amount of funding under a self-determination contract, however, that amount “shall not be reduced by the Secretary in subsequent years” except in specified circumstances. 25 U.S.C. 450j-1(b)(2).

The Secretary is generally required to enter into a self-determination contract upon receiving a proper re-

quest from an Indian tribe. 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[.]”). The tribe’s proposal must specify, *inter alia*, the federal program or service to be administered and the amount of funds requested, including any funding for contract support costs. 25 C.F.R. 900.8(h); see 25 U.S.C. 450f(a)(2). Within 90 days of receiving the proposal, the Secretary must “approve the proposal and award the contract” unless the Secretary makes a “specific finding” that the proposal falls within one of five enumerated grounds for declining the request. See 25 U.S.C. 450f(a)(2)(A)-(E).

If the Secretary declines a tribe’s request for a contract, the Secretary must give a written explanation of the reasons for declination, assist the applicant in overcoming the stated objections if possible, and provide an opportunity for a hearing on the record and for an administrative appeal.² 25 U.S.C. 450f(b). Alternatively, in lieu of an administrative appeal, the tribe may “initiate an action in a Federal district court and proceed directly to such court” to challenge the Secretary’s declination decision. 25 U.S.C. 450f(b)(3); see 25 U.S.C. 450m-1(a) (granting district courts original jurisdiction over suits against the Secretary under the ISDA, including claims for “injunctive relief to reverse a declination finding”).

b. This case concerns what happens when a tribe submits a proposal for a new ISDA contract that the Secretary cannot approve because Congress has not

² The Secretary must also approve “any severable portion” of the declined proposal, “subject to any alteration in the scope of the proposal that the Secretary and the tribal organization agree to.” 25 U.S.C. 450f(a)(4).

authorized sufficient appropriations to pay the tribe's contract support costs.

Federal funding under ISDA contracts, like funding for other federal programs, is contingent upon the availability of appropriations. Congress made that contingency explicit in several places in the Act. While the ISDA generally requires the Secretary to approve an Indian tribe's request for a self-determination contract, for example, Congress provided that "[t]he amounts of such contracts shall be subject to the availability of appropriations." 25 U.S.C. 450j(c). Similarly, the Act provides that "[e]ach self-determination contract" must "contain, or incorporate by reference," certain standard terms. 25 U.S.C. 450l(a)(1). Those prescribed terms specify that a lack of sufficient appropriations may negate the duty of either party to perform. See 25 U.S.C. 450l(c) (model agreement § 1(b)(4) and (c)(3)). And in a provision entitled "Reductions and increases in amount of funds provided," Congress specified that:

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 the possibility that the appropriations authorized by Congress may be inadequate to "make funds available" for a particular "tribe or tribal organization," even when funding is available for others.

2. The Indian Health Service (IHS), an agency within the Department of Health and Human Services,

provides health care services for approximately two million American Indians and Alaska Natives belonging to more than 500 tribal entities. According to agency data, more than half of the IHS's funding for Indian health programs is administered by tribal organizations under ISDA self-determination contracts. The Secretary funds such contracts, like other agency programs, from the lump-sum appropriation provided for the Department each fiscal year (FY) by Congress.

a. In *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) (*Cherokee*), citing a lack of available appropriations, the IHS paid only a portion of the contract support costs that it had promised to two tribal contractors under the ISDA in FYs 1994 through 1997. The tribes brought suit against the Secretary to recover the unpaid balance. The government argued, *inter alia*, that it had no further obligation to the tribes because the Secretary had obligated the remaining funds from the Department's annual appropriation to other tribes and for important federal administrative purposes. *Id.* at 641-642.

This Court rejected those arguments and held that the Secretary could properly be held liable for breach of contract. See *Cherokee*, 543 U.S. at 636-647. Noting that the IHS did "not deny that it [had] promised to pay the relevant contract support costs," *id.* at 636, this Court agreed with the tribes that the government "normally cannot back out" of a contract on the basis of insufficient appropriations, "as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue." *Id.* at 637. The appropriations acts for the years in question, the Court emphasized, "contained no relevant statutory restriction," *ibid.*, and the agency had available "*other* unrestricted funds, small in amount but sufficient to pay the claims at is-

sue,” *id.* at 641. Consequently, the ISDA’s proviso that all payments are “subject to the availability of appropriations,” 25 U.S.C. 450j-1(b), did not excuse the government’s breach: “Since Congress appropriated adequate unrestricted funds here,” that contingency was irrelevant. *Cherokee*, 543 U.S. at 643.

b. After the fiscal years at issue in *Cherokee*, Congress began to impose express statutory caps on the appropriations authorized to pay contract support costs under the ISDA. See *Arctic Slope Native Ass’n v. Sebelius*, 629 F.3d 1296, 1300 (Fed. Cir. 2010), petition for cert. pending, No. 11-83 (filed July 18, 2011). Congress has imposed such a cap in every annual appropriations act for the IHS since FY 1998.³

For the period at issue in this case, for example, from a total appropriation of approximately \$2.63 billion for the IHS in FY 2005, Congress specified that, “notwithstanding any other provision of law,” “*not to exceed \$267,398,000*” was authorized to be spent on contract support costs under the ISDA. See Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 3084 (2004) (emphasis added). After budgetary rescissions included in the same Act, the net appropriation to the

³ See Pub. L. No. 105-83, 111 Stat. 1543, 1583 (FY 1998); Pub. L. No. 105-277, 112 Stat. 2681, 2681-278 to 2681-279 (FY 1999); Pub. L. No. 106-113, 113 Stat. 1501, 1501A-181 to 1501A-182 (FY 2000); Pub. L. No. 106-554, 114 Stat. 2763, 2763A-214 (FY 2001); Pub. L. No. 107-63, 115 Stat. 414, 456 (FY 2002); Pub. L. No. 108-7, 117 Stat. 11, 260-261 (FY 2003); Pub. L. No. 108-108, 117 Stat. 1241, 1293 (FY 2004); Pub. L. No. 108-447, 118 Stat. 2809, 3084 (FY 2005); Pub. L. No. 109-54, 119 Stat. 499, 539-540 (FY 2006); Pub. L. No. 110-5, 121 Stat. 8-9, 27 (FY 2007) (continuing resolution); Pub. L. No. 110-161, 121 Stat. 1844, 2134-2135 (FY 2008); Pub. L. No. 111-8, 123 Stat. 524, 735-736 (FY 2009); Pub. L. No. 111-88, 123 Stat. 2904, 2945-2946 (FY 2010); Pub. L. No. 112-10, 125 Stat. 102-103, 153 (FY 2011) (continuing resolution).

IHS for contract support costs in FY 2005 was \$263,683,179.⁴ See App., *infra*, 8a n.3; C.A. App. 237. It is undisputed that this sum, which represented a decrease from the previous year’s appropriation, left the Secretary with “a shortfall in funds to pay [contract support costs] under existing contracts.”⁵ App., *infra*, 8a.

3. Respondent is a federally recognized Indian tribe. App., *infra*, 47a. In January 2005, respondent submitted to the IHS a proposal for a new self-determination contract to operate the Southern Ute Health Center, a federally funded health clinic. *Id.* at 48a; see *id.* at 7a. The IHS, however, had already “allocated its entire fiscal year 2005 [contract support cost] appropriation to existing contracts.” *Id.* at 8a. This left no funds remaining under the statutory appropriations cap to fund new contracts, such as respondent’s proposed contract to run the Southern Ute Health Center. *Ibid.*; see 25 U.S.C. 450j-1(b)(2) (prohibiting the Secretary from reducing funding under existing ISDA contracts except in enumerated circumstances).

As the agency reviewed respondent’s contract proposal, IHS officials repeatedly expressed concern that, if the contract were approved, the Secretary would be unable to pay respondent’s contract support costs. See

⁴ See Pub. L. No. 108-447, § 501, 118 Stat. 3111-3112 (rescinding 0.594% of the IHS’s budget authority in FY 2005); *id.* § 122, 118 Stat. 3348 (additional rescission of 0.8%).

⁵ In FY 2004, the IHS received a statutorily capped net appropriation of \$267,398,046 for ISDA contract support costs. See Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, Tit. II, 117 Stat. 1293 (“not to exceed \$270,734,000” for contract support costs); *id.* Tit. III, § 344, 117 Stat. 1318 (rescission of 0.646%); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 457 (further rescission of 0.59%).

App., *infra*, 7a-8a. In a February 2005 letter to respondent, for example, the IHS stated that, although the agency was still reviewing the tribe's proposal, "[i]t is important to point out now * * * that the Congress failed to add any new money to the [contract support cost] appropriation this year and therefore * * * the payment of any amounts ultimately negotiated for" respondent's contract support costs would "be subject to the availability of funding at some future time." C.A. App. 105-106. Negotiations between the parties continued for several months.⁶ Although the parties reached resolution on a variety of matters, see App., *infra*, 48a-52a, no agreement could be reached regarding funding for contract support costs.

In June 2005, following this Court's decision in *Cherokee*, the IHS informed respondent that the agency would decline the proposed contract unless respondent accepted contract language stipulating that the Secretary was not required to provide funding for contract support costs. App., *infra*, 8a-9a. Respondent refused to accept that condition, asserting that the Secretary "has a statutory duty" to fund a tribe's contract support costs under the ISDA. *Id.* at 54a. Respondent then submitted an amended contract proposal that expanded the range of functions that the tribe proposed to assume at the Southern Ute Health Center. *Id.* at 55a. The amended proposal included a proposed start date of October 1, 2005. *Id.* at 15a. Further negotiations between the parties failed to resolve the impasse.

On August 15, 2005, the IHS declined respondent's contract proposal in both its original and amended

⁶ Respondent consented to several extensions of the ISDA's 90-day deadline for the Secretary to act on a contract proposal. App., *infra*, 7a n.2; see 25 U.S.C. 450f(a)(2).

forms. App., *infra*, 9a; see C.A. App. 200-204 (declination letter). The agency explained that, although the Secretary desired to cooperate with respondent to transfer responsibility for operating the Southern Ute Health Center, respondent had refused to recognize that funding for contract support costs “is not available, and that it is not known if such [funding] will become available in the future.” *Id.* at 201. Because the Secretary could not fund the contract, the agency concluded, it was “not able to award” the contract.⁷ *Ibid.*

4. Respondent filed this suit in the United States District Court for the District of New Mexico to challenge the Secretary’s declination decision. App., *infra*, 9a; see 25 U.S.C. 450f(b)(3) and 450m-1(a). Respondent contended that a lack of available appropriations is not a valid ground on which the Secretary may decline a contract under the ISDA. *Ibid.* The government responded that the ISDA does not require the Secretary to promise to pay funds that Congress has not authorized to be expended and that, under the circumstances of this case, entering into the contract would have violated both the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, and the Anti-Deficiency Act, 31 U.S.C. 1341. See App., *infra*, 62a.

a. In June 2007, the district court granted summary judgment in favor of respondent. App., *infra*, 46a-69a. The court acknowledged that, in light of this Court’s decision in *Cherokee*, the Secretary’s hesitation to enter into a contract that the agency could not afford to fund was “not unreasonable.” *Id.* at 66a. The court con-

⁷ The IHS cited a number of additional grounds for declining respondent’s proposal, such as the misidentification of certain expenses as allowable contract support costs. C.A. App. 201-204. Those grounds are no longer at issue.

cluded, however, that the ISDA “clearly limits” the Secretary’s ability to decline an Indian tribe’s contract proposal to the five specific circumstances enumerated in 25 U.S.C. 450f(a)(2). App., *infra*, 61a. In declining respondent’s proposal, the Secretary had relied on Section 450f(a)(2)(D), which permits declination when “the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a) of this title.” The district court concluded that this provision was inapplicable because nothing in the cross-referenced provision, 25 U.S.C. 450j-1(a), makes the “applicable funding level” contingent on the availability of appropriations to fund the contract. App., *infra*, 62a.

b. Following the district court’s decision, the parties agreed to enter into a self-determination contract in the form of the model agreement set forth in the ISDA. App., *infra*, 34a. But the parties could not agree on contract language concerning the IHS’s obligation to pay contract support costs. *Id.* at 38a-39a. The Secretary proposed language specifying that, in view of the lack of available appropriations, the IHS presently owed respondent \$0 for contract support costs, but that respondent’s need for such funding would be calculated, placed on the agency’s shortfall report, and paid if and when funding became available. *Ibid.* Respondent contended that it was entitled under the ISDA to language promising full payment of contract support costs. *Id.* at 39a.

In October 2007, the district court resolved this dispute in favor of the Secretary.⁸ App., *infra*, 32a-45a.

⁸ The district court also resolved a dispute between the parties concerning the start date of the contract. See App., *infra*, 34a-38a. The court of appeals affirmed the district court’s judgment on that question, see *id.* at 24a-27a, and it is not at issue here.

The court reasoned that respondent “should have no objection to the inclusion of terms in the annual funding agreement which reflect the practical ramifications of the current statutory cap on available appropriations.” *Id.* at 42a. Absent such terms, the court explained, “it is abundantly clear that the Government will be forced to enter into a contract which it must breach up front.” *Ibid.* The court rejected respondent’s argument that the government’s proposed contract language conflicted with the terms of the Act, explaining that the ISDA expressly contemplates that annual funding agreements will specify the “time and method of payment.” *Id.* at 39a (quoting 25 U.S.C. 450l(c) (model agreement § 1(f)(2)(A)(i))). The court accordingly directed the parties to finalize a self-determination contract that included the government’s proposed language for contract support costs. *Id.* at 44a. Respondent appealed that order, but its appeal was dismissed on the ground that the district court’s order was not final. *Id.* at 11a-12a; see *Southern Ute Indian Tribe v. Leavitt*, 564 F.3d 1198 (10th Cir. 2009).

c. The parties ultimately agreed on the terms of a self-determination contract with an effective date of October 1, 2009, subject to either side’s appeal of the district court’s rulings. App., *infra*, 12a. The district court then entered a final order directing, *inter alia*, that the Secretary place respondent’s calculated need for contract support costs on the IHS’s shortfall list for future funding if and when sufficient appropriations became available. *Id.* at 30a-31a.

5. The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-27a.

a. The court of appeals agreed with the district court that the ISDA does not permit the Secretary “to

decline a contract on the basis that available appropriations are insufficient to fund the contract.” App., *infra*, 14a-15a. The court reasoned that, under the “plain text” (*id.* at 16a) of the declination criteria in 25 U.S.C. 450f(a)(2), the “applicable funding level” for an Indian tribe’s contract support costs “must be evaluated irrespective of whether the appropriations available to [the Secretary] are sufficient to pay that amount.” App., *infra*, 17a. The ISDA, the court concluded, “plainly does not authorize [the Secretary] to decline [respondent’s] contract proposal on the basis that it lacked sufficient appropriations.”⁹ *Ibid.*

b. The court of appeals next reversed the district court’s ruling that the annual funding agreement between the parties could “reflect the practical ramifications of the current statutory cap on available appropriations” (App., *infra*, 42a) by stipulating that the Secretary presently owed \$0 in funding for contract support costs, but that such costs would be paid in the future if available appropriations permitted. *Id.* at 20a-24a. The court ruled that such an agreement “violates the ISDA.” *Id.* at 22a. The court held that an Indian tribe under the ISDA “is entitled to a contract specifying the full statutory amount” of contract support costs and “cannot be forced to enter into a self-determination contract waiving its entitlement to full [contract support cost] fund-

⁹ The court of appeals also stated that the government could not properly decline the contract for lack of available appropriations in FY 2005 because respondent’s amended contract proposal had an effective date of October 1, 2005—*i.e.*, the first day of FY 2006. See App., *infra*, 15a-16a. But the court concluded that it “need not decide” whether the FY 2006 appropriation was sufficient in light of its holding that, as a matter of law, the Secretary may not decline an ISDA contract because of inadequate appropriations. *Id.* at 17a n.6.

ing.” *Id.* at 24a. The court added that “[a]ny disputes about whether funds are, in fact, available” to pay respondent’s contract support costs “remain open and litigable.” *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents the question whether the Secretary must accept an Indian tribe’s proposal for a new self-determination contract under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.*, notwithstanding that the Secretary lacks sufficient funds under an express statutory appropriations cap to pay the tribe’s proposed contract support costs. That question is closely related to the questions presented in two petitions currently pending before the Court. See *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054 (10th Cir. 2011), petition for cert. pending, No. 11-551 (filed Oct. 31, 2011) (*Ramah Navajo*), and *Arctic Slope Native Ass’n v. Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010), petition for cert. pending, No. 11-83 (filed July 18, 2011) (*Arctic Slope*). Both cases present the question whether the government is required to pay all of the contract support costs incurred by a tribal contractor under the ISDA, notwithstanding that Congress has imposed an express statutory cap on the appropriations available to pay such costs and the Secretary cannot pay all contractors’ claims without exceeding the statutory cap. The Solicitor General filed the petition for a writ of certiorari in *Ramah Navajo* and has not opposed the petition in *Arctic Slope*. See Gov’t Br., *Arctic Slope*, *supra*, at 9-11.

The Tenth Circuit’s decision below expressly builds upon that court’s earlier ruling in *Ramah Navajo*, see, *e.g.*, App., *infra*, 3a, 7a, 19a, and reflects many of the

same fundamental errors of law discussed in the government's petition for a writ of certiorari in that case. In particular, the decision below rests on the same mistaken premise that the ISDA guarantees "full" funding of a tribe's contract support costs. Compare *id.* at 24a, with Gov't *Ramah Navajo* Pet. at 19-23 (explaining that the ISDA does not confer on tribal contractors an unqualified right to "full" funding of contract support costs).

Although the Tenth Circuit in the decision below purported to leave open the question whether "funds are, in fact, available to pay" respondent's contract support costs, App., *infra*, 24a, the court of appeals had previously held in *Ramah Navajo* that the government is liable for *all* contract support costs for *all* tribal contractors under the ISDA as long as Congress has appropriated sufficient funds to pay any *one* contractor considered in isolation. See *Ramah Navajo*, 644 F.3d at 1068-1071. Because that minimal threshold is satisfied here, the apparent effect of the Tenth Circuit's ruling below, together with its prior ruling in *Ramah Navajo*, is to require the Secretary to enter into a contract to pay money that Congress has not authorized to be paid, yet to subject the government to immediate liability if it does not make the statutorily unauthorized payments. If that is the correct way to understand the interaction of the two decisions, Congress could not have intended that result, as the governing provisions of the ISDA confirm. See Gov't *Ramah Navajo* Pet. at 19-23.

If the Court grants the petition for a writ of certiorari in *Ramah Navajo* or *Arctic Slope*, this Court's decision would likely require reconsideration or reversal of the Tenth Circuit's decision in this case. Accordingly, the Court should hold this petition pending its disposi-

tion of *Ramah Navajo* and *Arctic Slope*, including any subsequent proceedings on the merits, and then dispose of the petition as appropriate in light of its disposition of those cases.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of *Salazar v. Ramah Navajo Chapter*, No. 11-551, and *Arctic Slope Native Ass'n v. Sebelius*, No. 11-83, and then disposed of as appropriate.

Respectfully submitted.

| | |
|---|--|
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DECEMBER 2012

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 09-2281 & 09-2291

SOUTHERN UTE INDIAN TRIBE,
PLAINTIFF-APPELLANT/CROSS-APPELLEE

v.

KATHLEEN SEBELIUS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; RICHARD H. CARMONA, SURGEON GENERAL OF THE UNITED STATES; CHARLES W. GRIM, ASSISTANT SURGEON GENERAL AND DIRECTOR OF THE INDIAN HEALTH SERVICE; JAMES L. TOYA, DIRECTOR, ALBUQUERQUE AREA OFFICE OF THE INDIAN HEALTH SERVICE; UNITED STATES INDIAN HEALTH SERVICE; UNITED STATES PUBLIC HEALTH SERVICE; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
DEFENDANTS-APPELLEES/CROSS-APPELLANTS

[Filed: Sept. 19, 2011]

**Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:05-CV-00988-WJ-LAM)**

Before: MURPHY, SEYMOUR and O'BRIEN, Circuit Judges.

SEYMOUR, Circuit Judge.

This is the second appeal in litigation arising from the Secretary of Health and Human Services' ("HHS") decision not to enter into a self-determination contract with the Southern Ute Indian Tribe ("Tribe"). In an initial order, the district court ruled that HHS's decision was unlawful, granted summary judgment to the Tribe, and directed the parties to prepare a proposed order for injunctive relief. *See Southern Ute Indian Tribe v. Leavitt (Southern Ute I)*, 497 F. Supp. 2d 1245 (D.N.M. 2007). After the parties were unable to agree on the proposed order, the district court issued an interlocutory order in which it endorsed HHS's approach to the contract's start date and contract support costs. *See Southern Ute Indian Tribe v. Leavitt*, Mem. Op. & Order Following Presentment H'rg (*Southern Ute II*), Civil No. 05-988 WJ/LAM (D.N.M. Oct. 18, 2007). The Tribe appealed, and we dismissed the appeal for lack of jurisdiction. *See Southern Ute Indian Tribe v. Leavitt (Southern Ute III)*, 564 F.3d 1198 (10th Cir. 2009). On remand, the district court issued a final order, directing the parties to enter a self-determination contract including HHS's proposed language regarding the contract start date and contract support costs, and denying the Tribe's request for damages. *See Southern Ute Indian Tribe v. Leavitt (Southern Ute IV)*, Civil No. 05-988 WJ/LAM (D.N.M. Sept. 16, 2009).

Both parties appeal. We affirm the district court's determination that HHS was required to contract with

the Tribe and regarding the contract start date, but reverse regarding contract support costs.

I.

The statutory and factual background underpinning this litigation is set forth in detail in our prior decision. *Southern Ute III*, 564 F.3d at 1200-06. We repeat here only those details necessary to understand our disposition.

A.

The Indian Self-Determination and Education Assistance Act (“ISDA”) directs the Secretary of HHS (the “Secretary”), upon request of an Indian tribe, to enter into a contract by which the tribe assumes direct operation of HHS’s federal Indian health care programs for the tribe’s members. 25 U.S.C. § 450f. Congress provided for these self-determination contracts in an effort to encourage self-government and thereby enhance the progress of Indian people and their communities. *See id.* §§ 450, 450a. The ISDA derives from “the Federal Government’s unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole.” *Id.* § 450a(b). “It pursues a goal of Indian ‘self-determination by assuring maximum Indian participation in the direction of . . . Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.’” *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1058 (10th Cir. 2011) (quoting 25 U.S.C. § 450a(a)).

Under the ISDA, the Secretary must approve a Tribe's contract proposal unless he or she makes a "specific finding that clearly demonstrates or . . . is supported by a controlling legal authority" that one or more of the statutory grounds for declination are met. 25 U.S.C. § 450f(a)(2)(A)-(E) (specifying grounds on which the Secretary may decline to enter a self-determination contract). Under one of these grounds, at issue here, the Secretary may decline a Tribe's contract proposal if "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract. . . ." *Id.* § 450f(a)(2)(D).

Once the Secretary enters into a self-determination contract, the ISDA directs the Secretary to provide two types of contract funding. The first is the "secretarial amount," which is the amount of funding Congress would have provided HHS to operate the programs had they not been turned over to the tribe. *Id.* § 450j-1(a)(1). The second type of funding, which is at issue here, is for "contract support costs" ("CSCs"). *Id.* § 450j-1(a)(2). Soon after the ISDA was enacted, Congress recognized that limiting contract funding to the secretarial amount created a "serious problem" because those funds did not cover ancillary costs of federally-mandated administrative requirements faced by contractor tribes. S. Rep. No. 100-274, at 8 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2627. To address this concern, Congress amended the ISDA to require the Secretary to provide full funding for CSCs to cover "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. . . ." 25 U.S.C. § 450j-1(a)(2); *see also*

Indian Self-Determination Amendments of 1987, Pub. L. No. 100-472, § 205, 102 Stat. 2285, 2292-94 (1988); *Ramah Navajo Chapter*, 644 F.3d at 1058.

The Secretary's obligation to fund self-determination contracts is not absolute. The ISDA includes an "availability clause," which states that the Secretary's payment of funds to contractor tribes is "subject to the availability of appropriations." 25 U.S.C. § 450j-1(b); *see also id.* § 450j(c)(1) ("The amounts of [self-determination] contracts shall be subject to the availability of appropriations."). The statute also provides that the Secretary may not reduce funding to tribes with ongoing contracts, absent a reduction in appropriations or other special circumstances. *See id.* § 450j-1(b)(2); *see also id.* § 450j-1(b)(stating that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this [Act]").

Every self-determination contract must also contain or incorporate by reference the provisions of the "model agreement" prescribed by the ISDA and "such other provisions as are agreed to by the parties." 25 U.S.C. § 450l(a). The model agreement states that the contract shall attach and incorporate by reference an "annual funding agreement." *Id.* § 405l(c) (model agreement § 1(f)). That agreement sets forth the negotiated annual CSC amounts associated with the contract, *id.* (model agreement §§ 1(b)(4), 1(c), 1(f)(2)(A)), and the "time and method of payment," *id.* (model agreement § 1(f)(2)(A)(i)).¹ It also reiterates that the Secretary's

¹ The annual funding agreements are renegotiated each year. *Ramah Navajo Chapter*, 644 F.3d at 1060; *see also* 25 U.S.C. § 450l(c) (model

payment of amounts specified in the annual funding agreement is “subject to the availability of appropriations.” *Id.* (model agreement § 1(b)(4)).

The fact that the Secretary’s payment of CSCs is subject to the availability of appropriations is important in light of Congress’s funding decisions. In fiscal year 1994, Congress began capping CSC funding. *Ramah Navajo Chapter*, 644 F.3d at 1059. Because of these caps, aggregate shortfalls in CSC funding have been ubiquitous, leaving the HHS with insufficient funds to pay full CSCs under both ongoing and new contracts. *See id.* (noting “funding shortfalls for CSCs were repeated every fiscal year from 1994-2001”); *see also Interior, Environment, and Related Agencies Appropriations for 2011: Hearings Before the Subcomm. on Interior, Environment, and Related Agencies of the H. Comm. on Appropriations*, 111th Cong. 229-31 (2010) (statement of Lloyd B. Miller, Counsel, National Tribal Contract Support Cost Coalition) (noting shortfalls through 2011).

The ISDA includes remedial provisions. Relevant here, it gives United States district courts jurisdiction to hear tribal claims against the Secretary for actions taken contrary to the ISDA. 25 U.S.C. § 450m-1(a). The district courts have authority to “order appropriate relief including money damages, injunctive relief against [the Secretary] . . . or mandamus . . . to compel the Secretary to award and fund an approved self-determination contract.” *Id.* The ISDA also provides that self-determination contracts are subject to the Con-

agreement §§ 1(b)(4), 1(b)(14)). The CSC amounts in the agreements, therefore, are likely to change over the course of multi-year contracts. *See id.* § 450j(c)(1).

tract Disputes Act of 1978, 41 U.S.C. § 601. *Id.* § 450m-1(d). The CDA provides a process for tribes seeking to recover contract funds when the Secretary refuses to pay them. *Id.*; see also *Indian Health Manual: Contract Support Costs* 6-3.4f (2007) (noting CDA claim as a preferred method for resolving disputes over CSCs).

Such litigation has led to decisions by the Supreme Court and this court about the Secretary's obligation to pay CSCs to tribes under *existing* contracts in the face of chronic shortfalls in CSC funding. See *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005); *Ramah Navajo Chapter*, 644 F.3d 1054. This appeal, by contrast, requires us to consider the Secretary's obligations in deciding whether and how to enter into *new* contracts.

B.

On January 31, 2005, the Tribe submitted a proposal to enter into a self-determination contract to assume control of the Southern Ute Health Center (the "Clinic"), beginning on May 1, 2005. This initiated protracted negotiations, and on July 13, 2005, the Tribe submitted a final, amended contract proposal in which it sought to assume control of the Clinic on October 1, 2005.²

During the negotiations, HHS expressed concerns that it lacked funds to pay the Tribe's CSCs. In February 2005, the month after the Tribe submitted its initial contract proposal, for example, HHS sent the Tribe a letter stating that it was continuing to review the Tribe's proposal for CSCs, but cautioning that "Congress failed

² Although HHS was required to approve or decline the Tribe's proposal within ninety days, 25 U.S.C. § 450f(a)(2), the Tribe consented to several extensions of the ninety-day deadline at HHS's request.

to add any new money to the CSC appropriation this year and therefore it is very unlikely that any pre-award or startup costs will be paid for [fiscal year] 2005 program assumptions.” App., vol. I at 105-06. The appropriations act for fiscal year 2005 provided that

not to exceed \$267,398,000 shall be for payments to tribes and tribal organizations for contract . . . support costs associated with contracts . . . or annual funding agreements between [the Secretary] and a tribe or tribal organization prior to or during fiscal year 2005, of which not to exceed \$2,500,000 may be used for contract support costs associated with new or expanded self-determination contracts . . . or annual funding agreements. . . .

Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 3084 (2004). The appropriation represented no increase from fiscal year 2004 and left a shortfall in funds to pay CSCs under existing contracts.³ Citing its obligation not to reduce funding to Tribes with ongoing contracts, 25 U.S.C. §§ 450j-1(b)(2), 450j(i), HHS allocated its entire fiscal year 2005 CSC appropriation to existing contracts, which left no CSC funds for new contracts.

In June 2005, HHS informed the Tribe that it had adopted a new policy of requiring all tribes seeking to enter into new self-determination contracts to include language in their contracts making clear that HHS “will not pay CSC, does not promise to pay CSC, that the

³ After rescissions, the actual amount appropriated for CSCs in fiscal year 2005 was \$263,683,179. The requirement that “not to exceed \$2,500,000” be used to fund CSCs under new or expanded contracts, however, did not change.

tribes cannot rely on any promise to pay, and tribes cannot report a failure to receive CSC as a shortfall.” *Southern Ute I*, 497 F. Supp. 2d at 1250. The Tribe refused to agree to this language. The Tribe instead submitted amendments to its proposal on July 13, 2005 confirming that although it would not agree to HHS’s proposed caveats, it nevertheless sought a contract to begin operating the Clinic on October 1, 2005. On August 15, 2005, HHS rejected the Tribe’s proposal, including the amendments submitted by the Tribe on July 13. HHS declined the proposal on the ground that the Tribe refused to recognize that there were no CSC funds available for the contract, and there might not be any CSC funds available in the future.

After informing HHS that its declination decision was unlawful, the Tribe filed this action seeking preliminary and permanent injunctive relief reversing HHS’s declination of its contract proposal; it also sought damages. The Tribe alleged that insufficient funding was not a basis for declining to contract pursuant to the ISDA, and that it had a right not to agree to HHS’s proposed CSC language, which differed from the ISDA’s model contract.⁴ In response, HHS moved for summary judgment. The parties agreed to consolidate the motion for preliminary injunction with the merits of the case, and the district court treated the parties’ respective motions as cross-motions for summary judgment.

On June 15, 2007, the district court issued an order siding with the Tribe. It held that HHS “did not have discretion to decline [the Tribe’s] proposal on the basis

⁴ The complaint also alleged a violation of the Administrative Procedure Act (“APA”). The APA claim ultimately was dismissed and has not been appealed

of insufficient Congressional appropriations to pay CSC and did not have discretion to condition approval of [the Tribe's] proposal on new contract language contradicting statutory model language or on [the Tribe's] waiver of funding specifically provided under the [ISDA]." *Southern Ute I*, 497 F. Supp. 2d at 1257. The court granted summary judgment and injunctive relief to the Tribe, reversing HHS's refusal to contract. *Id.* It ordered the parties to prepare a proposed injunctive order.

In preparing the order, the parties could not agree on two issues. First, HHS continued to press the Tribe to agree to language indicating that HHS did not have enough funds to pay the Tribe's CSCs. The Tribe refused, maintaining that the proposed CSC language was akin to the language that prompted the Tribe to litigate in the first place and did not conform to terms of the ISDA's model agreement. The second issue concerned the contract start date. The Tribe maintained that the start date should be October 1, 2005, the date listed in its final contract proposal, while HHS asserted it should be the date on which the Tribe would begin to operate the Clinic under the contract.

Having reached an impasse, the Tribe submitted a motion for a hearing, along with a proposed writ of mandamus stating that the contract's start date would be October 1, 2005. In response, HHS filed a motion for clarification and suggested language that

would reflect that defendants currently owe the tribe \$0 in contract support costs (on the basis that the tribe has not incurred any costs, and because no funds are available to be dispersed); that the [con-

tract support costs] amount reflecting plaintiff's required [contract support costs] will be calculated; but in view of the congressional earmark for [contract support costs], the amount will be placed on the shortfall list for payment if and when funding becomes available.

Southern Ute III, 564 F.3d at 1205 (alterations in original). HHS also argued that an October 1, 2005 start date made no sense because the Tribe had not yet assumed control of the Clinic.

On October 18, 2007, the district court issued an order endorsing HHS's proposed CSC language and start date. It held that the contract's start date "will be the date on which the Tribe begins the operation of the Clinic," rather than the October 1, 2005 date listed in the Tribe's final proposal. *Southern Ute II* at 6. Accepting HHS's position that it lacked funds to pay the Tribe's CSCs, the district court also held that "the Tribe is not entitled to full and immediate payment of all costs and expenses." *Id.* at 10. Relying on this rationale, it approved HHS's proposed language indicating that HHS "currently owed" the Tribe \$0 in CSCs and that the Tribe would be placed on the shortfall list and given funding if and when it becomes available. Accordingly, the court denied the Tribe's motion for a writ of mandamus, granted HHS's request for clarification, and ordered the parties to resume and complete negotiations for a contract containing HHS's proposed CSC language and contract start date.

Rather than resume negotiations, the Tribe appealed the district court's second order to this court. Because we concluded the order was not a final, appealable deci-

sion, we dismissed the appeal for lack of jurisdiction and remanded for further proceedings. *Southern Ute III*, 564 F.3d at 1210.

The district court thereafter issued a final order in which it directed the parties to execute a self-determination contract consistent with its prior orders. It also denied the Tribe's request for damages. *Southern Ute IV* at 10-11. The parties then executed a self-determination contract which listed a start date of October 1, 2009. Pursuant to the district court's order, they also executed an annual funding agreement which was incorporated into the contract, stating:

B. *Contract Support Costs*: The Secretary currently owes the Tribe \$0 in CSC funds. . . . The parties have calculated Southern Ute Indian Tribe's annual CSC . . . to be \$1,262,562.00. . . . [HHS] will place the amount on the annual Shortfall Report. If and when Congress appropriates additional funding, [HHS] will amend the AFA to add funding according to [HHS's] policy. . . .

App., vol. II at 480. In entering the agreement, the parties reserved their rights to appeal "any final order . . . affecting the terms of th[e] Contract." *Id.* at 480.

The Tribe now appeals the district court's order requiring the use of HHS's proposed CSC language and contract start date. HHS cross-appeals the district court's initial ruling that HHS was required to contract with the Tribe. It asks us to reverse the court's grant of summary judgment to the Tribe or, alternatively, to affirm the court's order regarding the CSC language and contract start date.

II.

We have jurisdiction under 28 U.S.C. § 1291 and review *de novo* the district court's grant of summary judgment and construction of the ISDA. See *Toomer v. City Cab*, 443 F.3d 1191, 1194 (10th Cir. 2006); *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000). "A party is entitled to summary judgment only if, viewing the evidence in the light most favorable to the nonmoving party, the movant is entitled to judgment as a matter of law." *Ramah Navaho Chapter*, 644 F.3d at 1062 (citing *Atl. Richfield Co.*, 226 F.3d at 1148).

In construing the ISDA, we begin with its text. *Id.* (citing *Chickasaw Nation v. United States*, 208 F.3d 871, 876 (10th Cir. 2000)). "If the terms of the statute are clear and unambiguous, they are controlling absent rare and exceptional circumstances." *Id.* (internal quotation marks omitted). "We also take into account the broader context of the statute as a whole when ascertaining the meaning of a particular provision." *Id.* (internal quotation marks omitted). "If a statute is ambiguous, we look to traditional canons of statutory construction to inform our interpretation." *Id.* (internal quotation marks omitted). One such canon is the one favoring Native Americans: "[I]f the [ISDA] can reasonably be construed as the Tribe would have it construed, it must be construed that way." *Id.* (internal quotation marks omitted). This canon of construction controls over more general rules of deference to an agency's interpretation of an ambiguous statute. *Id.*

A.

We begin with HHS's challenge to the district court's determination that HHS lacked discretion to decline the Tribe's contract proposal. HHS claims it properly declined to contract with the Tribe because, at the time the Tribe submitted its initial contract proposal, HHS had already obligated its entire fiscal year 2005 CSC appropriation to pre-existing contracts, thus leaving "no remaining unrestricted appropriations from which [it] could agree to pay new CSC to the Tribe." Aple. Br. at 27. HHS argues its decision to decline the Tribe's proposal was authorized by the ISDA, the Anti-Deficiency Act, 31 U.S.C. § 1341, and the Appropriations Clause, U.S. Const., art. I, § 9, cl. 7. We consider each in turn.

1.

Relying on the ISDA, HHS contends the Secretary may decline a tribe's proposal to contract if "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract." 25 U.S.C. § 450f(a)(2)(D). It argues that this statutory ground for declination was satisfied because the Tribe's proposal requested CSC in excess of "available" appropriations for fiscal year 2005.

There is no question the ISDA authorizes HHS to decline to enter into a self-determination contract if it makes a "specific finding that clearly demonstrates . . . or is supported by a controlling legal authority that . . . the amount of funds proposed under the contract is in excess of the applicable funding level for the contract." 25 U.S.C. § 450f(a)(2)(D). The question posed in this appeal is whether this provision permits HHS to decline a contract on the basis that available appropria-

tions are insufficient to fund the contract. We hold that it does not.

In urging the contrary conclusion, HHS relies on the ISDA's availability clause, which provides: "Notwithstanding any other provision of [the ISDA], the provision of funds under [the ISDA] is subject to the availability of appropriations. . . ." *Id.* § 450j-1(b); *see also id.* § 450j(c)(1) ("The amounts of [self-determination] contracts shall be subject to the availability of appropriations."). HHS argues that because its payment of contract funds is subject to the availability of appropriations, the "applicable funding level for a contract" must refer to the amount of appropriations available to fund that contract. Accordingly, HHS contends, it had discretion under § 450f(a)(2)(D) to decline the Tribe's proposed contract because available appropriations were insufficient to allow HHS to pay the amount of CSCs stated in the Tribe's proposal. We disagree.

As an initial matter, the Tribe's proposal, which HHS declined, did not request CSCs for fiscal year 2005. As stated above, the Tribe initially sought funds to begin operating the Clinic on May 1, 2005, but then amended its proposal to begin operations on October 1, 2005, the first day of fiscal year 2006. HHS's focus on fiscal year 2005 appropriations, therefore, is misguided. Whether HHS's appropriations were available to fund the Tribe's proposal depended entirely on appropriations for fiscal year 2006.⁵ That HHS had allocated its entire CSC ap-

⁵ As even the Tribe conceded at oral argument, payment of CSCs, including pre-award costs, is not due until the contract's start or "effective" date. *See* 25 U.S.C. § 450l(c) (model agreement § 1(b)(2)) (providing that contract does not become effective until after start date); *id.* (model agreement § 1(b)(6))(providing that parties must

proprietion for fiscal year 2005 to other contracts is thus of no consequence.

In any event, HHS’s interpretation of § 450f(a)(2)(D) belies the plain text of the statute. The meaning of “applicable funding level” is not open to broad interpretation but is instead specifically defined by cross-reference to § 450j-1(a). Under the ISDA, the Secretary may decline a contract if “the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, *as determined under section 450j-1(a) of [the ISDA].*” *Id.* § 450f(a)(2)(D) (emphasis added). Section 450j-1(a), in turn, does not mention appropriations, but instead describes the two types of contract funding discussed above—the secretarial amount and CSCs—which together constitute the “amount of funds provided under the terms of the self-determination contracts.” *Id.* § 450j-1(a)(1). With respect to CSCs, it declares that “[t]here *shall* be added to [the secretarial amount] contract support costs which *shall* consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management. . . .” *Id.* § 450j-1(a)(2) (emphasis added). Accordingly, the plain language of

agree on method and timing of payment, and noting that when a contract year coincides with a fiscal year, no quarterly payments are due until ten days *after* appropriations are apportioned by the Office of Management and Budget); *see also Ramah Navajo Chapter*, 644 F.3d at 1076 (noting that “self-determination contracts become effective upon the date of the approval and execution by the Contractor and Secretary”) (quoting 25 U.S.C. § 450l(c) (model agreement § 1(b)(2)); *cf. Indian Health Manual: Contract Support Costs* 6-3.3 (2007) (detailing HHS’s multi-step process for allocating and transferring CSC amounts to contractor tribes).

the statute dictates that as long as a tribe's proposed CSCs do not exceed the "reasonable costs" of complying with "the terms of the contract and prudent management," *id.*, the Secretary may not decline a contract proposal for exceeding the "applicable funding level" for CSCs, *id.* § 450f(a)(2)(D). The applicable funding level for CSCs must be evaluated irrespective of whether the appropriations available to HHS are sufficient to pay that amount.⁶

The ISDA's availability clause does not alter this result. Although the clause makes clear that the "*provision of funds* under [the ISDA] is subject to the availability of appropriations," *id.* § 450j-1(b) (emphasis added), it says nothing about the declination of contracts. We see no convincing reason to read this clause into the declination criteria set forth in a different part of the ISDA, *see id.* § 450f(a)(2)(A)-(E), and therefore agree with the district court that this "availability of appropriations" language cannot form the basis for declining a self-determination contract under § 450f(a)(2)(D). The ISDA plainly does not authorize HHS to decline the Tribe's contract proposal on the basis that it lacked sufficient appropriations to cover the CSCs requested by the Tribe, the amount of which HHS does not contend is unreasonable.⁷

⁶ Having held that the Secretary may not decline a contract under § 450f(a)(2)(D) because of insufficient CSC funds, we need not decide whether "available" appropriations were, in fact, insufficient to cover the Tribe's CSCs for fiscal year 2006 or any other year.

⁷ Even if the Tribe *had* proposed an amount of CSC "in excess of the applicable funding level for the contract," 25 U.S.C. § 450f(a)(2)(D), that fact alone would not have entitled HHS to decline the Tribe's *entire* contract. The ISDA requires HHS to approve any severable portion of a contract. *Id.* § 450f(a)(4)(B). Thus, absent a separate

2.

HHS next contends its decision to decline the Tribe's contract proposal was justified, if not mandated, by the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1). That 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. . . ." *Id.* HHS argues that by accepting the Tribe's proposal it would have violated this provision by obligating HHS to pay the Tribe an amount of CSCs in excess of appropriations available for fiscal year 2005.

HHS ignores the fact that the Tribe's proposal, as amended, sought CSCs beginning in fiscal year 2006, not 2005. This oversight is fatal to HHS's argument. Because the Tribe's proposal did not request *any* amounts for CSCs in fiscal year 2005, HHS cannot plausibly contend that accepting the Tribe's proposal would have obligated it to make payments of CSCs in *excess* of appropriations available for that fiscal year. The fact that the Tribe initially sought CSCs to begin operating the Clinic during the 2005 fiscal year (on May 1, 2005) is immaterial. By the time HHS issued its declination letter on August 15, 2005, the Tribe's originally-proposed start date had lapsed and been superseded by the October 1, 2005 start date listed in the amended proposal.

The Anti-Deficiency Act would not have barred HHS from accepting the Tribe's amended proposal for CSCs

ground for declination, HHS still would have been required, for example, to approve the Tribe's request for the secretarial amount, which HHS never contended was "unavailable" for transfer to the Tribe.

beginning in fiscal year 2006. The Act provides: “An officer or employee of the United States Government may not . . . involve [the] government in a contract or obligation for the payment of money before an appropriation is made *unless authorized by law*.” 31 U.S.C. § 1341(a)(1) (emphasis added). The Tribe submitted its proposal before appropriations had been made for fiscal year 2006. But as we have recently explained, there is no question that “the ISDA permits [HHS] to enter into self-determination contracts prior to Congress appropriating funds.” *Ramah Navajo Chapter*, 644 F.3d at 1076. This is why it is especially important that these contracts are required to specify that payment of CSC is “[s]ubject to the availability of appropriations,” 25 U.S.C. § 450l(c) (model contract § 1(b)(4)). *See Cherokee Nation*, 543 U.S. at 643 (noting that “subject to availability of appropriations” language “normally makes clear that an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year”); *see also Ramah Navajo Chapter*, 644 F.3d at 1076 (“The ‘subject to the availability of appropriations’ language would be rendered meaningless unless the contract was signed prior to congressional appropriations.”). Because the ISDA authorizes the Secretary to enter into self-determination contracts before an appropriation is made, HHS would not have violated the Anti-Deficiency Act if it had accepted, rather than rejected, the Tribe’s proposal.

3.

HHS’s appeal to the Appropriations Clause is equally unavailing. The Appropriations Clause states: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . .” U.S.

Const. art. I, § 9, cl. 7. HHS argues that, because it had no remaining CSC appropriations for fiscal year 2005, accepting the Tribe's proposal would have violated the Appropriations Clause by committing HHS "to pay money that had not been appropriated by Congress." Aple. Br. at 39. But this is not so. As explained above, accepting the Tribe's proposal would have committed HHS to pay CSC in fiscal year 2006, not fiscal year 2005. And even then, payment under the contract would be "subject to the availability of appropriations." 25 U.S.C. § 450l(c) (model agreement § 1(b)(4)). The Appropriations Clause did not prohibit HHS from entering into a contract to pay the Tribe's CSC for a later fiscal year when its payment of CSC under the contract would be "subject to the availability of appropriations." *Id.*

B.

Having held that HHS was required to contract with the Tribe, we turn to the Tribe's contentions that the district court erred in: 1) directing the Tribe to accept HHS's proposed contract language waiving immediate payment of CSCs, and 2) determining that the contract's start date would be October 1, 2009. We consider these contentions in turn.

1.

We begin with the disputed CSC language. After the district court correctly held that it was impermissible for HHS to condition approval of the Tribe's contract on the "availability of appropriations," the Tribe sought a contract providing the full statutory amount of CSCs (which the parties ultimately agreed was approximately \$1.2 million). The Tribe agreed to add the statutorily-mandated caveat that payment of funds under the con-

tract would be “subject to the availability of appropriations,” but it refused HHS’s continued pleas to add language conceding that “available appropriations” were, in fact, insufficient to pay any of the Tribe’s CSCs upon execution of the contract.

In response, HHS sought an order from the district court requiring the Tribe to “waive immediate payment of CSC” on the ground that HHS lacked funds to pay them. *Southern Ute II*, at 8. The district court obliged and directed the Tribe to include HHS’s proposed language in the annual funding agreement (of the yet-to-be executed contract) indicating:

[HHS] currently owe[s] the Tribe \$0 in CSC . . . ; that the CSC amount reflecting [the Tribe’s] required CSC will be calculated; but in view of the congressional earmark for CSC, the amount will be placed on the shortfall list for payment if and when funding becomes available.

Id. at 6. The court determined these terms were not prohibited by the ISDA. It also opined that the Tribe “should have no objection to the inclusion of [these] terms in the annual funding agreement which reflect the practical ramifications of the current statutory cap on available appropriations.” *Id.* at 8-9. It also cautioned that the omission of such language would “open[] the door to unwinnable—and perhaps frivolous—breach of contract claims,” *id.* at 9, by authorizing the Tribe to press its claim for immediate payment of CSCs when HHS clearly lacked any funds to pay them.

The Tribe contends that the district court’s ruling required it to accept CSC terms that deviate from the model agreement and conflict with the ISDA’s funding

provisions. We conclude that the required CSC language is without basis and also violates the ISDA.

The premise of the district court’s ruling—that “available appropriations” were insufficient to pay CSCs upon execution of the contract—is not supported by the record. The only evidence HHS presented to the district court was an affidavit discussing the congressional cap on CSC appropriations for fiscal year 2005. The cap on fiscal year 2005 appropriations, however, had nothing to do with HHS’s ability to pay CSCs upon execution of the contract at issue here—a contract which would not be executed until *after* the court issued its ruling in October 2007 and which did not seek funds for fiscal year 2005. There thus was no basis upon which to conclude that HHS’s appropriations would be unavailable to pay the Tribe any amount for CSCs upon execution of the contract.⁸

⁸ This case illustrates a further practical problem with attempting to determine prospectively whether appropriations will be available to pay CSCs at the beginning of a contract that has not been executed. At least in this case, it would have been impossible for the district court to predict *ex ante* when the contract would, in fact, be executed. As noted above, the Tribe appealed the district court’s October 2007 ruling to this court, and we dismissed the appeal for lack of jurisdiction. *Southern Ute III*, 564 F.3d 1198. The district court did not issue its final order, requiring the inclusion the CSC language, until September 2009. *See Southern Ute IV*, Civil No. 05-988. As a result, the ultimate start date for the contract—October 1, 2009—was a date which neither the district court, nor the parties, could have predicted. The effect of the court’s ruling, therefore, was to require the Tribe to add language to the contract conceding that appropriations were unavailable to pay CSCs starting in fiscal year 2010.

Even assuming *arguendo*, that HHS lacked funds to pay any CSCs upon execution of the contract, it was improper to require the Tribe to include HHS's requested CSC language. That language identifies the "current" level of CSC funding as "\$0," which is contrary to the ISDA's requirement that each contract include the full amount of CSCs. *See* 25 U.S.C. § 450j-1(a)(2); *accord id.* § 450l(c) (model agreement § 1(b)(4)). The ISDA defines that amount as the "amount for the reasonable costs for activities which must be carried on by" the Tribe. *Id.* § 450j-1(a)(2). Under the plain text of the statute, it is not, and can never be, "\$0," which is what HHS's requested language required.

The district court determined the CSC language did not violate the ISDA. Rather, the court held, the language described the "time and method of payment," as required by the ISDA's model agreement. *See id.* § 450l(c) (model agreement § 1(f)(2)(A)) (stating that the annual funding agreement "shall contain," *inter alia*, "terms that identify . . . the funds to be provided, and the time and method of payment"). Namely, the Tribe would receive \$0 "now," would be placed on the "shortfall list," and paid later, "if and when" funds became available.

We respectfully disagree with the district court's interpretation of the statute. The meaning of "time and method of payment" is plain when read in light of the "payment" provision of the model agreement, which is titled "[q]uarterly, semiannual, lump-sum, and other methods of payment." *Id.* § 450l(c) (model agreement § 1(b)(6)(B)). The provision does not include or contemplate, much less require, that "possible payment from the shortfall list" should be included in a contract as an

additional, unstated “method[] of payment.” *See id.* This provision of the model agreement does not justify the CSC language requiring the Tribe to waive full funding of its CSCs.

For these reasons, we hold that the Tribe is entitled to a contract specifying the full statutory amount of CSCs, not “\$0”, albeit with the required caveat that “the provision of funds . . . is subject to the availability of appropriations,” *id.* § 450j-1(b); *accord id.* § 450l(c) (model agreement § 1(b)(4)). A tribe cannot be forced to enter into a self-determination contract waiving its entitlement to full CSC funding. Any disputes about whether funds are, in fact, available to pay the Tribe’s CSCs remain open and litigable. *See* 25 U.S.C. § 450m-1. Nothing in the contract’s annual funding agreement should be read to affect that determination.⁹

2.

The Tribe also challenges the district court’s determination that the appropriate start date of the contract is the date on which the Tribe assumed operation of the Clinic. The Tribe contends its contract was “approved by operation of law” when the district court held in its initial order that HHS lacked discretion to decline the Tribe’s contract proposal, which specified an October 1, 2005 start date. Accordingly, the Tribe argues that the contract’s start date should be October 1, 2005, the date designated in its amended contract proposal, not Octo-

⁹ Because we conclude that the district court’s ruling was based on an erroneous reading of the ISDA, we do not decide whether, as the Tribe contends, the district court exceeded its equitable authority under the ISDA by “entering relief against the Tribe.” *Aplt. Br.* at 32.

ber 1, 2009, the date it began operating the Clinic. We are not persuaded.

The ISDA's model agreement makes clear that the default start date for a contract is the date on which the contract is approved and *executed by the parties*. 25 U.S.C. § 450l(c) (model agreement § 1(b)(2)) (emphasis added) ("The Contract shall become effective upon the approval and execution, by the [tribe] and the Secretary, unless the [tribe] and the Secretary agree on [another] effective date. . . ."). The Tribe does not offer any persuasive authority or rationale to suggest a different rule should apply with respect to the contract at issue here.

The Tribe cites one decision in which a court expressly deemed a contract and its successor funding agreement to be "approved by operation of law," as a result of the Secretary's "failure to comply with the declination statutes and regulations." *Cheyenne River Sioux Tribe v. Kempthorne*, 496 F. Supp. 2d 1059, 1062-68 (D.S.D. 2007). In that case, the Bureau of Indian Affairs (BIA) refused to continue funding an already-executed mature contract. In doing so, it failed to take timely action on the tribe's request for funding as required by the ISDA's declination guidelines. *Id.* at 1068; *see also* 25 U.S.C. § 450f (directing the Secretary to approve or decline proposals within ninety days of submission); *accord* 25 C.F.R. § 900.16 (same). The district court's ruling that the contract and successor funding agreement were "approved by operation of the law," *Cheyenne*, 496 F. Supp. 2d at 1068, simply reflected the tribe's right to continued funding for costs incurred under an already existing contract.

The Tribe also relies on *Crownpoint Inst. of Tech. v. Norton*, Findings of Fact and Conclusions of Law, Civ. No. 04-531 JP/DJS (D.N.M. Sept. 19, 2005). There, the district court similarly held that the BIA had wrongfully declined a series of self-determination contract proposals. The court deemed the contracts to be approved a certain number of days after the tribe submitted those proposals to the BIA. In that case, however, the Tribe had been running the program for years before the district court ordered the BIA to enter into the wrongfully declined contracts. The “deemed” start dates, therefore, were necessary to assure that the tribe would be reimbursed for costs it incurred while operating the program before the contracts were formally executed.

Cheyenne and *Crownpoint* suggest that a “deemed” start date may be appropriate when it is necessary to ensure that a tribe is reimbursed for costs and expenses of running the program before the court-mandated execution of a contract. But that rationale is not applicable here, where the Tribe did not begin operating the Clinic until October 1, 2009, and thus did not incur any such costs or expenses until four years after the October 1, 2005 start date listed in its proposal. Unlike in *Cheyenne* and *Crownpoint*, a retroactive start date is not necessary to ensure the Tribe is reimbursed for program-related costs incurred before the parties executed their contract.

Nor has the Tribe persuaded us it was prejudiced by the October 1, 2009 start date. The Tribe suggests the later start date denied it the opportunity to recover damages for HHS’s failure to execute a contract beginning October 1, 2005. The statute gives federal courts jurisdiction “over any civil action or claim against

the Secretary for money damages *arising under contracts*” authorized by the statute. 25 U.S.C. § 450m-1(a) (emphasis added). The Tribe asserts it would be entitled, for example, to interest it could have earned on “amounts it would have been paid to operate the Clinic.” Aplt. Br. at 26. The district court dismissed any such claim as speculative. We need not decide whether such lost profits could ever be recovered under the statute because the Tribe has offered no authority to convince us the district court erred in concluding such damages would be wholly speculative.

Absent any authority or rationale for doing otherwise, we affirm the district court’s determination that the start date of the contract is October 1, 2009, not October 1, 2005.

III.

For the reasons stated above, we **AFFIRM** the district court’s determination that HHS was required to enter a contract with the Tribe. As to the contract’s specifics, we **REVERSE** the court’s ruling requiring the inclusion of HHS’s requested CSC terms and **AFFIRM** its determination that the start date of the contract is October 1, 2009, the date on which the Tribe began operating the Clinic pursuant to the executed contract.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 09-2281 & 09-2291
(D.C. No. 1:05-CV-00988-WJ-LAM)
(D. of New Mexico)

SOUTHERN UTE INDIAN TRIBE,
PLAINTIFF-APPELLANT/CROSS-APPELLEE

v.

KATHLEEN SEBELIUS, SECRETARY OF THE UNITED
STATES DEPARTMENT OF HEALTH AND HUMAN
SERVICES; RICHARD H. CARMONA, SURGEON
GENERAL OF THE UNITED STATES; CHARLES W.
GRIM, ASSISTANT SURGEON GENERAL AND DIRECTOR
OF THE INDIAN HEALTH SERVICE; JAMES L. TOYA,
DIRECTOR, ALBUQUERQUE AREA OFFICE OF THE
INDIAN HEALTH SERVICE; UNITED STATES INDIAN
HEALTH SERVICE; UNITED STATES PUBLIC HEALTH
SERVICE; UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES,
DEFENDANTS-APPELLEES/CROSS-APPELLANTS

[Filed: Sept. 19, 2011]

JUDGMENT

Before: MURPHY, SEYMOUR, and O'BRIEN, Circuit Judges.

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

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

Entered for the Court,

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

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ. No. 05-988 WPJ/LAM

SOUTHERN UTE INDIAN TRIBE, PLAINTIFF

v.

KATHLEEN SEBELIUS, ET AL., DEFENDANTS

[Filed: Sept. 16, 2009]

ORDER

In accordance with the June 15, 2007 Memorandum Opinion and Order on Plaintiff's Motion for Preliminary Injunction and Defendant's Motion for Summary Judgment (Docket #50), and the October 18, 2007 the Memorandum Opinion and Order Following Presentment Hearing (Docket #66), and the parties having completed negotiations for a self-determination contract and annual funding agreement, attached hereto as Exhibit A, in accordance with the aforesaid orders, it is hereby

ORDERED that the parties shall execute and enter into the attached self-determination contract and annual funding agreement ("AFA"), and it is further

ORDERED that plaintiff's contract support cost need associated with the self-determination contract and

AFA will be placed on defendants' shortfall list in accordance with the AFA, and it is further

ORDERED that plaintiff's request for alleged damages resulting from defendants' declination of plaintiff's self-determination contract proposal is hereby DENIED, and it is further

ORDERED that the Third Count of the Complaint, alleging a violation of the Administrative Procedure Act, is hereby DISMISSED.

/s/ WILLIAM JOHNSON
WILLIAM JOHNSON
UNITED STATES DISTRICT JUDGE

Submitted by: Lisa A. Olson
U.S. Department of Justice,
Civil Division
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Counsel for Defendants

Concurred: Steven Boos
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Counsel for Plaintiff

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 05-988 WJ/LAM
SOUTHERN UTE INDIAN TRIBE, PLAINTIFF

v.

MICHAEL O. LEAVITT, SECRETARY OF THE UNITED
STATES DEPARTMENT OF HEALTH AND HUMAN
SERVICES, ET AL., DEFENDANTS

[Filed: Oct. 18, 2007]

**MEMORANDUM OPINION AND ORDER
FOLLOWING PRESENTMENT HEARING**

THIS MATTER comes before the Court following hearing and oral argument on the following two motions: Plaintiff's Motion to Set Presentment Hearing for Writ of Mandamus, filed July 2, 2007 (Doc. 51), and Defendants' Motion for Clarification, filed July 25, 2007 (Doc. 58). Parties have applied to the Court for resolution of certain issues which have impeded their ability to comply with the Court's previous Order granting injunctive relief to Plaintiff.

BACKGROUND

Plaintiff, Southern Ute Indian Tribe, is a federally recognized Indian tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934 (codified at 25 U.S.C. § 476) In a Memorandum, Opinion and Order entered on June 15, 2007 (Doc. 50), the Court decided the purely legal issue whether the Defendants had discretion under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 through 458bbb-2 (“ISDA”), to decline to enter into a contract with the Plaintiff Tribe (“Tribe”) to assume control over and management of the programs, functions services and activities of the Southern Ute Health Center. I granted Plaintiff’s Motion for Preliminary Injunction, and denied Defendants’ Motion for Summary Judgment.¹

Plaintiff is entitled to summary judgment on this issue and its first and second causes of action in its Complaint and is entitled to injunctive relief in accordance with 25 U.S.C. § 440m-1(a). Plaintiff is directed to prepare a form of order for injunctive relief, submit it to Defendants for approval as to form, and then submit it to the Court through the email address indicated on my web page for proposed orders. . . . If parties are unable to reach agreement as to the form of an order, Plaintiff shall file a motion for a presentment hearing

Doc 50 at 19.

Plaintiff requested a presentment hearing because the parties have been able to only partially agree on a

¹ The preliminary injunction was consolidated with the merits of the case. *See*, Docs. 37, 38 and 39.

form of order for injunctive relief. Specifically, parties have agreed to enter into a self-determination contract in the form of the model contract codified in 25 U.S.C. § 450l(c) without modification. However, the parties are unable to agree as to the starting date of the contract, the amount of contract support costs required to be paid under the contract, or the terminology concerning payment of contract support costs (“CSC”). Defendants request clarification as to the amount and terms of payment, which they contend are inseparable from the issue of whether Defendants were required to enter into a contract.

DISCUSSION

I. Beginning Date of Contract

Plaintiff argues that the “beginning date” or “start date” of the proposed contract should be the date that was originally proposed as a start date: October 1, 2005. Defendants urge the Court to find that the start date for the new proposed contract should be the date on which Plaintiff begins operating the Clinic. They contend that an earlier start date would result in a windfall to the Tribe because the Indian Health Service (“IHS”), and not the Tribe, was expending program funds to operate the Clinic from that time. Plaintiff stated that if the original start date is not used, it gets punished for filing an appeal. Plaintiff concedes, however, that it is not entitled to operational expenses and support costs it has not incurred, but claims there are other damages to which it may be entitled.²

² Such damages, as described by Plaintiff, are: pre-award and start-up costs for buying equipment and moving furniture; interest from lump sum payments; and third party reimbursements.

Section § 450m-1(a) of the ISDA provides for injunctive relief “to compel the Secretary to award and fund an approved self-determination contract.” However, the statute offers no guidance on appropriate beginning dates for declined contracts which are reversed on appeal. The cases cited by Plaintiff suggest a beginning date which mirrors the original proposed start date for the contract, but I find these cases not to be persuasive because they are categorically different from this case.

For example, in *Pascua Yaqui Tribe of Arizona*, Docket No. A-99-20 (HHS Appeals Bd. Jan. 12, 1999), the agency declined certain parts of a proposed self-determination contract in October 1997. At the same time, the agency approved the tribe’s request for CSC, and placed the request in a “queue” or waiting list with other fiscal year 1998 program “starts” with a request date of July 21, 1997.

The issue in *Pascua* was whether section 328 of an appropriations bill passed by Congress in 1998 (“Section 328”) prohibiting the use of fiscal year 1999 appropriations to enter into “new or expanded” self-determination contracts had an effect on the proposed self-determination contract which was declined by the agency in 1997. On the administrative level, the tribe’s request for a hearing on the partial declination was dismissed on the ground that it was rendered moot by Section 328. The Appeals Board decided that Section 328 did not bar the use of fiscal year 1999 appropriations to fund the contract. It concluded that “any contract approved on appeal should not be viewed as a new fiscal year 1999 contract within the meaning of the appropriations bill but rather as a prior year contract that was unlawfully declined on October 20, 1997.” The Appeals

Board also noted that the tribe would still be entitled to “the same contract as if IHS had properly approved its contract in the first instance.” As a result, the proposed contract was placed on the waiting list as of July 21, 1997, the date on which the agency had already obligated itself from that time to provide CSC for the approved portions of the proposed contract.

In another case cited by Plaintiff, *Crownpoint Institute of Technology v. Norton*, Civil No. 04-531 JP/DJS (D.N.M. Sept. 19, 2005) (“*Crownpoint*”), U.S. District Judge James A. Parker entered an order requiring the Bureau of Indian Affairs (“BIA”) to enter into a series of contracts which the Court found had been wrongfully declined.³ *Crownpoint* provided post-secondary education programs, including vocational-technical programs. Judge Parker ordered that the declinations be reversed, and that the contracts be deemed approved a certain number of days after the contracts’ submissions to the contracting officer.

Both *Crownpoint* and *Pascua* are similar in that they involved contracts or programs which had already been partially approved, or had been operating under other funds. The educational program in *Crownpoint* was running under grant funds, thereby forcing the tribe to incur the costs and expenses of running the program. A “deemed” approval date assured that the agency would be reimbursing the CSC and continuing to fund the program. Similarly, in *Pascua*, IHS had already obligated itself to provide CSC for the proposed contract.

³ The Court’s Findings of Fact and Conclusions of Law, and the Declaratory Judgment and Writ of Mandamus in the *Crownpoint* case are attached as exhibits to Defendants’ response, Doc. 57.

In yet another case cited by Plaintiff, *Cheyenne River Sioux Tribe v. Kempthorne*, Civ. 06-3015 (D.S.D. July 10, 2007), the United States District Court for South Dakota deemed “approved by operation of law” a self-determination contract proposal to run an educational program, which was found to be unlawfully declined by the BIA. However, the court did not select a particular date, or mention whether the start date should relate back to a specific period of time.

In the instant case, the Tribe has not been operating the Clinic, nor has there been partial approval of portions of the contract such that the agency would have already been obligated to provide funding for CSC from October 1, 2005. *See*, Compl., ¶ 42 (stating that the Tribe’s proposed contract was declined “in its entirety”). *Crownpoint* and *Pascua* are not similar enough to this case to convince the Court that a bright-line standard should be applied to the selection of a start date for the proposed contract. What is clear is that the sole purpose in imposing a start date of October 1, 2005 would be to preserve Plaintiff’s ability to continue to allege damages which the Court considers largely speculative—a view with which Plaintiff’s counsel does not entirely disagree.⁴

Defendants reject the notion that Plaintiff is entitled to any “damages” for a reversal of a declination under the ISDA, other than an award of the proposed contract. In *Samish Indian Nation v. U.S.*, the Federal Circuit found that the ISDA showed no congressional intent to allow the Samish Tribe to seek damages for CSC which

⁴ The parties have not conducted any discovery on the damages issue.

were never incurred, on contracts never created, based on a wrongful refusal to accord federal recognition. 419 F.3d 1355, 1367 (Fed. Cir. 2005) (“Such a damage remedy, if available, would provide them nothing but a wind-fall”).

I find that the Tribe would not be prejudiced nor punished for appealing (as Plaintiff contends) if the contract were to become effective when the Tribe takes over the Clinic’s operation. Plaintiff would still be awarded the same contract as if it had not been declined, subject to a reconfiguring of the proposed numbers to conform to present day accounting—an exercise which Defendants represent is handled by computer. Defendants also represent that the Tribe would be placed immediately on the waiting list (or “shortfall list”), and prioritized on the basis of need, and not according to waiting time.⁵

Accordingly, the Court finds that the starting date for the proposed contract which has been the subject of this lawsuit will be the date on which the Tribe begins the operation of the Clinic.

II. Contract Language

The parties also cannot agree on certain language as part of the contract. Defendants’ version of the contract language would reflect that Defendants currently owe the Tribe \$0 in CSC (on the basis that the Tribe has not incurred any costs, and because no funds are available to be dispersed); that the CSC amount reflecting Plaintiff’s required CSC will be calculated; but in view of the congressional earmark for CSC, the amount will be

⁵ Defendants will be held to adhere to this representation.

placed on the shortfall list for payment if and when funding becomes available. Plaintiff contends that this language is not authorized by the model agreement language which is set out in the ISDA, and that it contradicts this Court's mandate in its June 15, 2007 Memorandum, Opinion and Order. Neither argument has merit.

Based upon my review of the statute, including the model agreement language included at 25 U.S.C. § 450l(c), I find that the language which Defendants propose is additional language which is envisioned by, and inherently complies with, the model agreement language in the ISDA. The model agreement requires that:

The *annual funding agreement* under this Contract shall only contain . . . *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*.

25 U.S.C. § 450l(c) (model agreement § (f)(2)(A)(i) (emphasis added). The annual funding agreement is "incorporated in its entirety" and must be attached to the proposed self-determination contract. 25 U.S.C. § 450l(c) (model agreement § (f)(2)(B)). The model agreement also states:

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

amount determined pursuant to [25 U.S.C. § 450j-1]⁶ (emphasis added).

25 U.S.C. § 450l(c) (model agreement § (b)(4)).

It is apparent that the annual funding agreement is part of the framework of the model agreement. Thus, language which is inserted into the contract as part of the “terms” describing the “time and method of payment” cannot be characterized as additional language which contradicts the model agreement. I agree with Defendants that the Government cannot enter into a self-determination contract listing only the amount it must pay, under §§ 450j-1(a)(1) and (a)(2). The agency must also describe *how* that amount will be paid, under the express requirements of the ISDA and the model agreement.

Plaintiff’s version of the proposed contract refers to the annual funding agreement, but merely tracks the generic language of the model agreement, containing no specific terms for “time and method of payment.” Doc. 51, Mot. to Set Presentment Hrg. for Writ of Mandamus Ex. 3 (Self-Determination Contract) at 9, Article VI. Plaintiff’s version also allows for a method of quarterly payment “[i]f quarterly payments are specified in the annual funding agreement. . . .” Ex. 3, Section 6 (“Payment”). Thus, Plaintiff’s own draft of the proposed contract envisions the need for specific terms for time and method of payment to be included within the annual funding agreement. Ironically, while the Tribe argues that language regarding time and method of payment is

⁶ Sections 450j-1(a)(1) and (a)(2) describe, respectively, the amount of funds which should be provided for the operational expenses and contract support costs.

not part of model agreement language, it simultaneously attempts to dictate its own terms for payment of a nebulous amount of money which it alleges it is owed. Plaintiff's draft of the Writ of Mandamus states:

By no later than 60 days after entry of this Writ, the defendants are directed to pay the Southern Ute Indian Tribe any amounts due for FY 2006, FY 2007 and FY 2008 and to transfer operation of the Southern Ute Health Clinic to the Tribe.

Doc. 51, Ex. 1, ¶ 5 (Writ of Mandamus).

The Tribe recognizes that the agency cannot breach a contract where Congress has not appropriated sufficient funds to cover the terms of the contract.⁷ Plaintiff has previously stated:

[n]othing in the ISDA and nothing discussed during the negotiations between Plaintiff and Defendants would require Defendants to pay funds that have not been appropriated . . . the lack of sufficient appropriations from Congress would only support a refusal of the agency to pay CSC under the terms of an existing contract.

Doc. 25 (Pltff's Resp. to Mot. for Sum. J.), at 6. Thus, there is common sense to Defendants' position that, if Plaintiff acknowledges that IHS' contractual obligation to pay contract support costs is unenforceable (based on the model agreement's "subject to the availability of ap-

⁷ The United States Supreme Court's decision in *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005) suggests, as this Court has noted, that "the Government's obligation to pay CSC may be different when there are no unrestricted funds available to pay them." Doc. 50 (Mem. Op. & Order).

appropriations” language), then Plaintiff’s refusal to waive immediate payment of CSC is illogical. *See*, Doc. 29 at 5 (Defts’ Reply in Supp. of Mot. for Sum. J.).

Plaintiff should have no objection to the inclusion of terms in the annual funding agreement which reflect the practical ramifications of the current statutory cap on available appropriations. On the other hand, if such language is omitted, it is abundantly clear that the Government will be forced to enter a contract which it must breach up front, but which it will ultimately be allowed to breach. Ruling in favor of Plaintiff on this issue is not only contrary to ISDA provisions, it would prove to be an exercise in futility by opening the door to unwinnable—and perhaps frivolous—breach of contract claims.

Defendants’ version of the terms for the annual funding agreement is not prohibited under the ISDA. Plaintiff would not be waiving any of the funding provided under 25 U.S.C. § 450j-1(a)(1) and (a)(2) for operating expenses and CSC, but only waiving immediate payment of CSC. Plaintiff would be paid \$0 now, and would be placed on Defendants’ “shortfall list,” and CSC amounts would be paid if and when funds become available.

Inclusion of the language also does not contradict the Court’s previous mandate to the agency. In its June 15, 2007 decision, the Court stated that the IHS:

. . . may not unilaterally amend the ISDEA by altering the declination criteria in the ISDEA, eliminating an element of the funding scheme for Self-Determination contracts, or developing new contract language that contradicts the statutory model language developed by Congress.

Doc. 50 (Mem. Op. & Order, at 17). The Court also concluded that:

Defendants did not have discretion to decline Plaintiff's proposal on the basis of insufficient Congressional appropriations to pay CSC and did not have discretion to condition approval of Plaintiff's proposal on new contract language contradicting statutory model language or on Plaintiff's waiver of funding specifically provided under the ISDEA.

Mem. Op. & Order, at 19. Those findings concerned ISDA language only as it related to *declination* of the proposed contract. Further, I have determined that the "additional language" Defendants wish to add does not contradict the model agreement language in the ISDA.

This Court has already ruled in favor of Plaintiff in that the agency is required to enter into a self-determination contract with the Tribe. However, the Tribe is not entitled to full and immediate payment of all costs and expenses, as a matter of law. The language Defendants wish to include within the annual funding agreement is consistent with the statutory requirements of the ISDA or the model agreement language.

CONCLUSION

I find in favor of Defendants on both issues raised in the pleadings. Neither the ISDA nor the case law cited by Plaintiff requires a start of date for the self-determination contract Plaintiff of October 1, 2005. The Tribe will not be prejudiced by an effective date for the contract as the date the Tribe begins to operate the Clinic, because the Tribe will be placed immediately on the agency's shortfall list.

I also conclude that the annual funding agreement requires the addition of language describing the terms for time and method of payment. Therefore, the language which Defendants seek to insert into the annual funding agreement does not contradict the ISDA or the model agreement language, nor is it inconsistent with this Court's previous rulings.

THEREFORE,

IT IS ORDERED that Plaintiff's Motion to Set Presentment Hearing for Writ of Mandamus (Doc. 51) is hereby **DENIED** for reasons described above;

IT IS FURTHER ORDERED that Defendants' Motion for Clarification (Doc. 58) is hereby **GRANTED** for reasons described above;

IT IS FURTHER ORDERED that the following shall occur regarding the self-determination contract at issue:

(1) parties shall meet and resume negotiations for entering into a self-determination contract which includes a start date of the date the Tribe undertakes operation of the Southern Ute Health Clinic;

(2) the contract will include Defendants' version of the annual funding agreement language which is described within this Memorandum Opinion;

(3) the Southern Ute Indian Tribe will be placed immediately on Defendants' shortfall list, which Defendants have represented it will do, and which Defendants represent allows payment on the basis of need;

(4) within six (6) weeks of the date this Memorandum, Opinion and Order is entered, parties shall complete negotiations and submit a form of order for injunc-

tive relief to the Court, through the email address indicated on the Court's web page for proposed orders. The proposed order must be submitted in WordPerfect or Rich Text format. Parties are directed to advise the Court upon either party's failure to comply with the above requirements;

IT IS FINALLY ORDERED that, within the six week period allowed for renegotiating the self-determination contract, parties shall advise the Court regarding the status of Plaintiff's Third Count in the Complaint, alleging a violation of the Administrative Procedures Act.⁸

/s/ WILLIAM JOHNSON
WILLIAM JOHNSON
UNITED STATES DISTRICT JUDGE

⁸ At oral argument, Defendants represented that Plaintiff's Third Count has become moot, but there is nothing of record to substantiate this.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 05-988 WJ/LAM
SOUTHERN UTE INDIAN TRIBE, PLAINTIFF

v.

MICHAEL O. LEAVITT, SECRETARY OF THE UNITED
STATES DEPARTMENT OF HEALTH AND HUMAN
SERVICES, ET AL., DEFENDANTS

[Filed: June 15, 2007]

**MEMORANDUM OPINION AND ORDER ON
PLAINTIFF'S MOTION FOR PRELIMINARY
INJUNCTION AND DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

THIS MATTER comes before the Court pursuant to Plaintiff's Motion for Preliminary Injunction (Doc. 3) and Defendants' Motion for Summary Judgment (Doc. 14). After reviewing the briefs in both parties' motions, I issued an Order to Show Cause why the preliminary injunction should not be consolidated with the merits of the case (Doc. 37). The parties agreed that consolidation was appropriate. Additionally, at a hearing on February 8, 2007, the parties agreed that the legal issues are fully briefed and may be decided without further argument.

Accordingly, I decide here the purely legal issue whether the Defendants had discretion under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 through 458bbb-2 (“ISDEA”), to decline to enter into a contract with the Plaintiff Tribe to assume control over and management of the programs, functions services and activities of the Southern Ute Health Center.

INTRODUCTION

Plaintiff, Southern Ute Indian Tribe, is a federally recognized Indian tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934 (codified at 25 U.S.C. § 476). Congress enacted the ISDEA in recognition of “the Federal government’s historical and special legal relationship with, and resulting responsibilities to, American Indian people. . . .” 25 U.S.C. § 450. Congress set forth a method within the ISDEA for Indian Tribes to assume control over certain federally provided programs. Relevant to the instant case, the ISDEA directs the Secretary of the United States Department of Health and Human Services (“HHS”), upon request of an Indian tribe, to enter into a contract by which the Tribe assumes direct operation of an HHS federal Indian Health care program. 25 U.S.C. § 450f(a)(1). Under the ISDEA, if an Indian tribe submits a proposal for a self-determination contract, “the Secretary shall, within 90 days after receipt of the proposal, approve the proposal and award the contract. . . .” 25 U.S.C. § 450f(a)(2). The secretary has very little discretion to decline to award a contract proposed by an Indian tribe.

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

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

For Fiscal Year 2005, Congress appropriated \$263,638,000 to IHS to pay contract support costs and stated that money expended for contract support costs was not to exceed this amount. Medrano Dec. (attached

to Def's. Mem. in Support of Summary Judgment). This amount does not represent sufficient money to pay contract support costs for any new or expanded program assumption under the ISDEA. *Id.*

On March 24, 2005, Plaintiff responded to the CPLO's letter with the requested clarifications. Pl's. Ex. 3. Under the ISDEA, IHS had 90 days to approve the proposal or provide written notification of declination of the contract for one of five permissible reasons. However, the 90 day period may be extended with consent of the tribe. 25 U.S.C. § 450f(a)(2). Prior to the expiration of the 90 day period in this case, the IHS Acting Director of the Office of Tribal Support ("Acting Director") sent a letter to Plaintiff requesting a thirty day extension due to restructuring within IHS of the contract proposal review process. Pl's. Ex. 4. Plaintiff responded that it would like some indication that the tribe had adequately addressed the CPLO's concerns and would also like some details regarding any effect of the restructuring on Plaintiff's particular contract proposal. Pl's. Ex. 5. The Acting Director responded back with some additional detail with regard to portions of Plaintiff's proposal that were not sufficiently clarified. Pl's. Ex. 6. The letter also reiterated a request for Plaintiff's consent to the thirty day extension and stated that, in the absence of an extension, IHS would proceed to approve the contract to the extent the proposal was satisfactory, and provide Plaintiff with a timely partial declination letter to the extent the proposal was not sufficient as indicated. *Id.*

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

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

The Area¹ has made the decision to decline the tribe's request to contract for the CEO, the Health Center Director, the Clinical Director, the Chief Pharmacist, and the Administrative Officer positions based on 25 U.S.C. [§] 450f(a)(2)(A)-(E) Declination Criteria "The program, function, service or activity (or portion thereof) that is the subject of this proposal is beyond the scope of programs, functions, services or activities under section 102(a)(1) of the ISDEAA because the proposal includes activities that cannot lawfully be carried out by the contractor". More specifically, a Tribal employee cannot by

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

law manage and obligate the services and funding of Federal Programs and Federal employees. By contracting only the decision making and administrative aspects of any service program and not including the p,f,s,a's² that go along with each of these positions the tribe is asking the Area to approve an unlawful act. If the Tribe were to modify the proposal to include the p,f,s,a's under the direction of each of these positions the Area would have a proposal that could more easily be approved.

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

The first negotiation occurred on May 27, 2005. Pl's. Ex. 9. Present were the Acting Director and several representatives for Plaintiff. Plaintiff's counsel explained the details of the Tribe's proposal and pointed out that the proposal did indicate that Plaintiff would be taking over the programs, functions, services and activities (“PFSAs”) under the CEO, the Health Center Director, the Clinical Director, the Chief Pharmacist, and the Administrative Officer. *Id.* At the conclusion of this negotiation, the Acting Director stated that, as far as he could tell, no declination issues existed. *Id.* Following this negotiation, Plaintiff consented to an additional extension until June 3, 2005. Pl's. Ex. 10. A second negoti-

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

ation occurred on June 2, 2005. Pl's. Ex. 11. After this negotiation, the Acting Director prepared a summary of the agreement between Plaintiff and IHS which indicated that CSC funding had been discussed as a problem during the negotiation. *Id.* With regard to CSC, the summary states that,

the new CSC language that generally states that there are no Start Up Costs or CSC available for contracting these PFSAs and the tribe will not be able to have the associated CSC dollar amount for this contract placed on the Que³ was discussed with the tribe. They have requested this decision in writing and will notify the Area of their position following a review. The tribe understands that refusal to include this language will result in a proposal declination.

Pl's. Ex. 11.

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

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

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

On June 24, 2005, the Acting Director sent Plaintiff an email indicating that HQ⁴ wanted the Area to decline Plaintiff's proposal based on a failure to agree on finances as well as other elements of the proposal. Pl's. Ex. 14. The Area Director indicated he preferred to decline solely on the issue of the CSC language. *Id.*

On June 29, 2005, Plaintiff granted another extension until July 15, 2005 and reiterated its unwillingness to agree to the new CSC language in its contract. Pl's. Ex.

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

10. On that same date, Plaintiff sent a letter to Defendant Toya, Director of the Area, stating that the Acting Director had previously hinted at a new IHS policy on CSC but that there was no disclosure to Plaintiff that the new policy might lead to declination of its proposal if it did not agree to contractually waive its statutory rights to CSC. Pl's. Ex. 15. Plaintiff stated that it would not likely have granted additional extensions if it had been aware that the new policy would be retroactively applied to its proposal. *Id.* Plaintiff stated its belief that the CSC policy could not be raised as a declination issue because the Area did not pursue a timely, good faith review of Plaintiff's proposal and "dragged its feet." *Id.* Plaintiff urged that it offended "principles of fundamental fairness to now make the Tribe's contract proposal retroactively subject to declination issues which did not exist when it first submitted its contract and only came into play after the Area Office's failure to review the Tribe's contract proposal in a timely manner." *Id.* Plaintiff further stated that it would not agree to the CSC even if it were not being retroactively applied because "IHS has a statutory duty to provide CSC funds. . . ." *Id.* Plaintiff then stated its position that the declination criteria in the ISDEA do not give IHS discretion to refuse to enter into a contract if a tribe will not give up other rights under the ISDEA. *Id.* Plaintiff noted that the ISDEA includes a model agreement that provides for CSC, and that published IHS Circulars providing for CSC were not superseded by any subsequently published Circulars. *Id.* Plaintiff agreed to include the ISDEA model agreement language regarding CSC, but stated that it would challenge a declination based on its refusal to include the new CSC language developed by IHS. *Id.*

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

On July 13, 2005, Plaintiff submitted an amendment to its contract proposal in which it proposed to take over all contractible PFSAs at the Clinic. Pl's. Ex. 17. On July 14, 2005, Plaintiff consented to an extension until August 15, 2005 to negotiate the amended proposal. Pl's. Ex. 10. On July 18, 2005, Defendant Grim, Assistant Surgeon General and Director of IHS, sent a memorandum to all Area Directors stating that the decision of the United States Supreme Court in *Cherokee Nation v. Leavitt* interpreted ISDEA agreements as binding similar in nature to procurement contracts. Pl's. Ex. 18. He then noted that Congress had placed a cap on the amount of funds that IHS could use for CSC, and the appropriation does not include any funds for new or expanded program assumption by Indian Tribes. *Id.* Defendant Grim stated that, in light of the Supreme Court decision and the lack of appropriations, IHS would require language in any new or expanded contract indicating that there are no CSC funds available, the Tribe wishes to contract the new or expanded PFSAs knowing that CSCs are not available, the Tribe is able to carry out the new or expanded PFSAs without added CSC funding, the Tribe agrees that no new need for CSC funding is created under the contract, and there is no promise by IHS to pay CSC. *Id.*

On August 8, 2005, Plaintiff and Defendants' representatives met for a final negotiation session. Pl's. Ex. 9.

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

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

On September 2, 2005, Plaintiff sent a letter to Defendant Toya in response to the declination indicating that the declination of the entire proposal on the stated grounds was unlawful. Plaintiff noted that none of the twelve additional criteria had ever been raised during

negotiations, but that these grounds were irrelevant because Toya expressly stated they were not the actual grounds for declination. Plaintiff stated that these additional grounds were, however, an indication that IHS had negotiated in bad faith. Plaintiff urged that the declination of the entire proposal was unlawful, that the actual grounds stated for the declination were not factually accurate, and that the grounds were unlawful under the ISDEA.

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

LEGAL STANDARD

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

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

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

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

DISCUSSION

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

posed under the contract exceed the applicable level of funding for the contract.

I. ISDEA STATUTORY SCHEME FOR FUNDING AND DECLINATION

Under the ISDEA, the Secretary⁵ “is directed, upon request of any Indian tribe by tribal resolution, to enter into a self-determination contract . . . ” 25 U.S.C. § 450f(a)(1). An Indian tribe may submit a proposal for a self-determination contract to the Secretary,

and the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that—

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

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

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

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for

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

the contract, as determined under section 450j-1(a) of this title; or

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

25 U.S.C. § 450f(a)(2).

As both parties note, Section 450f(a)(2)(D) allows the Secretary to decline a proposal if the amount of funds are in excess of the applicable funding level for the contract. However, the meaning of “applicable funding level” is not open to broad interpretation and is specifically defined by cross reference to Section 450j-1(a). Section 450j-1(a) provides that the amount of funds provided under a self-determination contract shall not be less than the Secretary would have provided for the operation of the program, and added to this required amount shall be contract support costs. 25 U.S.C. § 450j-1(a)(1) and (2).

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

Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2).

Such amount shall not be less than the applicable amount determined pursuant to [25 U.S.C. § 450j-1].

25 U.S.C. § 450l(c).

The government notes that Section 450j-1(b) states in part that:

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

25 U.S.C. § 450j-1(b).

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

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

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

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

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

Under the Appropriations Clause, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. In cases cited by the Government decided on the basis of the Appropriations Clause, claimants were seeking

payment from the government that had no underlying substantive authorizing statute. For instance, in *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386 (9th Cir. 2000), a plaintiff’s claim for coverage under a policy of flood insurance issued pursuant to and funded by the National Flood Insurance Act was denied. Federal regulations required that any claim for payment under such policy must be by a sworn proof of loss submitted within 60 days of loss, and the plaintiff failed to submit a sworn proof of loss within that time period. *Id.* at 389. In determining that plaintiff was not entitled to payment, the court concluded that the Appropriations Clause precludes payment out of the Treasury in a **manner** not authorized by Congress. *Id.* at 391 (emphasis added).

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

contravention of the federal statute upon which his ultimate claim to the funds must rest.” *Id.* The Court referred to any such payment as an “extrastatutory payment.” *Id.* at 430.

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

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

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

availability of appropriations which language Plaintiff agreed should be included in its contract.

The Government's argument that its statutory duty to approve Plaintiff's proposal has been alleviated by the lack of sufficient Congressional appropriations is, in essence, an assertion that the appropriations law amends or repeals the substantive provisions of the ISDEA. "The mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute." *Greenlee County, Ariz. v. United States*, — F.3d —, 2007 WL 1391389 *4 (Fed. Cir. 2007); *see also Whatley v. District of Columbia*, 447 F.3d 814, 819 (D.C. Cir. 2006) (noting the presumption that appropriations acts do not amend substantive law). When appropriations acts conflict with underlying substantive law, their effect must be narrowly construed. *Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000). "When two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Highland Falls-Fort Montgomery Central Sch. Dist.*, 48 F.3d 1166, 1171 (Fed. Cir. 1995) (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). In this case, the Secretary's obligations to approve proposals under the ISDEA have not been amended or repealed by any heretofore enacted annual appropriations act, and the Secretary's obligation to accept proposals from Indian Tribes remains what it has always been. Additionally, the appropriations acts have not amended the ISDEA by expanding the declination criteria or the Secretary's discretion to decline proposals.

The Government's interpretation of its discretion under the ISDEA in light of annual appropriations is actually contrary to the very purpose of the Appropriations Clause. Under the Appropriations Clause, only the legislative branch and not the executive branch of government may make ultimate decisions regarding public funds. The IHS may not unilaterally amend the ISDEA by altering the declination criteria in the ISDEA, eliminating an element of the funding scheme for Self-Determination contracts, or developing new contract language that contradicts the statutory model language developed by Congress.

The Government's reaction to the Supreme Court decision in *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005) is not unreasonable. In *Cherokee*, the Court made clear that the Government is obligated to pay its contract obligations under the ISDEA even when there are insufficient specific appropriations so long as there are sufficient unrestricted appropriations. *Id.* at 643. It seems the Government is between a rock and a hard place if it has no discretion to decline contracts, no discretion to pay less than full CSC on all outstanding contracts, and receives inadequate appropriations to meet its obligations. However, the Supreme Court did not decide what the Government's obligations to pay CSC would be if Congress explicitly prohibited the use of unrestricted funds to meet these obligations. Furthermore, the Supreme Court hinted that the Government's obligation to pay CSC might be different if Congress did not appropriate adequate unrestricted funds. Accordingly, the Government cannot speculate that the Supreme Court will require it to pay obligations for which there are no unrestricted funds available and engage in

self-help statutory amendment to avoid the anticipated result of such a decision.

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

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

543 U.S. at 642. This language is not a warning to the Government not to enter into contracts. Refraining from less essential contractual commitments is merely one of several examples of ways an agency might reserve its unrestricted funds for uses other than paying on contracts. The Court did not address the Government’s obligations to enter into contracts under the ISDEA and was not suggesting that the Government attempt to redefine its statutory obligations. Interestingly, one of the Court’s suggestions is that the Government seek protection of funds by requesting statutory earmarks. This appears to be another suggestion that

the Government's obligation to pay CSC may be different when there are no unrestricted funds available to pay them. I note that the funding for FY 2005 specified that the money earmarked for CSC was the only money to be used to pay for CSC. *See* P.L. 108-447, 118 Stat. 2089, 3084.⁶

CONCLUSION

Based on the above analysis, I conclude that Defendants did not have discretion to decline Plaintiff's proposal on the basis of insufficient Congressional appropriations to pay CSC and did not have discretion to condition approval of Plaintiff's proposal on new contract

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

language contradicting statutory model language or on Plaintiff's waiver of funding specifically provided under the ISDEA. Accordingly, Plaintiff is entitled to summary judgment on this issue and its first and second causes of action in its Complaint and is entitled to injunctive relief in accordance with 25 U.S.C. § 440m-1(a). Plaintiff is directed to prepare a form of order for injunctive relief, submit it to Defendants for approval as to form, and then submit it to the Court through the email address indicated on my web page for proposed orders. The proposed order must be submitted in Word-Perfect or Rich Text format. If parties are unable to reach agreement as to the form of an order, Plaintiff shall file a motion for a presentment hearing.

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

IT IS SO ORDERED.

/s/ WILLIAM JOHNSON
WILLIAM JOHNSON
UNITED STATES DISTRICT JUDGE

APPENDIX F

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 provided¹ the last proviso in section 450j(a) of this title, no contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this subchapter shall be construed to be a procurement contract;

* * * * *

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

* * * * *

¹ So in original. Probably should be “provided in”.

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

Self-determination contracts

(a) Request by tribe; authorized programs

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

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

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

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

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

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

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and

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

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

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

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

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

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for

the contract, as determined under section 450j-1(a) of this title; or

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

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

¹ So in original. Probably should be “paragraph”.

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

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

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

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

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

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

* * * * *

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

(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3) of this section or any civil action conducted pursuant to section 450m-1(a) of this title, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

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

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

(B) by an administrative judge.

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

Contract or grant provisions and administration

Term of self-determination contracts; annual renegotiation

(1) A self-determination contract shall be—

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

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

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

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

* * * * *

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

Contract funding and indirect costs

(a) Amount of funds provided

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(6) Costs incurred before the initial year that a self-termination 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 con-

tractors for the fiscal year for which the report is being submitted;

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

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

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

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

(d) Treatment of shortfalls in indirect cost recoveries

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

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

* * * * *

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

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

* * * * *

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

Contract or grant specifications

(a) Terms

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

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

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

* * * * *

(c) **Model agreement**

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

“SECTION 1. AGREEMENT BETWEEN THE SECRETARY AND THE _____ TRIBAL GOVERNMENT.

“(a) AUTHORITY AND PURPOSE.—

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

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

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

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

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

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

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

“(5) LIMITATION OF COSTS.—The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this Contract or a specific activity conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the Contract until such time as additional funds are awarded.

* * * * *

“(c) OBLIGATION OF THE CONTRACTOR.—

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

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

“(3) CONTRACTED PROGRAMS.—Subject to the availability of appropriated funds, the Contractor shall administer the programs, services, functions, and activities

identified in this Contract and funded through the annual funding agreement under subsection (f)(2).

* * * * *

“(f) ATTACHMENTS.—

* * * * *

“(2) ANNUAL FUNDING AGREEMENT.—

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

“(i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and

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

“(B) INCORPORATION BY REFERENCE.—The annual funding agreement is hereby incorporated in its entirety in this Contract and attached to this Contract as attachment 2.”

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

Contract disputes and claims

(a) Civil actions; concurrent jurisdiction; relief

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

* * * * *

(d) Application of Contract Disputes Act

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

* * * * *

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

Judgments, awards, and compromise settlements

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

- (1) payment is not otherwise provided for;
- (2) payment is certified by the Secretary of the Treasury; and
- (3) the judgment, award, or settlement is payable—
 - (A) under section 2414, 2517, 2672, or 2677 of title 28;
 - (B) under section 3723 of this title;
 - (C) under a decision of a board of contract appeals; or
 - (D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 20113 of title 51.

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

Limitations on expending and obligating amounts

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

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

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

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

Payment of claims

(a) Judgments

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

(b) Monetary awards

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

(c) Reimbursement

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

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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.