

INTERIOR BOARD OF CONTRACT APPEALS

ARCTIC SLOPE NATIVE ASSOCIATION,)	
Ltd.,)	
)	
)	
)	
)	IBCA Nos. 4794 through 4803/06
Appellant,)	ISDA Contract No. 243-96-6025
vs.)	(effective through Sept. 30, 1997)
)	
MICHAEL O. LEAVITT, SECRETARY)	ISDA Compact No. 58G980054
U.S. DEPARTMENT OF HEALTH AND)	(effective Oct. 1, 1996 to present)
HUMAN SERVICES, <i>et al.</i> ,)	
)	
Appellees.)	
<hr/>		

**MEMORANDUM IN OPPOSITION TO APPELLEES' MOTION TO DISMISS
AND IN SUPPORT OF APPELLANT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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GLOSSARY OF TERMS

Abbreviation	Term
AFA	Annual Funding Agreement
ASNA	Arctic Slope Native Association, Ltd.
ATHC	Alaska Tribal Health Compact
BIA	Bureau of Indian Affairs, U.S. Department of the Interior
CDA	Contract Disputes Act
G&A	General and Administrative
CSC(s)	Contract Support Cost(s)
HQ-DFM	IHS Headquarters, Division of Financial Management
DHHS	U.S. Department of Health and Human Services
DOI	U.S. Department of the Interior
IBCA	Interior Board of Contract Appeals
IHS	Indian Health Service
ISD	Indian Self-Determination
ISDA	Indian Self-Determination and Education Assistance Act, Publ. L. No. 93-638, 88 Stat. 2203, as amended (codified at 25 U.S.C. §§ 450a-458aaa-18)
ISDM	Indian Self-Determination Memorandum

claims at issue in the *Cherokee* litigation. As with the Cherokee Nation, the Secretary denied the Arctic Slope Native Association, Ltd. (“ASNA”) the funding to which it was entitled by law under its contracts. ASNA now seeks to vindicate the same rights as the Cherokee Nation.

For the reasons discussed below, ASNA respectfully requests that this Board deny the Secretary’s motion to dismiss, and that the Board instead grant ASNA’s motion for partial summary judgment with respect to the government’s legal liability under the Complaint’s First Cause of Action.¹

II. BACKGROUND

A. Nature of the Case

This appeal arises under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (“ISDA” or “Act”). ASNA seeks damages for the Secretary’s implementation of a systemwide practice of underpaying Tribal contractors. This practice was carried out over several years through a succession of unauthorized IHS “Circulars.” The IHS Circulars at issue were applied to all Tribal contractors, including ASNA. Under those Circulars, the Secretary calculated each Tribal contractor’s statutory contract support cost (“CSC”) requirement. Then, under those same Circulars, the Secretary unilaterally limited the amount IHS could pay for CSCs. As a result, Tribal contractors like ASNA were underpaid their full statutory CSC requirement.²

¹ The agency has filed an Administrative Record containing 25 tabs and hand-numbered pages within each tab. References herein to the Record are set forth as “AR [tab no.] at p. ____.”

² For ease of reference, this Memorandum uses the term “Tribes” and “Tribal contractors” to include “Tribal organizations” contracting under the Act. 25 U.S.C. § 450b(l). Unless context indicates otherwise, this Memorandum also uses the term “contract” to include “self-determination contracts,” § 450b(j), self-governance “compacts,” § 458aaa-3, and “annual funding agreements,” in accordance with the Supreme Court’s conventions in *Cherokee III*. Finally, this Memorandum uses the terms “Secretary” and “Indian Health Service” (IHS) interchangeably because, in so far as pertinent here, the ISDA’s mandates are directed to Federal programs operated by the Secretary, and within the Department of Health and Human Services (DHHS) those programs are carried out by IHS.

ASNA's claims embrace two separate causes of action, summarized as follows:

(1) the Secretary unlawfully failed to pay in full the CSC requirements which the Secretary acknowledged were due and owing to ASNA;

(2) the Secretary unlawfully failed to calculate correctly, and thus further underpaid, the indirect administrative CSCs the Secretary was required to pay to ASNA.

See Compl. ¶ 2. ASNA's First Cause of Action is commonly referred to as the "shortfall claim," because it deals with the "shortfall" between the amount IHS agrees ASNA required to administer the contract, and the amount IHS actually paid. The Second Cause of Action is commonly referred to as the "miscalculated rate claim," because it alleges IHS actually miscalculated the amount ASNA required to administer the contract. In this Motion for Partial Summary Judgment, ASNA seeks to establish the Secretary's liability only with respect to ASNA's shortfall claim, a claim that is precisely the same claim that this Board, the Federal Circuit and the Supreme Court resolved against the Secretary in the *Cherokee* litigation.³

B. Statutory Background⁴

In 1975, Congress through the ISDA committed this Nation to "the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of [Federal] programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and

³ Because ASNA is not seeking summary judgment with respect to its miscalculated rate claim, this Memorandum does not discuss the Government's policies or practices under the Circulars that ASNA contends violated the ISDA and its contracts in connection with that claim.

⁴ Although the Interior Board of Contract Appeals is long familiar with contract support cost claims arising under the ISDA, see e.g., *Appeals of Cherokee Nation*; *Appeals of Seldovia*, Nos. 3862-3863, 03-2 B.C.A. (CCH) ¶ 32,400, 2003 WL 22422891 (Oct. 20, 2003), in the event this Motion is not resolved prior to this Board's merger into the Civilian Board of Contract Appeals, the fuller treatment set forth herein may be of assistance to other judges assigned to this appeal.

services.” 25 U.S.C. § 450a(b). *See also Cherokee II*, 334 F.3d at 1079-1081 (detailing ISDA background). To carry out this commitment, Congress required the Secretary to enter into contracts under which Tribal contractors would be paid certain promised amounts in return for administering the Secretary’s Federal hospitals, clinics or other programs that “a Government agency would otherwise provide.” *Cherokee III*, 543 U.S. at 634. *See* 25 U.S.C. §§ 450a(b), 450f(a)(1). In this sense, ISDA contracting is a form of ‘out-sourcing,’ albeit with very special requirements. *See Cherokee III*, 543 U.S. at 644 (applying to the ISDA general contract principles associated with the government’s reliability as a contracting partner).

Between 1975 and 1988 Congress witnessed IHS’s “consistent failures . . . to administer self-determination contracts in conformity with the law,” and its “systematic[] violat[ions]” of contractors’ rights. S. REP. NO. 100-274, at 37 (1987). *See also id.* at 8, 12, 30-32 (discussing agency failures). Significantly, Congress noted that “the single most serious problem with implementation of the Indian self-determination policy ha[d] been the failure of the . . . [IHS] to provide funding for the indirect [contract support] costs associated with self-determination contracts.” *Id.* at 8 (emphasis added). This “practice . . . require[d] tribal contractors to absorb all or part of such indirect costs within the program level of funding, thus reducing the amount available to provide services to Indians as a direct consequence of contracting.” *Id.* at 33. *See also id.* at 8-10 (discussing problem). IHS’s failures to pay in full various contract “indirect costs” (later redefined to “contract support costs”) also resulted in a “tremendous drain on tribal financial resources” (*id.* at 7), because tribal contractors were compelled to “subsidize” the contracted programs. *Id.* at 9. In considering amendments to the Act, the Senate Indian Affairs Committee cautioned: “*It must be emphasized that tribes are operating federal programs and carrying out federal responsibilities*

when they operate self-determination contracts.” *Id.* at 9 quoted in *Cherokee II*, 334 F.3d at 1081 (Fed. Cir. 2003) (italics in *Cherokee II*). See also S. REP. NO. 100-274, at 12 (directing IHS to “cease the practice of requiring tribal contractors to take indirect costs from the direct program costs, which results in decreased amounts of funds for services”).

Congress in 1988 and 1994 twice substantially rewrote the Act to constrain as much as possible the Secretary’s contracting discretion, and to guarantee full funding of all contract costs, including contract support costs.⁵ See e.g. *Cherokee II*, 334 F.3d at 1088 (“[A]llowing the Secretary such discretion would be directly contrary to the purpose of the 1988 Amendments . . . to remedy ‘[t]he consistent failure of federal agencies to fully fund tribal indirect costs.’”) (quoting S. REP. NO. 100-274, at 8-9; *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996) (Congress “clearly expressed . . . its intent to circumscribe as tightly as possible the discretion of the Secretary . . .”). In 1994 Congress also imposed a mandatory contract on the Secretary, the exact terms of which were prescribed verbatim in the statute. 25 U.S.C. § 450l(c). On top of that, Congress mandated inclusion of contract language specifying that “[e]ach provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the . . . related functions, services, activities, and programs . . . from the Federal Government to the Contractor[.]” *Id.* sec. 1(a)(2).

Congress further made plain that the ISDA involves the execution of an enforceable “contract . . . between a tribal organization and the appropriate Secretary” 25 U.S.C. § 450b(j). The multi-year mandatory contract, in turn, is supplemented by an Annual Funding Agreement (or

⁵ Indian Self-Determination Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285 (1988); Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (1994).

“AFA”) which provides additional details for the coming year. 25 U.S.C. § 450l(c), sec. 1(c)(2) and (f)(2). *See also* 25 U.S.C. § 458aaa-4 (similar provision for compacts).⁶

C. The ISDA’s Funding Provisions

The ISDA’s funding provisions are unique and further set ISDA contracts apart from routine government contracts. Congress carefully specified in the Act, 25 U.S.C. § 450j-1(g), that “[u]pon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under [subsection 450j-1(a)]” This command is echoed in the mandatory model contract provision, guaranteeing that the contract amount “shall not be less than the applicable amount determined pursuant to [subsection 450j-1(a)].” *Id.* § 450l(c), sec. 1(b)(4). The twice-referenced § 450j-1(a), in turn, requires the Secretary to transfer all funds associated with running the program, *Cherokee II*, 334 F.3d at 1080 (calling this the “secretarial amount”), and – most relevant here – requires that:

There shall be added to the [contract] 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

25 U.S.C. § 450j-1(a)(2) (emphasis added). *See also* 25 U.S.C. §§ 450j-1(a)(3) & (5) (describing the eligible CSCs that “shall be added” to the contract).

⁶ As a more autonomous alternative to self-determination contracting under Title I of the ISDA, Congress in 1988 enacted the Tribal Self-Governance Demonstration Project Act, Pub. L. 100-472, § 209, 102 Stat. 2296 (1988) formerly reprinted at 25 U.S.C. § 450f note (1988) (“Title III”) repealed Pub. L. No. 106-260, § 10, 114 Stat. 734 (2000). Under Title III, as amended, qualifying Tribes (including ASNA) entered into “self-governance compacts” rather than “self-determination contracts.” Consistent with *Cherokee III*, the parties agree that for purposes of the issues presented here, there is no legal difference between contracts awarded under Title I of the ISDA, compacts now awarded under Title V of the ISDA (25 U.S.C. §§ 458aaa-458aaa-18) and compacts that were for a time awarded under the now-repealed Title III of the ISDA. *See* Mot. to Dismiss at 2. This is because compacting Tribes are entitled to receive the same level of funding, including contract support costs, as are Tribes operating programs under ISDA Title I contracts. *See* Section 303(a)(6), Title III; 25 U.S.C. § 458aaa-7(c).

As the Supreme Court in *Cherokee III* explained, “[c]ontract support costs’ can include indirect administrative costs, such as special auditing or other financial management costs, § 450j-1(a)(3)(A)(ii); they can include direct costs such as workers’ compensation insurance, § 450j-1(a)(3)(A)(i); and they can include certain startup costs, § 450j-1(a)(5).” *Cherokee III*, 543 U.S. at 635. “Indirect administrative costs” typically include pooled overhead costs such as personnel and financial management systems costs that benefit all of a contractor’s operations, including the ISDA-contracted portion of those operations. They are akin to general and administrative (“G&A”) costs in the routine procurement setting. The other two types of costs are commonly referred to as direct CSCs and start-up costs, and collectively IHS terms all three categories “contract support cost requirements.”⁷

The described CSCs cover the “reasonable costs” which tribal contractors must “incur ‘to ensure compliance with the terms of the contract and prudent management.’” *Cherokee III*, 543 U.S. at 635 (quoting 25 U.S.C. § 450j-1(a)(2)). *See also Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997) (describing these “fixed” costs). Since CSCs include the necessary fixed overhead costs of running contracted Federal programs, when IHS fails to pay CSCs a Tribe must either divert contracted funds that it would have otherwise used for patient care, or else it must subsidize those costs from other Tribal funds. By requiring that CSCs be fully paid, the ISDA is specially tailored to ensure that Tribal contractors are not faced with this Hobson’s choice.

In its 1988 Amendments Congress also devoted a lengthy section of the Act to cataloguing

⁷ “Contract support cost requirements” (or “CSC requirements”) is a term of art employed by IHS to describe the amount IHS “determined” a Tribal contractor was entitled to in CSCs, before assessing whether IHS would or would not pay that requirement. *See e.g.* AR 21 at p. 2, IHS Circular 2000-01, section 4 (“CSC Requirement”). The full amount of CSC need (Indian Self-Determination Fund [ISD] plus ongoing contracted or compacted programs) as determined under this Circular pursuant to [25 U.S.C. § 450j-1], as amended.”). Throughout this Memorandum ASNA uses this term of art in the same manner as IHS.

specific prohibitions against contract reductions, ending a rampant agency practice of funding its own agency operations at the expense of fully paying ISDA contracts. 25 U.S.C. § 450j-1(b)(1) - (b)(4). Subsection 450j-1(b), dubbed the “anti-reduction clause,” provides that the amount of funds due under a contract “shall not be reduced to make funding available for contract monitoring or administration by the Secretary,” *id.* § 450j-1(b)(1); “shall not be reduced by the Secretary in subsequent years” except pursuant to five narrow reasons not directly pertinent to ASNA’s claims, *id.* § 450j-1(b)(2), “shall not be reduced by the Secretary to pay for Federal functions,” *id.* § 450j-1(b)(3), and “shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract” *Id.* § 450j-1(b)(4).⁸ A narrow exception to the Secretary’s duty to pay contract amounts provides that “the provision of funds . . . is subject to the availability of appropriations.” *Id.* § 450j-1(b).

D. IHS’s Internal CSC Circulars and Policies

IHS’s longstanding history of improper conduct motivated Congress in 1994 to withdraw from the Secretary any “delegated authority” over all self-determination issues, which necessarily includes CSCs, including any authority both to promulgate regulations and to impose non-regulatory requirements upon Tribes concerning CSC issues. In *Ramah Navajo Sch. Bd.*, 87 F.3d at 1350, the D.C. Circuit discussed § 450k at length noting “ISDA’s absolute ban on the imposition of [nonregulatory requirements regarding CSCs].” *See also* S. REP. NO. 100-274, at 20 (amendments bar imposition of unpublished “administrative policy directives” such as “the Indian Self-Determination Memoranda and the Indian Self-Determination Advisories”); 25 C.F.R. § 900.5

⁸ *See also* S. REP. NO. 100-274, at 30 (25 U.S.C. § 450j-1(b) “prevents the diversion of tribal contract funds to pay for costs incurred by the Federal government.”); *Cherokee III*, 543 U.S. at 642 (pressure upon agency’s budget to accomplish some other “potentially . . . very important purpose” does not excuse the legal obligation to pay CSCs).

(unpublished requirements are not binding). Thus, beyond the specific topics listed in § 450k(a)(1) – which notably do not include CSCs – Congress made plain that “no further delegated authority is conferred.” S. REP. NO. 103-374, at 14 (1994). It stated that this limitation was “a direct result of the failure of the Secretaries [of IHS & BIA] to respond promptly and appropriately to the comprehensive amendments” enacted in 1998. *Id.*

Nonetheless, beginning in the early 1990s IHS continually imposed upon Tribal contractors a succession of non-regulatory internal CSC “Circulars,” and it applied those Circulars to unlawfully reduce the CSC amounts IHS would pay Tribal contractors. These included Indian Self-Determination Memorandum (“ISDM”) 92-2, AR 19, IHS Circular 96-04, AR 20, and IHS Circular 2000-01, AR 21. IHS’s Circulars were applied uniformly across the Nation and were intended to be absolutely binding upon agency personnel.⁹ And, as ASNA alleges, IHS’s conduct under these Circulars led directly to its shortfall claims.

1. IHS conduct under the CSC Circulars involving shortfalls. IHS’s common course of conduct under the Circulars produced CSC payment shortfalls for ASNA in a three-step process.

First, IHS designated all contracts either as “ongoing” contracts or as “new and expanded” contracts.¹⁰ As the Federal Circuit understood it, “‘Ongoing contracts’ are contracts that continue from fiscal years before the relevant appropriations acts, while ‘initial [new] and expanded contracts’

⁹ In a March 27, 2000 Memorandum to Area Directors, IHS Headquarters Division of Financial Management Director Carl Fitzpatrick warned: “It should be noted that CSC allocations pursuant to IHS Circular 2000-01 are not discretionary. The allocation methodologies contained in IHS Circular 2000-01 are mandatory; Area offices have no discretion to depart from these instructions.” Exh. 2 at 2 (emphasis in original).

¹⁰ *See e.g.*, AR 19 at pp. 2-5, 7-8, sections 4 (“New and Expanded Contracts”) and 6 (“Ongoing Contracts”); AR 20 at pp. 9-13, IHS Cir. 96-04, section 4a (“Pool No. 1-[ISD] Fund”) and Section 4(b) (“Pool No. 2 -Prior Year CSC Base”). Occasionally IHS would also divide a Tribal contractor’s single contract into “ongoing” and “new and expanded” pieces. For instance, the old “ongoing” dental program portion of a contract that had been re-awarded for several years could be separated from a “new” hospital whose operation was added to the same contract in a more recent year.

are those that begin during the fiscal year of the relevant appropriations.” *Cherokee II*, 334 F.3d at 1087 (citing IHS Circular 96-04 at 10, 13).

Second, IHS determined all CSC requirements for the “ongoing” contracts, but then chose to limit total CSC payments paid collectively to all such contracts to the collective amounts IHS had budgeted (through fiscal year 1997) or to the collective amounts Congress placed in a lump-sum earmark for this purpose (after fiscal year 1997). *See infra* at 11-15 (discussing Appropriations Acts). This led to systematic and repeated underpayments, which for years through FY1997 have now been declared illegal. *Cherokee III*, 543 U.S. at 638-44; *Cherokee II*, 334 F.3d at 1087-1088.

Third, through fiscal year 1998 IHS would rank the CSC requirements associated with all the “new and expanded” contracts on a “Queue” list (sometimes called a “Priority List”) on a ‘first-come, first-served’ basis.¹¹ ISDM 92-2, sec. 4, AR 19 at pp. 2-5; IHS Circular No. 96-04, sec. 4(A)(4)(a)(ii), AR 20 at p. 10; *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306, 1329 (D. Or. 1997) (*Shoshone I*).¹² IHS then chose to limit total CSC payments to the “new and expanded” contracts on the list to no more than \$7.5 million, matching the amount Congress annually placed in a special “Indian Self-Determination Fund” (“ISD Fund”) to pay certain “transitional costs,” *see, e.g.* Omnibus Consolidated Recissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-189 (1996). *Cherokee II*, 334 F.3d at 1082 n.3, 1089-1090.

¹¹ This Memorandum uses the term “new and expanded” because that is the term IHS uses. *Supra* at 9 n.10. Although the annual Appropriations Acts usually use the term “initial or expanded,” *infra* at 12-13, the meaning is the same.

¹² *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306 (D. Or. 1997) (“*Shoshone I*”), *modified on reconsideration* 999 F. Supp. 1395 (1998) (“*Shoshone II*”), *on reconsideration*, 58 F. Supp. 2d 1191 (1999), *rev’d sub nom. Shoshone-Bannock Tribes of the Fort Hall Reservation v. Thompson*, 279 F.3d 660 (9th Cir. 2002) (“*Shoshone III*”), *reinstating judgment under Rule 60(b), Shoshone-Bannock Tribes v. Leavitt*, 408 F. Supp. 2d 1073 (D. Or. 2005) (“*Shoshone IV*”).

Tribal contractors were ranked on the Queue by the fiscal year in which they first contracted to operate the particular “new and expanded” program, and the \$7.5 million in CSC funding would be allocated to those at the top of the Queue on a ‘first-come, first-served’ basis until it was exhausted. ISDM 92-2 sec. 4(c)(4), AR 19 at p. 5; IHS Circular No. 96-04, secs. 4(A)(4)(a)(i)-(ii), AR 20 at pp. 9-10. Once a contract (or portion of a contract) was deemed “new and expanded,” it remained in that category until it moved up to the top of the Queue in a future year and the Tribal contractor finally received CSC payments to support that contract. IHS Circular No. 96-04, sec. 4(A)(4)(a)(i)-(ii), AR 20 at pp. 9-10. At that point, IHS then removed that contract from the Queue (now reclassifying it as “ongoing”) and advanced the remaining contracts up the Queue. *Id.* at section 4(A)(4)(a)(vii) & 4(A)(4)(b), AR 20 at pp.12-13. Thus, under IHS policy, only if a contract advanced high enough on the Queue in a given year so that it would be covered by the \$7.5 million sum that IHS decided to pay, would that contract receive CSCs to cover the general administration of the contracted program. Conversely, so long as a contract remained lower on the Queue – typically for several years (as in the *Cherokee* and *Shoshone* cases, and in ASNA’s case) – the contractor typically would receive no CSCs at all to administer and support the contract. *Shoshone I*, 988 F. Supp. at 1329.

E. The Relevant Appropriations Acts

Over the course of the 1996-2000 fiscal year period covered by ASNA’s First Cause of Action, the appropriations structure for IHS changed. We next review those appropriations because they are relevant both to ASNA’s motion and to IHS’s position that in certain years it has no liability for any failure to pay in full ASNA’s annual CSC requirements.

1. 1996-1997. Every year Congress provides IHS with a general multi-billion dollar

lump-sum appropriation “to carry out . . . the Indian Self-Determination Act” and other statutes, while also earmarking smaller lump-sum amounts to be spent for specified purposes. *See* Table *infra* at 13-14. In fiscal years 1996 and 1997, all CSC requirements associated with ongoing contracts were payable out of IHS’s general lump-sum appropriation. *Cherokee II*, 334 F.3d at 1087-88.

In each of these two years Congress also set aside \$7.5 million in the ISD Fund, to be available without fiscal year limitation.¹³ IHS treated this piece of the appropriation as a cap limiting what IHS could spend on “new and expanded” contracts. However, the Federal Circuit in *Cherokee II* held, and the Supreme Court in *Cherokee III* affirmed, that in these years all CSC requirements associated with “new and expanded” contracts were likewise payable out of IHS’s general multi-billion dollar lump-sum appropriation, just like ongoing CSCs. *Cherokee II*, 334 F.3d at 1089-1090.

2. 1998. In fiscal year 1998 the appropriations law remained unchanged from prior years with respect to the ISD Fund, and thus payments for “new and expanded” contracts, as in prior years, remained payable out of IHS’s general multi-billion dollar lump-sum appropriation.¹⁴ With respect to “ongoing” contracts, however, Congress altered the appropriations structure by designating a smaller lump-sum amount out of which “ongoing” CSCs would be paid. The Appropriations Act stated that, of the almost \$2 billion made available to IHS that year, “payments to tribes and tribal

¹³ Omnibus Consolidated Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-189 (1996) (“That of the funds provided, \$7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, compacts, grants or cooperative agreements with the Indian Health Service under the provisions of the [ISDA].”); Omnibus Consolidated Appropriations Act 1997, Pub. L. No. 104-208, 110 Stat. 3009-213 (1996) (same).

¹⁴ Department of Interior and Related Agencies Appropriations Act 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1582 (1998) (“That of the funds provided, \$7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, compacts, grants or cooperative agreements with the Indian Health Service under the provisions of the [ISDA].”).

organizations for contract support costs associated with ongoing contracts . . . entered into with [IHS] prior to fiscal year 1998” are “not to exceed \$168,702,000.” 111 Stat. 1583 (emphasis added).

3. 1999 and 2000. In fiscal years 1999 and 2000, Congress altered the appropriations structure once again, this time including all CSC payments (whether ongoing or new) under a single lump-sum amount. In 2000, Congress also earmarked from this special lump-sum amount up to \$10 million for CSC’s associated with new and expanded contracts.

To illustrate the evolution of the Appropriations Acts over the five years at issue here, the relevant language of each is included in the Table below.

Fiscal Year	IHS CSC Appropriation	ISD Fund Appropriation
1996 ¹⁵	Nothing specific (“For expenses necessary to carry out the . . . Indian Self Determination Act . . . \$1,747,842,000 . . .”)	“That of the funds provided, \$7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, grants or cooperative agreements with the Indian Health Service under the provisions of [ISDA].”
1997 ¹⁶	Nothing specific (“For expenses necessary to carry out the . . . Indian Self Determination Act . . . \$1,806,269,000 . . .”)	same language as FY1996
1998 ¹⁷	“Provided further, That not to exceed \$168,702,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts entered into with the Indian Health Service prior to fiscal year 1998, as authorized by [ISDA]”	same language as FY1996

¹⁵ 110 Stat. 1321-189.

¹⁶ 110 Stat. 3009-212.

¹⁷ 111 Stat. 1543, 1582.

1999 ¹⁸	“Provided further, That, notwithstanding any other provision of law, of the amounts provided herein, not to exceed \$203,781,000 shall be for payments to tribes and tribal organizations for contract or grant support costs associated with contracts, grants, self-governance compacts or annual funding agreements between the Indian Health Service and a tribe or tribal organization pursuant to the [ISDA]”	None
2000 ¹⁹	“Provided further, That, notwithstanding any other provision of law, of the amounts provided herein, not to exceed \$228,781,000 shall be for payments to tribes and tribal organizations for contract or grant support costs associated with contracts, grants, self-governance compacts or annual funding agreements between the Indian Health Service and a tribe or tribal organization pursuant to the [ISDA] . . . of which not to exceed \$10,000,000 may be used for such costs associated with new and expanded contract, grants, self-governance compacts or annual funding agreements”	See language at left.

IHS’s common course of conduct under the Circulars, which included its erroneous interpretation of Congressional appropriations, annually produced tens of millions of dollars in contract underpayments relative to Tribal contractors’ CSC requirements.²⁰ IHS documented this fact in detailed Area and Headquarters CSC “shortfall” reports, as well as in periodic internal reports and reports prepared for Congress or Congressional committees.²¹ In the *Cherokee* litigation the Supreme Court and Federal Circuit squarely rejected these practices as contrary to the ISDA and the contracts executed thereunder in fiscal years 1994-1997 (including two of the five fiscal years at

¹⁸ Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-279.

¹⁹ Consolidated Appropriations Act, 2000 Pub. L. No. 106-113, 113 Stat. 1501A-182 (1999).

²⁰ See Defs’ Pet. for Cert. at 27, *Cherokee III*, 543 U.S. 631 (2005) (No. 03-853) (“As a result [of pending class actions] the Indian Health Service could face liability of up to \$100 million”). See also Department of the Interior and Related Agencies Appropriations Hearings Before A Subcomm. of the House Comm. On Appropriations, 105th Cong., 2nd Sess. (1998) (regarding CSC shortfalls), reproduced in part in Exh. 3 at p. 6-7 (describing CSC shortfall litigation and detailing “the annual CSC shortfall for fiscal years 1994 through 1997”). See also, Exh. 4, GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES: INDIAN SELF-DETERMINATION ACT, SHORTFALLS IN INDIAN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED (June 1999) (“1999 GAO Report”) (depicting shortfalls in IHS payments of CSC requirements) (excerpts).

²¹ *Supra* n.20

issue here).²² Although the Courts did not directly address IHS’s conduct in later years, this Board can take judicial notice that the FY1998 Appropriations Act’s language governing the ISD Fund is identical to the earlier years’ language, and that the CSC earmark that year was expressly limited to “ongoing” contracts only. Thus, as in those earlier years, CSCs associated with “new and expanded” contracts for FY1998 remained payable out of IHS’s general multi-billion dollar lump-sum appropriation. *See Cherokee II*, 334 F.3d 1089-90.

F. The *Cherokee* Litigation

The instant case is a direct follow-on to the predominant common course of conduct at issue in the *Cherokee III* litigation, where the Supreme Court considered together one case arising from this Board and another case arising from the Eastern District of Oklahoma.

1. The *Cherokee II* litigation. In this Board the Cherokee Nation sought damages to recover unpaid CSCs associated with ISDA contracts covering fiscal years 1994, 1995 and 1996. *Appeals of Cherokee Nation*, 99-2 B.C.A. (CCH) ¶ 30,462. In those years most of the Cherokee Nation’s CSC requirements went unpaid because IHS placed those requirements on the IHS Queue list. IHS defended its failure to pay based upon its CSC Circulars and IHS’s determination that, while the relevant appropriations Acts may have been silent or ambiguous, the associated committee reports or a later appropriations Act rider limited IHS’s duty to pay.

²² *Cherokee III*, 543 U.S. at 646 (addressing IHS’s improper reliance on committee report language to limit payments to “ongoing” contracts: “The relevant case law makes clear that restrictive language contained in Committee Reports is not legally binding”) and at 644 (addressing IHS’s reliance on the ISD Fund to limit payments to “new or expanded” contracts: “Nor can we find sufficient support [for IHS’s failure to pay] in the other statutory provisions to which the Government points.”) (citing “[ISD] Fund” provisions of the four annual Appropriations Acts)); *see also Cherokee II*, 334 F.3d at 1088 (“[N]on-binding recommendations of Congress do not excuse the Secretary from fulfilling his duty under the contracts at issue here to pay full contract support costs”) and at 1089-90 (noting the Secretary’s admission that the \$7.5 million ISD Fund was not a cap on payments for new and expanded contracts, and holding the same).

In ruling for the Tribe, this Board held that the appropriations committee’s “nonstatutory instruction[s]” were “legally unenforce[able]” and “non-binding” under standard appropriations law. *Id.* at 15,490-91. Relying on “case law that dates back to the post-Civil-War period,” *id.* at 15,493 this Board further held that “when a Government agency has a sufficient unrestricted lump-sum appropriation available to it, it is bound by its contracts to the same extent that a private party would be” *Id.* at 15,493-94. This Board also rejected the Government’s argument that a rider known as “Section 314” of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681, was designed to prevent any further CSC payments to Indian Tribes for fiscal years 1994-1998.²³ *Id.*

The Federal Circuit affirmed, grounding its decision on five “fundamental principles of appropriations law.” *Cherokee II*, 334 F.3d at 1084-86. The Circuit agreed that committee recommendations are never binding, and that the Secretary therefore lacked discretion under the ISDA not to pay the contract obligations in full, even if doing so required reprogramming other funds. *Id.* at 1087-88. In so ruling the Circuit emphasized Congress’ elimination of all Secretarial discretion over CSC funding issues. *Id.* at 1088. Most importantly for purposes here, the Federal Circuit also held that, with respect to CSCs due on “new and expanded” contracts (like ASNA’s), the ISD Fund language in the Appropriations Acts did not limit IHS’s payment of such costs. *Id.* at 1089-90. Instead, the Circuit explained that the term “shall remain available” which established the

²³ Section 314 provided: “Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes, except that, for the Bureau of Indian Affairs, tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, self-governance compacts or annual funding agreements.” 112 Stat. 2681-288.

ISD Fund is universally understood as a “term of art” which creates “carryover authority” and indicates that “unexpended funds ‘shall remain available’ for the same purpose during the succeeding fiscal year.” *Id.* at 1090. The Federal Circuit thus rejected IHS’s ‘first-come, first-served’ Queue payment policy reflected in the agency’s CSC Circulars. *Id.* at 1082 n.3 & 1087 (discussing IHS Cir. 96-04). Finally, the Federal Circuit affirmed this Board’s rejection of the Government’s argument that Section 314 limited its liability. *Id.* at 1092. The Secretary then sought a writ of certiorari in the Supreme Court.

2. The *Cherokee I* litigation. Also at issue in the *Cherokee* litigation were claims for fiscal year 1997, which arose from a consolidated parallel case that commenced in the Eastern District of Oklahoma involving a different Cherokee Nation contract and two contracts of the Shoshone-Paiute Tribes. *Cherokee III*, 542 U.S. at 635. After exhausting their remedies under the CDA, the Tribes in that parallel action similarly challenged IHS’s practice of placing most of their CSC requirements on the IHS Queue, and its practice of underpaying some of their “ongoing” CSC requirements. Contrary to the ruling of this Board, the Oklahoma district court concluded that appropriations for ongoing CSCs had been “earmarked in appropriation committee reports,” *Cherokee Nation v. United States*, 190 F. Supp. 2d 1248, 1250 (E.D. Okla. 2001), and that appropriations were “insufficient” because IHS eventually “spent” its appropriations on other things. *Id.* at 1251, 1250. The district court also ruled that Section 314 imposed a retroactive “cap” on the amounts IHS could spend on CSCs associated with the “new and expanded” portions of the Tribes’ contracts. *Id.* at 1261.

The Tenth Circuit affirmed. *Cherokee Nation v. Thompson*, 311 F.3d 1054 (10th Cir. 2002) (*Cherokee I*). The Court noted IHS’s conduct under the CSC Circulars. *Id.* at 1058 & n.3; *see also*

id. at 1059 (explaining “full CSC funding for such new and expanded contracts was delayed and/or not paid at all for some tribes, including the plaintiffs”). The Tenth Circuit then agreed with IHS that “providing to the plaintiff Tribes their entire CSCs for ongoing contracts would have necessitated a reduction in funding for other tribal programs, or a reprogramming of such funds.” *Id.* at 1062. The court further ruled that the Secretary had the discretion to follow committee recommendations in lieu of his contract obligations, *id.* at 1063; that the Appropriations Acts’ “ISD Fund” language was ambiguous but best read so as “to limit the amount available for new or expanded CSCs to \$7.5 million,” *id.* at 1065; and that Section 314 retroactively confirmed the limited availability of the appropriations to pay CSCs. *Id.* The Tribes sought a writ of certiorari in the Supreme Court.

3. *Cherokee III*. The Supreme Court granted certiorari in both cases, affirmed the Federal Circuit, reversed the Tenth Circuit, and on all points ruled against the Secretary.

Directly at issue were IHS’s uniform policies and procedures for awarding CSC’s under its Circulars, and whether those policies were lawful in light of the ISDA’s funding provisions for CSCs and the language of the applicable appropriations Acts. Thus, the Secretary explained in his brief that “in anticipation of funding shortfalls for CSCs” “IHS allocated its CSC funds in those years in accordance with [certain] guidelines [citing Circular ISDM 92-2].” U.S. Br. at 12, *Cherokee III*, 543 U.S. 631 (2005) Nos. 02-1472 & 03-853. *See also id.* at 13 (explaining how CSCs were allocated under the Circulars for “new or expanded contracts” and for “ongoing contracts”) & 43 n.17 (defending that “IHS had established the queue system” under its Circulars for new and expanded contracts). The Supreme Court flatly rejected these explanations for IHS’s illegal conduct.

In ruling against the Secretary the Court underscored that:

The Act specifies that the Government must pay a tribe’s costs, including

administrative expenses. See § 450j-1(a)(1) and (2).

Cherokee III, 543 U.S. at 634 (emphasis added). The Court later noted that Congress purposefully placed this duty to pay directly into the Act:

The Act also reflects a congressional concern with [the] Government's past failure adequately to reimburse tribes' indirect administrative costs and a congressional decision to require payment of those costs in the future. See, e.g., § 450j-1(g); see also §§ 450j-1(a), (d)(2).

Id. at 639.²⁴ In affirming the Federal Circuit and this Board, the Supreme Court made clear that when it comes to the ISDA and ISDA contracts, the root duty to “pay” is found in the Act itself, and that this duty carries over into every ISDA contract. *Id.* at 639 (*affirming* 334 F.3d at 1082, *affirming* 99-2 B.C.A. (CCH) ¶ 30,462 (June 30, 1999)).

After noting the Secretary’s agreement before the Court on the controlling principles, *id.* at 636-38, the Court rejected the Government’s newly-minted argument on appeal that ISDA contracts are by their very nature less enforceable than other Government contracts. *Id.* at 638-40. The Court also rejected the Government’s argument that its liability should be limited if paying a contractor would require tapping funds committed to “inherent federal functions.” *Id.* at 641-43. Further, the Court rejected the argument that the ISDA’s “availability” clause in 25 U.S.C. § 450j-1(b) grants the Secretary “the legal right to disregard its contractual promises,” *id.* at 644, holding that in the four years at issue “Congress appropriated adequate unrestricted funds” to pay the Tribes’ contracts, *id.* at 643, and dismissing as unconvincing, the Secretary’s reliance on the Appropriations Acts’ ISD Fund language. *Id.* at 644-645. Finally, the Court affirmed this Board’s and the Federal Circuit’s

²⁴ This Board and the Federal Circuit had likewise observed that these unique mandatory funding provisions were inserted into the Act in 1988 as a congressional reaction to a consistent agency practice over a period of many years to underfund the CSCs to which Tribes were entitled under the Act. *Appeals of Cherokee Nation*, 99-2 B.C.A. (CCH) ¶ 30,462 at 150,492-93; *Cherokee II*, 334 F.3d at 1088.

rejection of the Secretary's Section 314 defense. *Id.* at 645-47.

In sum, it is beyond reasonable dispute that the implementation of the Circulars the Secretary developed because he claimed “insufficient appropriations” – really the heart of the underlying problem here – is the very same policy (and defense) the Secretary relied upon in the *Cherokee* cases, just as it was in the *Shoshone-Bannock* litigation. In effect, then, it can fairly be said that the Supreme Court in *Cherokee III* defined a class of CSC shortfall claimants, a few of whom are now coming to this Board, comprised of Tribal contractors who (just like the Tribes there) were underpaid their CSCs as a direct result of IHS's erroneous interpretations of the ISDA, federal appropriations law and government contract law, all as reflected in IHS's Circulars, and all without regard to any particular contract language. The instant appeal is thus both derived from and a direct follow on to the predominant course of conduct adjudged to be illegal in *Cherokee III*.

G. Related Class Action Litigation

Given the Government's limitations argument, we briefly summarize here related class action litigation concerning CSC issues.

First, in 1990 the Ramah Navajo Chapter filed a class action lawsuit against the BIA to recover damages over the BIA's miscalculation of CSC requirements. *Ramah Navajo Chapter v. Kempthorne*, No. 90-0957 (D.N.M.) (“*Ramah*”). A nationwide class covering all Tribal contractors contracting with the BIA was certified in 1993 over the BIA's objections (*id.*, Order & Mem. Op. of Oct. 1, 1993 (Dkt. Nos. 95 & 96), Ex. 14); in 1997 the Tenth Circuit found the Government liable (*Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997)); and in 1999 the district court approved a \$76 million partial settlement. *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999). This settlement covered claims in fiscal years 1989-1993, and specifically included

a release of CSC claims against IHS. *See id.*, *Ramah*, No. 90-957, Partial Settlement Agreement, at secs. 3.a.iii and 3.a.iv(3) (Aug. 31, 1998), Exh. 5 at 4. In 2002, following an amendment of the pleadings to add shortfall and other CSC class claims, the district court approved a second \$29 million partial settlement. *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303 (D.N.M. 2002).

Second, in March 1999 the Cherokee Nation and the Shoshone-Paiute Tribes filed a class action lawsuit against IHS as part of their Oklahoma CSC litigation. However, in February 2001 class certification was denied and no appeal of that decision was taken. *Cherokee Nation v. United States*, 199 F.R.D. 357 (E.D. Okla. 2001). The remainder of that litigation became *Cherokee Nation v. United States*, 190 F. Supp. 2d 1248 (E.D. Okla. 2001), and, on appeal to the Tenth Circuit, *Cherokee I*, before its reversal in *Cherokee III*.

Third, in September 2001 the Pueblo of Zuni filed a class action lawsuit against IHS over CSC underpayments. *Pueblo of Zuni v. United States*, No. CV 01-1046 (D.N.M.) (“*Zuni*”). The action was stayed from late 2001 until March 2005 (*id.*, Order of Dec. 28, 2001 (Dkt. No. 8)), Exh. 9, and a motion to certify the class is now *sub judice*. However (and contrary to the district court’s ruling in *Ramah*), in the Summer of 2005 the Government asserted in *Zuni* that even if a class might otherwise be appropriate, all class members would have to individually present claims under the Contract Disputes Act and that the time to do so was running out. The Government’s position prompted many Tribal contractors (including ASNA) to file CDA claims in August and September 2005 and, when those claims were denied, to pursue appeals to this Board.

III. MATERIAL FACTS RELATING TO ASNA THAT ARE NOT IN DISPUTE

ASNA is an inter-tribal consortium organized as a non-profit Alaska corporation based in Barrow, Alaska. Compl. ¶ 4, Answer ¶ 4. ASNA is a “tribal organization” as defined by the ISDA,

id.; 25 U.S.C. § 450b(l), and is controlled by the following federally-recognized tribes situated on the North Slope of Alaska: the Native Village of Barrow, the Native Village of Point Hope, the Native Village of Atkasuk; the Kaktovik Native Village of Barter Island; the Native Village of Anaktuvuk Pass; the Native Village of Nuiqsut; the Native Village of Point Lay; and the Native Village of Wainwright.

On January 22, 1996 (during fiscal year 1996), ASNA entered into a model Title I contract with IHS to operate the IHS Samuel Simmonds Memorial Hospital in Barrow, Alaska, together with various associated IHS programs, functions, services and activities serving the North Slope Tribes (collectively the “Barrow Service Unit”). ASNA initially did so under Contract No. 243-96-6025. AR 3; Compl. ¶ 6; Answer ¶ 6; Effective October 1, 1997 (fiscal year 1998), ASNA replaced its contract with an ISDA compact, under which it has continued to operate the IHS Barrow Hospital and Barrow Service Unit. The compact is known as the Alaska Tribal Health Compact (“ATHC” or “Compact”) and is an umbrella contract for most of the Alaska Tribal organizations contracting with IHS to operate Federal health care facilities in Alaska. Compl. ¶ 6; Answer ¶ 6; ISDA Compact No. 58G980054 (effective Oct. 1, 1997 to the present), AR 5. ASNA’s contract, compact and annual funding agreements are generically referred to herein as “contracts.”²⁵

When ASNA in FY1996 contracted with the Secretary to operate IHS’s Barrow Hospital and Service Unit, the Secretary viewed ASNA’s contract as a “new” contract. Accordingly, pursuant to its CSC Circulars IHS placed ASNA’s CSC requirement associated with operating the Hospital and Service Unit on the ISD Queue. ISD Queue Sept. 17, 1997, Exh. 6 (noting Arctic Slope’s (ASNA’s)

²⁵ ISDA Compact No. 58G98005 was originally authorized under Title III of the ISDA. Since FY2001 the compact has been authorized under Title V, 25 U.S.C. §§ 458aaa - 458aaa-18. As noted earlier, these technical changes do not alter the issues presented in this case. *See supra* at 6 n.6.

start date for the Queue as FY1996). And since (as was the case with the Cherokee Nation and Shoshone-Paiute Tribes in the *Cherokee* litigation), ASNA was ‘too low’ on the Queue to be paid out of the \$7.5 million that IHS chose to use for new contracts, IHS did not pay ASNA its full CSC requirements associated with administering the contract in fiscal years 1996, 1997 or 1998.²⁶

By fiscal year 1997, ASNA was the 18th Tribe listed on the ISD Queue with an outstanding unpaid annual CSC requirement of \$2,301,842 associated with operating the Barrow Hospital and Service Unit. Exh. 6 at 1, ISD Queue Sept. 19, 1997; *See also* Exh. 15, ISD Queue 1996-1998. Although it appeared ASNA might be high enough to be paid its CSC requirement in FY1998, on April 6, 1998 the IHS Alaska Area Office sent a letter to ASNA stating that it “cannot confirm that [ISD] funds are or will be available during FY98.” Letter from Duff Pfanner, Area Project Officer, Alaska Area Native Health Service to Eben Hobson Jr., Executive Director, ASNA (Apr. 6, 1998) AR 14 at p. 4,. Eventually ASNA did reach the upper portion of the ISD Queue that year, but IHS only paid ASNA approximately \$1.3 million of its \$2.3 million requirement, at which point IHS reached its self-imposed \$7.5 million ceiling in payments for “new and expanded” contracts. In FY1999 ASNA was on top of the Queue ready to be fully paid that year, but then IHS abolished its ‘first-come, first-served’ payment policy. As a consequence, in FY1999 IHS only paid ASNA a portion of its CSC requirement associated with operating the Barrow Hospital and Service Unit. Further, IHS never paid ASNA any portion of its CSC requirement associated with the one-time CSC start-up costs it had incurred in FY1996 in connection with ASNA’s original contract (a sum which had remained on the IHS Queue until IHS removed it in FY1999). IHS eventually explained its

²⁶ The payment documents included in the agency record are incomplete and confusing, so that it remains possible some CSC funds were paid to ASNA during these years. However, since this Motion only addresses the issue of liability, and not quantum, resolution of payment issues is unnecessary at this time.

belief that Section 314 barred IHS from “pay[ing] any startup costs for fiscal years 1994-1998.” AR 16 at p. 2.

Pursuant to the CDA, 41 U.S.C. §§ 601-612 and 25 U.S.C. §§ 450m-1(a) and (d) of the ISDA, and in the wake of the government’s position in *Zuni* regarding class membership, on September 30, 2005, ASNA filed claims with IHS to contest the agency’s failure to meet its obligation to pay full CSCs in fiscal years 1996-2000. In so far as relevant to this Motion, ASNA alleged that IHS unlawfully failed to pay ASNA’s full CSC requirement by applying an unlawful policy that limited the total amount IHS would pay ASNA in particular years. Claims letters from ASNA to IHS Director Dr. Charles Grim claiming contract support costs for fiscal years 1996-2000 (Sept. 30, 2005), AR 2 at pp. 1-25. IHS has acknowledged receipt of the claim letters for all fiscal years. Letter from Burton J. Humphrey, Senior Contracting Officer, Alaska Area Native Health Service to Eben Hobson Jr., President/CEO ASNA (Oct. 27, 2005), AR 11 at p. 2; Letter from Charles W. Grim, Director IHS to Eben Hopsen Jr., President/CEO, ASNA (March 15, 2006) (certifying IHS received claim letters on October 3, 2005), AR 11 at p. 1. For nearly 11 months ASNA never received a decision from any contracting officer on any of its claims, and it therefore deemed all of its claims denied. 41 U.S.C. §§ 605(c)(2), (5). On August 21, 2006, ASNA filed its Notice of Appeal with this Board.

IV. STANDARDS OF REVIEW

A. Motion to Dismiss

In deciding a motion to dismiss for lack of jurisdiction, the allegations of the complaint are construed in favor of the appellant. *Appeal of Harddrives, Inc.*, No. 2319, 93-2 B.C.A. (CCH) ¶ 25,779 at 128,293, 1992 WL 390995 (Dec. 30, 1992). Any unchallenged allegations are accepted

as true. *Id.* When the jurisdictional facts are in dispute, however, the Board considers relevant evidence of record. *Id.* The burden is upon appellant to establish jurisdiction. *Id.* See also *Appeals of Ball, Ball, and Brosamer, Inc.*, Nos. 3542-3544, 99-1 B.C.A. (CCH) ¶ 29, 637 at 146,859, 1998 WL 119766 (Mar. 17, 1998).

B. Motion for Summary Judgment

Under the Contract Disputes Act, an appeal from a decision by a contracting officer is reviewed *de novo*. *Appeal of White & McNeil Excavating, Inc.*, No. 2488, 93-1 B.C.A. (CCH) ¶ 25,286 at 125,961, 1992 WL 181690 (July 24, 1992) (citing 41 U.S.C. § 605(a) and (b)), *summarily aff'd White & McNeil Excavating, Inc. v. Lujan; Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987)).

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. See *Appeals of Gardner Zemke Co.*, No. 3261-62, 96-1 B.C.A. (CCH) ¶ 27,936 at 139,525, 1995 WL 564868 (Sept. 11, 1995) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986)). See also *Sheinbein v. Dudas*, 465 F.3d 493, 495 (Fed. Cir. 2006) (citing Fed. R. Civ. P. 56(c)). The movant bears the initial burden of “identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp.*, 477 U.S. at 323 (1986). “By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). See also *In re Appeals of Gardner Zemke Co.*, 96-1 B.C.A. (CCH) ¶ 27,936 at 139,525 (“A material fact is one that

will ‘affect the outcome of the suit under the governing law.’” (quoting *Anderson*, 477 U.S. at 248)).

By this motion for partial summary judgment, ASNA seeks to establish the Secretary’s liability on the shortfall claims. These claims are based upon ASNA’s contractual agreements with the Secretary – all of which incorporate the ISDA. Specifically, ASNA challenges the Secretary’s continuing course of conduct and implementation of a systemwide practice, carried out over several years through a succession of unauthorized “Circulars” (including the five years covering ASNA’s claims), that annually underpaid ASNA the contract support costs due under its contracts during fiscal years 1996 through 2000. The material facts are not in dispute. Rather, the parties disagree on the Secretary’s legal liability under the contracts.

C. Rule of Construction

The ISDA and contracts entered into thereunder also require that “[e]ach provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the . . . related functions, services, activities, and programs . . . from the Federal Government to the Contractor[.]” 25 U.S.C. § 450l(c), sec. 1(a)(2). This mandatory rule of statutory construction applies to both the ISDA and to all the terms of ASNA’s contracts.

V. ARGUMENT

This brief takes an unconventional approach in that it addresses at one time the Secretary’s Motion to Dismiss and those areas in which ASNA requests this Board grant Appellant partial summary judgment of liability. Since the Secretary’s Motion to Dismiss asserts one procedural argument for dismissal of claims covering fiscal years 1996 through 1998, and one substantive argument for dismissal of claims covering fiscal years 1998 through 2000, we address the Secretary’s

procedural argument first (in Part V-A) and defer discussion of the Secretary's substantive argument to that portion of this brief where we discuss ASNA's summary judgment motion on the same issue (Part V-B.2 and V-C).

A. This Board Has Jurisdiction over ASNA's FY1996-FY1998 Claims Because the Time for Filing Those Claims Was Tolloed by the Filing of the Class Action Suit in *Zuni v. United States*.

The Secretary accurately points out that ASNA's claims, received September 30, 2005, were filed more than six years after the close of fiscal years 1996, 1997 and 1998, pointing to the six-year accrual rule in 41 U.S.C. § 605(a). What the Secretary does not mention is that the time within which ASNA had to file its claims was tolled pending class certification proceedings in the *Zuni* case.

1. Rule 23 tolling. The Supreme Court long ago ruled that once a class action lawsuit is filed, that suit tolls the running of the statute of limitations for all putative class members until after a decision on the class certification motion is rendered. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974); *Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983). *See also Stone Container Corp. v. United States*, 229 F.3d 1345, 1354 (Fed. Cir. 2000) (same tolling rule applied to litigation against the government). Thus "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *American Pipe*, 414 U.S. at 554 (footnote omitted). This includes putative class members who choose to file their own actions. *Crown Cork & Seal*, 462 U.S. at 351 (discussing the Supreme Court's reliance on *American Pipe* in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974), and holding that the filing of a class action tolls the statute of limitation for a class member who chooses to file a separate suit).

The Supreme Court recognized that, without this sensible rule, “[o]nly by intervening or taking other action prior to the running of the statute of limitations would [putative class members] be able to ensure that their rights would not be lost in the event that class certification was denied.” *Crown Cork & Seal*, 462 U.S. at 350. Such a result would not be in the interest of judicial economy nor consistent with Rule 23. For these sound reasons, courts have applied the *American Pipe* rule to also toll statute of limitations periods for filing administrative appeals. *Griffin v. Singletary*, 17 F.3d 356, 360-61 (11th Cir. 1994) (“[a]pplying the tolling rule to the filing of administrative claims will have the same salutary effect as exists for the filing of lawsuits. In both cases, tolling the statute of limitations during the pendency of a class action will avoid encouraging all putative class members to file separate claims”) (quoting *Sharpe v. American Express Co.*, 689 F. Supp. 294, 300 (S.D.N.Y. 1988)); see also *McDonald v. Sec’y of Health & Human Services*, 834 F.2d 1085, 1092 (1st Cir. 1987).

The *Zuni* complaint seeks money damages arising out of the very same claims at issue here. Specifically *Zuni*’s complaint asserts that the Secretary:

- (1) failed to properly calculate the Tribes’ “contract support cost” requirements, (2) failed to pay the properly calculated amount required to be paid, and (3) failed to fully pay even the Tribes’ undercalculated “contract support cost” requirements.

Exh. 7 at 2, *Zuni* Compl. (filed Sept. 10, 2001) (Dkt. No. 1). See also Exh. 8 at 2, *Zuni* First Am. Compl. (filed Dec. 12, 2001) (Dkt. No. 5) (same). The *Zuni* complaint seeks damages based on the ISDA and the ISDA contracts in effect between IHS and several hundred Tribal contractors. *Id.*²⁷

²⁷ Because of the similarity of claims, the *Zuni* case was originally stayed in 2001 pending the outcome in the Tenth Circuit of *Cherokee II*. Exh. 9 at ¶ 1, *Zuni* Order Granting Stay (Dec. 28, 2001) (Dkt. No. 8). The stay was lifted shortly after the Supreme Court decision in *Cherokee III*. Exh. 10 at ¶ 1, *Zuni* Order Lifting Stay (Mar. 17, 2005) (Dkt. No. 32).

In its motion for class certification Zuni defines the plaintiff class as:

All Indian Tribes and Tribal organizations that have contracted with the Indian Health Service under the Indian Self-Determination Act, 25 U.S.C. § 450 *et seq.*, at any time from fiscal year 1993 to the present (including FY 2005).

Exh. 11 at 1, *Zuni* Pl. Mem. in Support of Class Certification (excerpts) (filed June 6, 2006) (Dkt. No. 281). Zuni also defines the class claims:

1. Claims under the ISDA for statutory or contractual damages relating to contracts in effect at any time during fiscal year 1995 to the present and arising out of the Defendants' common course of conduct of denying full funding of contract support cost requirements associated with "new or expanded" contracts.
2. Claims under the ISDA for statutory or contractual damages relating to contracts in effect at any time during fiscal year 1995 to the present and arising out of the Defendants' common course of conduct of denying full funding of contract support cost requirements associated with "ongoing" contracts.
3. Claims under the ISDA for statutory or contractual damages relating to contracts in effect at any time during fiscal year 1995 to the present and arising out of Defendants' common course of conduct of denying full funding of contract support costs by use of a methodology for determining indirect administrative contract support costs that undercalculates those costs.
4. Claims falling substantively within either Claims 1, 2 or 3, but relating to contracts in effect for fiscal years 1993 or 1994.

Id. at 1-2. The proposed *Zuni* definition and class claims embrace all of ASNA's claims at issue here. To date no decision has been issued on the pending class certification motion in *Zuni*.

ASNA here asserts the same claims as are alleged in the *Zuni* class action, albeit for only five years. ASNA's first claim asserts, like *Zuni* class claims 1 and 2, that "the Secretary . . . unlawfully failed to pay in full the CSCs which the Secretary acknowledged were due and owing to ASNA." Compl. ¶ 2(a) (emphasis added). ASNA's second claim is similarly encompassed by *Zuni* class claim (3): "the Secretary . . . unlawfully failed to calculate correctly, and thus underpaid, the indirect

administrative CSCs the Secretary was required to pay under the ISDA” *Id.* ¶ 2(b) (emphasis added). The claims are identical.

Zuni filed its class action complaint in September 2001 – well before the expiration of the six-year period to file claims relating to underpayments in fiscal years 1996, 1997 and 1998. Because no ruling in *Zuni* has yet issued on the class certification motion, the statute of limitations for filing an administrative claim continues to be tolled under Rule 23. *Griffin*, 17 F.3d at 360-61 (applying *American Pipe* to toll administrative limitations period); *McDonald*, 834 F.2d at 1092 (same). The limitations period will continue to be tolled until the *Zuni* class motion is decided.

Although ASNA could have deferred longer filing its claims, in the wake of *Cherokee III* and the government’s threat that claimants who did not file would be barred from participating in any *Zuni* class, ASNA filed its own CDA claims. Even still, the *American Pipe* rule extends to a putative class member like ASNA that elects to pursue its claim on its own. *Crown Cork & Seal*, 462 U.S. at 351. Therefore, this Board should deny the Secretary’s motion to dismiss ASNA’s claims for fiscal years 1996, 1997 and 1998, and conclude that under the *American Pipe - Crown Cork & Seal* tolling rule, ASNA’s administrative claims were timely filed with the contracting officer.

2. Equitable tolling outside Rule 23. Apart from Rule 23 tolling, the period for filing individual CDA claims was independently tolled for ASNA by operation of equitable tolling principles. *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (noting “rebuttable presumption of equitable tolling” in “suits against the United States”); *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1238 (Fed. Cir. 2002) (applying doctrine of equitable tolling to the CDA); *see also Bonneville Associates, Ltd. P’ship v. Barram*, 165 F.3d 1360, 1367 (Fed. Cir. 1999) (Gajarsa, J., concurring) (suggesting agreement that equitable tolling applies to the CDA); *cf.*

Kirkendall v. Dep't of the Army, 412 F.3d 1273, 1276 (Fed. Cir. 2005) (applying *Irwin* presumption of equitable tolling in the context of exhaustion of administrative remedies), *vacated on other grounds*, 159 Fed. Appx. 193 (Fed. Cir. 2006).

Here, there is a “general trust relationship between the United States and the Indian people.” *United States v. Mitchell*, 463 U.S. 206, 225 (1983). The Secretary is a trustee and is contracting to the trust beneficiary the operation of a trust program. The Secretary had a “overriding duty . . . to deal fairly with Indians,” *Morton v. Ruiz*, 415 U.S. 199, 236 (1974), and to conform his conduct to the law. Here the Secretary did neither.²⁸ He adopted and imposed a policy he was barred by Congress from imposing. *Supra* at 8-11. He then told Tribes who depended on him for superior knowledge and experience that appropriations were not available and that nothing more could be done. These equities were so compelling that the District Court of Oregon was recently moved to reopen a three-year-old final judgment against the Shoshone-Bannock Tribes, and to award the Tribes damages against the Secretary for IHS’s precise same misconduct. *Shoshone-Bannock IV*, 408 F. Supp. 2d at 1081 (noting IHS’s “untenable (and now flatly rejected) position” not to pay CSCs associated with “new and expanded” contracts). In the context of the ISDA, the unique relationship between the United States and Tribes, and the trust services being contracted, equitable tolling should be interpreted liberally. *Cf. Bailey v. West*, 160 F.3d 1360, 1365 (Fed. Cir. 1998) (relying on the “particular relationship between veterans and the government” to determine there were grounds to apply equitable tolling); *Jacquay v. Principi*, 304 F.3d 1276, 1286 (Fed. Cir. 2002)

²⁸ For a discussion of the Secretary’s trust responsibility to provide health care services to Indian Tribes, *see generally* U.S. Comm’n on Civil Rights, BROKEN PROMISES: EVALUATING THE NATIVE AMERICAN HEALTH CARE SYSTEM (Sept. 2004) available at <http://www.usccr.gov/pubs/nahealth/nabroken.pdf>; *McNabb v. Bowen*, 829 F.2d 787, 791-93 (9th Cir. 1987); *White v. Califano*, 437 F. Supp. 543, 555 (D.S.D. 1977), *aff’d* 581 F.2d 697 (8th Cir. 1978).

(interpreting equitable tolling in the context of the “paternalistic, uniquely pro-claimant veterans’ compensation system”).

Additionally, here it is indisputable that at the time Zuni filed its class action in 2001, ASNA could have presented then-timely CDA claims covering all five years, but that ASNA relied on the fact that the *Zuni* class action complaint embraced its claims, and that general class action practice relieves a class member of the burden to pursue its own claims until the class issue is resolved. *Supra* at 27-28. In this regard ASNA also relied on the fact that the New Mexico District Court in *Ramah* had certified a near-identical class action against the BIA over unpaid CSCs, that the court there specifically had held that no Tribal contractor needed to file a CDA claim to be covered by the class action, and that two multi-million dollar settlements had subsequently been distributed to Tribal contractors (including ASNA) in the *Ramah* case, none of whom ever filed CDA claims. *Supra* at 20-21. *See Gonzalez-Aller Balseyro v. GTE Lenkurt, Inc.*, 702 F.2d 857, 859 (10th Cir. 1983) (citing *Carlile v. S. Routt Sch. Dist. RE 3-J*, 652 F.2d 981, 986 (10th Cir. 1981), in which the court “suggested that tolling may be appropriate when a plaintiff has been ‘lulled into inaction by . . . the courts.’”); *see also Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) (citing *Carlile* as an example of a case where tolling was justified because “the court ha[d] led the plaintiff to believe that she had done everything required of her”).

Equitable tolling, unlike Rule 23 tolling, is “determined on a case-by-case basis,” *Gonzalez-Aller Balseyro*, 702 F.2d at 859, and applied “where called for by the ‘facts of the case.’” *United States v. Clymore*, 245 F.3d 1195, 1197 (10th Cir. 2001) (quoting *Bowen v. City of New York*, 476 U.S. 467, 479 (1986)). The factual aspect of equitable tolling generally precludes dismissal based on lack of subject matter jurisdiction. *Mallard Auto. Group, Ltd. v. United States*, 343 F. Supp. 2d

949, 954 (D. Nev. 2004) (“[I]f the statute of limitations on a claim against the government is subject to equitable tolling, the statute of limitations issue cannot be resolved on a 12(b)(1) motion.”).

B. ASNA’s Shortfall Claims for Fiscal Years 1996, 1997 and 1998 Are in All Material Respects Identical to the Claims Presented in *Cherokee III*, and Therefore ASNA is Entitled to Partial Summary Judgment.

1. Claims arising in fiscal years 1996 and 1997. This Board, the Federal Circuit and the Supreme Court have all rejected the IHS Circulars and policies once again at issue here. Indeed, IHS conceded in *Cherokee III* that a victory for the Tribes there would mean “the [IHS] could face liability of up to \$100 million,” U.S. Pet. for Cert. at 27, *Cherokee III*, 543 U.S. 631 (2005), No. 03-853, and acknowledged to the Court that “in 1996 and 1997, the overall shortfall in CSC funding, including both new or expanded contracts and ongoing contracts, was approximately \$43 million and \$82 million, respectively.” U.S. Br. at 12, *Cherokee III*, 543 U.S. 631, Nos. 02-1472, 03-853.

It should come as no surprise, then, that in the wake of IHS’s defeat in *Cherokee III*, identically-situated Tribal contractors would rightfully seek damages for the same injuries. Indeed, any other outcome would be manifestly unjust, and would permit the government to escape the consequences of its now judicially-determined wrongful conduct. *Shoshone IV*, 408 F. Supp. 2d at 1079-80 (discussing effects of IHS’s wrongful conduct) and 1081-82 (rejecting, based in part on the trust relationship, IHS’s position that Tribes are simply “out of luck”).

The facts here are indistinguishable from the facts at issue in the *Cherokee* litigation. Beginning in FY1996, ASNA contracted to operate the IHS Barrow Hospital and Service Unit, just as the Shoshone-Paiute Tribes contracted that year to operate the IHS Owyhee Hospital and Service Unit, and just as the Cherokee Nation’s contracts were expanded in the adjacent years to operate the Stilwell Clinic, Sallisaw Clinic and two outpatient referral programs. Exh. 6 at 1, Sept. 17, 1997 IHS

Queue (listing all three Tribes). The first two years of ASNA's claims, FY1996 and FY1997, are two of the same years at issue in *Cherokee III*, involving the precise same IHS Circulars, the precise same IHS conduct, and the precise same erroneous IHS interpretation of the ISDA, federal appropriations law, and government contract law.

The similarities are inescapable. Pursuant to the same IHS Circulars at issue in *Cherokee III* (ISDM 92-2, AR 19, and IHS Cir. 96-04, AR 20), IHS recognized ASNA's CSC requirement associated with operating the Barrow Hospital and Service Unit, just as it had recognized the Cherokee's and Shoshone-Paiute's CSC requirements associated with operating their expanded hospital and clinic contracts. Pursuant to those same two IHS Circulars, IHS recorded ASNA's CSC requirement but did not pay ASNA those requirements in full – just as it failed to pay CSCs in full to the Cherokee and Shoshone-Paiute. Instead, and just as it had done with the Cherokee and Shoshone-Paiute (and the Shoshone-Bannock during the same period), IHS simply placed ASNA's CSC requirement on the Queue, where ASNA was to wait until in some future year IHS's self-created 'first-come, first-served' rule would eventually allow IHS to pay (albeit on a prospective basis only). As in all the other reported cases, IHS did all this because of its erroneous position that appropriations were not legally available in the years at issue to pay ASNA's CSC requirement. As with Cherokee, Shoshone-Paiute and Shoshone-Bannock, IHS also eventually relied on the argument – which the Supreme Court rejected – that the later-enacted Section 314 Appropriations Act rider further supported IHS's decision not to pay ASNA's CSC requirement in the earlier years. *See supra* at 15-20.

In short, other than the name of the contractor and the name of the IHS program being contracted, there is no material difference between (1) ASNA's shortfall claims for fiscal years 1996

and 1997 (nor, as discussed below, for FY1998), and (2) the claims in *Cherokee III* and *Shoshone-Bannock IV*. Therefore, under *Cherokee III*, ASNA is entitled to summary judgment finding the government liable for failing to pay ASNA its full CSC requirement during fiscal years 1996 and 1997.

2. Claims arising in fiscal year 1998.

The Federal Circuit's and Supreme Court's rulings in *Cherokee II* and *III* equally apply to ASNA's shortfall claims during fiscal year 1998. For the same reasons, ASNA is therefore entitled to summary judgment on these claims too.

Here, again, the basic facts are not in dispute. As in the prior years, IHS in FY1998 classified ASNA's Barrow Hospital contract as a "new and expanded" contract; it kept ASNA on the Queue; and it limited CSC payments to contracts at the top of the Queue to \$7.5 million, the same amount Congress designated for the ISD Fund and an insufficient amount to pay ASNA its full CSCs associated with operating the IHS Barrow Hospital.

In fiscal year 1998 there was no change from prior law respecting the payment of CSC requirements associated with "new and expanded" contracts. That is, the appropriations language in FY1998 was identical to the language used in prior years. *Supra* at 12-13. This Board and the Federal Circuit have already held that the ISD Fund provision in the Appropriations Acts did not constitute a limitation on the lump-sum appropriations available to pay such CSC requirements. *Cherokee II*, 334 F.3d at 1089-90. In affirming the Circuit, the Supreme Court gave short shrift to IHS's argument that the ISD Fund language either meant something else or was ambiguous. *Cherokee III*, 543 U.S. at 644-45. Thus in FY1998, as in prior years, CSC requirements associated with "new and expanded" contracts like ASNA's were payable out of IHS's general multi-billion

lump-sum appropriation made available “to carry out . . . the Indian Self-Determination Act.” See 111 Stat. 1543, 1582.

To this, the Secretary’s response, Mot. to Dismiss at 4, is that other language in the IHS FY1998 Appropriations Act limited the availability of the larger lump-sum appropriation to pay CSCs associated with “new and expanded” contracts. But whatever the meaning of that other language (discussed *infra* in Part V-C), it simply does not apply here. This is because the limiting language IHS relies on specifically applies only to CSCs associated with “ongoing” contracts, and not “new and expanded” contracts like ASNA’s:

Provided further, That not to exceed \$168,702,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts entered into with the Indian Health Service prior to fiscal year 1998, as authorized by the Indian Self-Determination Act of 1975, as amended.

111 Stat. 1543, 1583 (emphasis added). Because (1) IHS had long before classified ASNA’s Barrow contract as a “new and expanded” contract, not an “ongoing” contract; (2) IHS had left ASNA on the Queue for years where IHS might ultimately pay it out of the ISD Fund; and (3) IHS continued so to treat ASNA in FY1998; it is not possible now to rewrite either the law or history and somehow transmogrify ASNA’s “new and expanded” CSC requirement into an “ongoing” CSC requirement. In short, *Cherokee II* and *III* apply equally to ASNA’s fiscal year 1998 claim.

C. ASNA is Entitled to Partial Summary Judgment on Its Shortfall Claims for Fiscal Years 1999 and 2000.

In FY1999, IHS abolished the infamous Queue system and the related ‘first-come, first-served’ policy. In the same year, Congress eliminated the ISD Fund, and fenced off all IHS’s CSC payments from IHS’s larger general lump-sum appropriation. Congress did so by setting apart a smaller lump-sum appropriation, stating that “not to exceed \$203,781,000 shall be for payments to

tribes and tribal organizations for contract or grant support costs” 112 Stat. 2681-279. This situation was not presented in *Cherokee II* and *III*, and it is IHS’s argument that this new appropriations structure is sufficient for IHS to escape liability to ASNA because, under the ISDA (IHS argues) the agency’s contract payments are “subject to the availability of appropriations.” 25 U.S.C. § 450j-1(b). IHS’s argument fails because appropriations were legally available to pay ASNA. In the alternative, ASNA submits that the Secretary had “contract authority” without regard to the availability of appropriations for the Secretary to pay ASNA’s contract.

The Federal Circuit has previously ruled that the ISDA does not confer upon a contractor dealing with the BIA a right to be paid an amount in excess of an appropriation that was limited with somewhat similar language. *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep’t*, 194 F.3d 1374, 1376-78 (Fed. Cir. 1999). In so ruling, the Court rejected the contractor’s central position that the ISDA conferred upon the Secretary the authority to commit the United States to a contract in advance of and in excess of appropriations made available to the Secretary to pay the contract. This “contract authority” decision, recently accepted by a New Mexico district judge in other litigation,²⁹ is addressed *infra* in Part V-C.2. What *Oglala* does not address is an entirely different argument – and one now highlighted specially by the Supreme Court in *Cherokee III*: whether the government is excused from paying a contract out of a single-purpose lump-sum appropriation that is large enough to pay the contract, even though it may not be large enough to pay all the contracts the agency has made. ASNA respectfully submits that in such a setting, *Cherokee III* indicates that the government remains liable.

²⁹ Exh. 13 at 14, *Ramah*, No. 90-957, Mem. Op. and Order (D.N.M. Aug. 31, 2006) (Dkt. No. 1042) (agreeing with *Oglala*).

1. Under *Cherokee III*, the government remains liable if its appropriation is sufficient to pay ASNA’s contract, even though the appropriation “is insufficient to pay all the contracts the agency has made.”

We begin with a review of appropriations and contract law. Fundamental to government contracting law is a longstanding distinction between (1) lump-sum appropriations, *see Int’l Union v. Donovan*, 746 F.2d 855, 861 (D.C. Cir.1984) (“the lump-sum appropriation has a well understood meaning”); *Cherokee II*, 334 F.3d at 1085-86; and (2) specific appropriations that recite (or ‘cap’) the amount available for a particular purpose (usually applicable to a single contract). In the case of a lump-sum appropriation, “[a] contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects.” *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892) (quoted approvingly in *Cherokee III*, 543 U.S. at 638).³⁰ *See also Dougherty v. United States*, 18 Ct. Cl. 496, 503 (1883) (“[W]e have never held that persons contracting with the Government for partial service under general appropriations are bound to know the condition of the appropriation account at the Treasury or on the contract book of the Department.”); *Blackhawk Heating, Inc. & Plumbing Co., Inc. v. United*

³⁰ In *Ferris* the U.S. Army entered into a contract with Ferris to dredge a channel of the Delaware River. 27 Ct. Cl. 542. Ferris started performance of his work and continued until his operation was closed down “because the appropriation therefore [was] exhausted.” *Id.* At all times Ferris was ready and able to complete the work. *Id.* Ferris brought suit to recover profits which he would have made on the unperformed portion of the work contracted for. *Id.* The Court held the contractor was “Entitled to all the profits which [he] might have made” under the contract. *Id.* The Court held that insufficient appropriations was not a defense in the action, explaining that the defense did not discharge the government’s legal obligations (*id.*):

A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects. An appropriation *per se* merely imposes limitations upon the Government’s own agents; it is a definite amount of money intrusted to them for distribution; but its insufficiency does not pay the Government’s debts, nor cancel its obligations, nor defeat the rights of other parties. (*Dougherty’s Case*, 18 C. Cls. R., 496.).

States, 622 F.2d 539, 552 (Ct. Cl. 1980) (holding the government liable for failing to make first settlement payment due from a lump-sum appropriation prior to enactment of a restricting amendment) (cited approvingly in *Cherokee II*, 334 F.3d at 1085-86). In the lump-sum *Ferris-Blackhawk* situation, an agency’s exhaustion of an appropriation without fully paying the contract prevents the agency from spending more, given the proscription of the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A), but does not bar a recovery of damages. *N.Y. Cent. R.R. Co. v. United States*, 65 Ct. Cl. 115, 128 (1928), *aff’d* 279 U.S. 73 (1929); *see also Lee v. United States*, 129 F.3d 1482, 1483-84 (Fed. Cir. 1997); *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1583-84 (Fed. Cir. 1994); GEN. ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-20 (3d ed., Vol. 2, Feb. 2006) (“APPROPRIATIONS LAW”).

This was the situation presented in *Cherokee III*, and the Supreme Court squarely endorsed the lump-sum rule of federal appropriations law in finding the government liable for failing to pay the Tribal contracts in full. 543 U.S. at 637-38, 641-43. The Court placed beyond any doubt that:

[A]s long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of “insufficient appropriations,” even if the contract uses language such as “subject to the availability of appropriations,” and even if an agency’s total lump sum appropriation is insufficient to pay all the contracts the agency has made.

Id. at 637-38 (citing *Ferris* and *Blackhawk*) (underscoring added; italics in original). By this language and speaking with unmistakable clarity and emphasis, the Supreme Court has placed beyond debate that if an appropriation is legally available to pay a contract, the government “cannot back out of a promise to pay on grounds of ‘insufficient appropriations.’” *Id.* It does not matter that the contract uses an “availability” clause, and – most importantly to the issue at hand – it does not matter that the appropriation “is insufficient to pay *all* the contracts the agency has made.” *Id.* The

government remains liable for the broken promise.

At the other end of the spectrum is the situation where there is a specifically-appropriated sum for a given undertaking. In such a situation a contractor may, in appropriate circumstances, be held to the limits of the capped amount. *Sutton v. United States*, 256 U.S. 575, 579 (1921) (contractor held to notice of \$20,000 statutory limit on agency authority to contract with contractor); *Shipman v. United States*, 18 Ct. Cl. 138 (1883) (“Where an alleged liability of the Government rests wholly upon an appropriation, they must stand and fall together.”); *Bradley v. United States*, 98 U.S. 104, 114, 117 (1878); *but see New York Airways, Inc. v. United States*, 369 F.2d 743, 748-49 (Ct. Cl. 1966) (government liability may survive a legally insufficient appropriation depending upon the terms of the contract and the authorizing legislation); *Ross Constr. Corp. v. United States*, 392 F.2d 984, 986-87 (Ct. Cl. 1968) (government liable for losses “beyond the control or responsibility of the . . . contractor”). See APPROPRIATIONS LAW 6-22 – 6-23 (discussing the *Ferris* rule).

In *Cherokee III*, the Supreme Court applied long-standing government contracting law because of the importance of “provid[ing] a uniform interpretation of similar language used in comparable statutes, lest legal uncertainty undermine contractors’ confidence that they will be paid, and in turn increase the cost to the Government of purchasing goods and services.” 543 U.S. at 644; *see also Cherokee II*, 334 F.3d at 1084 (applying “fundamental principles of appropriations law, as enunciated by the Supreme Court, by this court, by our predecessor court, and by other circuits”). The Court heard from *Amici* with “a critical interest in ensuring that this Court reaffirm 120 years of case law and protect settled expectations regarding the government’s responsibilities as a reliable contracting partner.” Br. of *Amici Curiae* the Chamber of Commerce of the United States of America, the National Defense Industrial Association, and the Aerospace Industries Association at

2, *Cherokee III*, 543 U.S. 631, Nos. 02-1472, 03-853. *Amici* explained that “the specific language on which the government places a substantial portion of its argument – the language stating that a contract is ‘subject to the availability of appropriations’ – is a staple of government contract law, appearing frequently in statutory schemes, procurement regulations, and government contracts.” *Id.*

In describing the *Ferris* and *Sutton* distinction, these *Amici* explained:

But the issues presented in cases such as *Sutton* and *Bradley* differ in at least one critical respect from the issues presented here and in *Ferris* and *Dougherty*: *Sutton* and *Bradley* involved a specific line-item appropriation designated for a single contract or project, rather than (as was the case in *Ferris* and *Dougherty*) a general appropriation for a number of contracts. *See generally* Fenster & Volz, 11 Pub. Contr. L. J. At 167-74.

That distinction is critical. When a contract is funded by a specific line-item appropriation, the contractor can determine exactly what the government is obligated to pay and, because the contractor is the only one to be paid from the appropriation, can easily track the funds remaining in the appropriation. In contrast, when a contract is to be paid from a general appropriation, the contractor cannot track government spending on all of the myriad activities to be funded from the account.

...

Government contract jurisprudence sensibly reflects these differences. . . . *See Dougherty*, 18 Ct. Cl. at 503 (“[W]hen one contract on its face assumes to provide for the execution of all the work authorized by an appropriation, the contractor is bound to know the amount of the appropriation, and cannot recover beyond it.”); *see also Shipman v. United States*, 18 Ct. Cl. 138, 146-47 (1883) (amount appropriated in specific appropriation authorizing construction was the limit of contractor’s recovery).

Id. at 1011; *see Cherokee III*, 543 U.S. at 637 (referring to *Amici* in citing to *Ferris*).

The question presented in connection with ASNA’s fiscal year 1999 and 2000 claims is whether the rule of *Cherokee-Ferris* applies, or instead the rule of *Sutton*. We submit the rule of *Cherokee-Ferris* applies. The agency had a lump-sum amount of \$203,781,000 for “payments to tribes and tribal organizations for contract or grant support costs” due under the ISDA. 112 Stat. at

2681-279. Because, borrowing from *Cherokee III*, “Congress ha[d] appropriated sufficient legally unrestricted funds to pay the [ASNA] contract[] at issue [here, at most \$2.3 million], the Government normally cannot back out of a promise to pay on grounds of ‘insufficient appropriations,’ . . . even if [IHS’s] total lump-sum appropriation [of \$203,781,000] [was] insufficient to pay *all* the contracts the agency ha[d] made.” 543 U.S. at 637. Unlike in *Sutton*, there was no statutory earmark limiting the amount available for ASNA’s contract. Thus, the *Cherokee-Ferris* rule applies.

IHS will insist that the insufficiency of the lump-sum amount for CSC payments to all contractors mandates a different rule. But the Supreme Court in *Cherokee III* squarely rejected the argument that Tribal contractors bear the risk that a bulk lump-sum appropriation might prove “insufficient to pay *all* the contracts the agency has made.” *Cherokee III*, 543 U.S. at 637. As the Court made clear, there is no reason in the ISDA setting, particularly with IHS constantly changing its Circulars and its payment rules, that a Tribal contractor should bear the risk that a lump-sum appropriation might be insufficient to pay the contractor the full amount of CSCs required under its contract as mandated by the ISDA. The unfairness of the alternative – leaving ASNA at IHS’s whim – is particularly brought into focus when one considers that in fiscal year 1999 – when ASNA finally rose up to the top of the Queue and was in a position to be fully paid under IHS’s historic ‘first-come, first-served’ policy, IHS that year simply abandoned the policy. As in *Ferris*, these facts only underscore that a contractor cannot be “chargeable with knowledge of [an appropriation’s] administration” where the contractor “is one of several persons to be paid out of [the] appropriation.” 27 Ct. Cl. at 546.

The Supreme Court has with unmistakable clarity ruled that once the promise to pay has been made to a contractor, what matters is that the appropriation be sufficient to pay that contract in full.

If so (and if, as here, the contractor sues), the government is liable for the non-payment even though, under the circumstances described in *Cherokee III*, the Secretary by definition could never pay in full “all the contracts the agency has made.”

This outcome is consistent with Congress’ addition of the “availability” clause to § 450j-1(b) in 1988. As noted in *Cherokee III*, Congress wrote against the backdrop of federal appropriations and contract law, and thus presumably understood that the availability clause would not come into play unless the *Sutton* situation arose, with Congress stating clearly that no more than a specified sum could be paid to a contractor. That is not the case here. Congress also wrote against the backdrop of an agency that had historically failed to pay contract support costs to such an extent that this one issue had become “the single most serious problem with implementation of the Indian self-determination policy.” S. REP. NO. 100-274, at 8 (1987). In this setting, it is completely understandable for Congress to have set up a regime where only the clearest *Sutton*-type language in an appropriations Act could cut short the duty to pay an ISDA contract in full.

Such a reading of the CSC cap serves the critical function, expressly recognized by the Supreme Court in *Cherokee III*, of fencing off the CSC appropriation from the balance of IHS’s appropriation. By erecting a fence around the CSC-specific lump-sum appropriation, the balance of IHS’s operations remained protected and the agency could not be compelled to invade its remaining general appropriation to make its contractors whole. As the Court noted, an agency can avoid being forced to invade other funds to pay its contracts “by asking Congress in advance to protect funds needed for more essential purposes.” *Cherokee III*, 543 U.S. at 642. And that is precisely what Congress did here. But fencing off the one appropriation from the other, without more, does not relieve the government of its promise to pay ASNA’s contract when there are legally

sufficient funds to pay the contract.

In sum, the CSC lump-sum amount accomplished a self-protective result for the Secretary, by fencing off CSC contract payments from IHS's general lump-sum appropriation required for other agency operations. But as the Supreme Court's opinion teaches, the CSC earmark did nothing to undo the core promise reflected in the ISDA and ASNA's contract that the contract amount must be paid in full when sufficient appropriations are legally available to do so, and that each contract promise remains intact even when there are insufficient appropriations to pay all outstanding promises to *all* contractors.

2. By requiring the Secretary to award a contract for a specific sum, in advance of appropriations, the ISDA confers upon the Secretary "contract authority" to bind the government notwithstanding that the Secretary's own provision of funds to pay the contract remains "subject to the availability of appropriations."³¹

As an alternative argument, ASNA submits that the ISDA imposes a duty upon the Secretary to enter into binding contractual obligations, in advance of appropriations, to provide specified amounts to tribal contractors. This duty is made clear in 25 U.S.C. § 450f(a)(1), which commands that "[t]he Secretary is directed . . . to enter into a self-determination contract or contracts . . .," and in § 450j-1(a) and (g) (discussed *supra* at 2-5), detailing the precise amount of funding to be awarded under each contract. Nowhere in these provisions is either the contract obligation or the amount of the current contract award made subject to the availability of appropriations. Thus, taken together these provisions provide the statutory authority for the Secretary to enter into ISDA contracts in

³¹ ASNA respects that the Board is bound by the Federal Circuit's decision rejecting aspects of this argument in *Babbitt v. Oglala Sioux Tribal Public Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999). See also Exh. 13 *Ramah*, Mem. Op. and Order (D. N.M. Aug. 31, 2006) (Dkt. No. 1042) (agreeing with *Oglala*). However, ASNA puts forth this argument to preserve it for any appeal that may occur in this case.

advance of appropriations – commonly termed “contract authority”³² – and the record in this case shows that the Secretary has done so repeatedly in his dealings with ASNA. As the Supreme Court has explained, a statute granting “contract authority” to an agency:

establishe[s] a funding method different in important respects from the normal system of program approval and authorization of appropriations followed by separate annual appropriations acts. Under that approach, it is not until the actual appropriation that the Government funds can be deemed firmly committed. Under the contract-authority scheme incorporated in the [1972 amendments of the Federal Water Pollution Control Act] before us now, there are authorizations for future appropriations but also initial and continuing authority in the Executive Branch contractually to commit funds of the United States up to the amount of the authorization. The expectation is that appropriations will be automatically forthcoming to meet these contractual commitments. This mechanism considerably reduces whatever discretion Congress might have exercised in the course of making annual appropriations.

Train v. City of New York, 420 U.S. 35, 39 n.2 (1975).

Although obligations incurred under contract authority are generally funded by subsequent appropriations, it is hornbook government contract law that a failure by Congress to appropriate sufficient funds to meet those obligations does not limit the government’s liability to pay the specified amount of the obligation. *New York Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966) (“It has long been established that 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.”); *see also Gibney v. United States*, 114 Ct. Cl. 38, 53 (1949) (“We know of no case in which any of the courts have held that a simple limitation on an appropriation bill of the use of funds has been held to suspend a

³² *Nat’l Ass’n of Reg’l Councils v. Costle*, 564 F.2d 583, 586 (D.C. Cir. 1977) (“legislative authorization . . . to create obligations in advance of an appropriation” creates “contract authority”); *Train v. City of New York*, 420 U.S. 35, 39 n.2 (1975); To the Chairman, House Comm. Merchant Marine and Fisheries Op. No. B-211190, 1983 WL 207412 (Comp. Gen. Apr. 5, 1983) (discussing “contract authority”); OMB Cir. A-34 at 11.2 (1997), superceded by OMB Cir. A-11ct 20.3 (2002) (defining “contracting authority”); APPROPRIATIONS LAW at 6-88 – 6-91.

statutory obligation.”).

Although “contract authority” allows an agency to obligate the United States regardless of appropriations, “[c]ontract authority itself is not an appropriation; it provides the authority to enter into binding contracts but not the funds to make payments under them.” GEN. ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 2-6 (3d ed. Vol. 1 Jan. 2004); *see also Nat’l Assoc. of Reg’l Councils*, 564 F.2d 583, 586 (D.C. Cir. 1977). To make this limitation clear, statutes conferring contract authority generally contain a provision that limits the agency’s authority later to liquidate the contract – that is, to pay its obligations.

In the leading *New York Airways* case, the Court of Claims considered a statute under which the Civil Aeronautics Board set a monthly subsidy (in addition to payments from the Postmaster General) to be paid by the Board to a helicopter company for transporting the mail. The court considered “whether the particular wording of the Act empower[ed] the Board to obligate the United States for the payment of an agreed subsidy in the absence or deficiency of a congressional appropriation.” 369 F.2d at 744. The relevant portion of the statute provided that:

The Board shall make payments of [its portion] of the total compensation payable under this section *out of appropriations made to the Board for that purpose.*

Id. at 745 (citing former 49 U.S.C. § 1376(c)). The key issue was whether the “italicized phrase allows the Board to pay subsidies only to the extent that Congress appropriates money to it for that specific purpose,” or rather “merely defines the ministerial responsibility” of the Board “for disbursement of . . . subsidy payments to the carriers.” *Id.*

After considering the structure of the statute, the legislative history, and the views of the Comptroller General, the Court of Claims ruled that the italicized phrase did not limit the amount

of the government’s liability for subsidy payments under its contract with the helicopter company, but only the Board’s authority to liquidate (*i.e.*, to pay) those obligations where Congress failed to appropriate enough funds for it to do so. *Id.* at 748. The court ruled that the authority of the Board to fix the subsidy rates was not “circumscribed by the availability of annual appropriations,” nor did Congress intend “to deposit in [itself] the ultimate authority to determine rates through the annual appropriation process.” *Id.*

Like former 49 U.S.C. § 1376(c), the ISDA contains in 25 U.S.C. § 450j-1(b) a proviso which, by its plain terms, limits “the provision of funds by the Secretary” *i.e.*, the Secretary’s authority to pay the contracts. But nothing in this proviso alters (or even speaks to) the United States liability for the full amounts specified by the statute and the contracts. This is because, like the statute at issue in *New York Airways*, the ISDA authorizes – indeed, requires – IHS to turn over to willing Tribal contractors the administration of federal programs designed to benefit Indians. To further the goal of self-determination, Congress tightly cabined the Secretary’s discretion either to decline a contract or to dictate the terms of a contract, including the amount of contract support cost funding to be added to the contract, and it specifically required the Secretary to bind the United States to that amount through contract.

Significantly, Congress is well-familiar with the language required to condition the amount of a grant or contract on the availability of appropriations, or to similarly condition the Secretary’s authority to award a contract or grant. For instance, in the same year Congress rewrote the ISDA, it enacted another Indian affairs statute which, in relevant part, provided that “[t]he authority of the Secretary to enter into contracts under this title shall be to the extent, and in an amount, provided for in appropriation Acts.” Pub. L. No. 100-713, tit. V, § 501, 102 Stat. 4824 (1988) (codified as

amended at 25 U.S.C. § 1658). Attached hereto as Exh. 12 are over 50 statutes showing examples of similarly restrictive language. Significantly, the formula Congress uses in such instances is not reflected in the ISDA, where § 450j-1(b)'s proviso limits only the Secretary's "provision of funds."

In sum, even if the FY1999 and FY2000 appropriations had been legally insufficient for the agency to pay the contractual amounts owed to ASNA (and, as noted in Part IV-C.2 above, we believe they were not), the government would remain contractually liable for those full amounts. On this alternative basis ASNA is thus entitled to summary judgment on its shortfall claims for fiscal years 1999 and 2000, and the Secretary's motion to dismiss these claims should be denied.

3. The Motion to Dismiss based on appropriations language should be denied because it turns on unsupported factual issues.

Even if the FY1999 and FY2000 Appropriations Acts limited the Government's liability to ASNA for the payment of CSCs (and ASNA submits it did not, under both *Ferris* and the grant of "contract authority"), and even if the FY1998 Appropriations Act somehow limited the Government's liability (and *Cherokee II* and *III* both held it did not), nowhere in his Motion to Dismiss does the Secretary ever establish that the entire CSC appropriation each year was spent. Even the Secretary must agree he has a duty to pay ASNA's contracts to the extent there were funds in the CSC appropriations to do so. *Cherokee II*, 334 F.3d at 1094. In the *Cherokee* litigation, the Government's initial suggestion that it lacked unexpended funds ultimately proved to be false with regard to fiscal years 1994 through 1996. *Id.*

- D. Under the ISDA's § 450j-1(b) 'No Reduction' Provision, the Measure of Damages for a Contract Underpayment in a Given Year Includes the Value of Additional Sums IHS Would Have Paid, but Did Not Pay, in Subsequent Years Had the Underpayment Never Occurred.**

The final issue upon which ASNA seeks partial summary judgment of liability concerns the

availability of certain “expectancy damages.” Specifically, ASNA seeks a ruling that damages in this case include the future contract amounts ASNA would have received under the ISDA had IHS complied with the law in the first instance. We discuss first the pertinent provisions of the ISDA, and then turn to a discussion of the law governing expectancy damages.

As briefly noted *supra* at 7-8, the ISDA contains an unusual section setting forth prohibitions on agency reductions of contract amounts. While § 450j-1(b) establishes several principles by which the Secretary is prohibited from reducing contract amounts, the one key principle for purposes of this Memorandum is section 450j-1(b)(2):

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

* * *

(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;

(emphasis added). Under this provision the Secretary is generally prohibited from reducing the amounts payable under an ISDA contract from one year to the next (absent one of the unusual circumstances specified in subparagraphs (A) through (E), none of which is applicable here). ASNA contends (and the Supreme Court in *Cherokee III* held) that the Secretary was required by law to pay full contract support costs in fiscal year 1996. Had the Secretary complied with the law and paid

those amounts in fiscal year 1996, both ASNA and the Secretary would have expected ASNA to be paid no less than that same amount in fiscal year 1997 and later years. ASNA submits that it is therefore entitled to recover damages that reflect the amounts which both parties understood ASNA would have been paid in later years had ASNA been paid the full amount required under the ISDA and its contract in FY1996. ASNA makes the same submission, of course, for each of the contract breaches that occurred in each of the fiscal years. The statutory prohibition against contract payment reductions in subsequent years is reflected in IHS's Circulars, which consistently provide that each contractor shall receive, out of what is termed "Pool 2," no less than the same amount the contractor received in the prior year (provided such an amount does not overpay the contractor its contract support cost requirement). *See* AR 20 at p. 13.

The law regarding expectancy damages is clear. As stated by the Federal Circuit:

One way the law makes the non-breaching party whole is to give him the benefits he expected to receive had the breach not occurred. The benefits that were expected from the contract, 'expectancy damages,' are often equated with lost profits, although they can include other damage elements as well.

Energy Capital Corp. v. United States, 302 F.3d 1314, 1324 (Fed. Cir. 2002) (citations omitted).

To recover this type of 'expectancy' damages ASNA must establish foreseeability, causation, and certainty. Here, all three elements are readily met.

First, a Court need look no further than the statutory regime, specifically § 450j-1(b)(2), to see that both parties foresaw that, had a higher CSC contract amount been paid in a given year, that same higher amount would have been paid in all subsequent years so long as necessary to meet ASNA's CSC requirement. Conversely, under the ISDA and IHS's own Circulars, it was foreseeable that a reduction in the amount paid in one year would have a direct impact on the

minimum amount that would automatically be paid in subsequent years. Thus, the foreseeability element is satisfied.

Second (and for the same reason), the Secretary's breach directly caused these additional consequential damages. That is, had IHS paid the full CSC requirement in FY1996, that full amount would have been paid once again in FY1997; IHS's decision not to pay ASNA and to instead place ASNA on the IHS Queue directly caused ASNA not to receive higher payments in subsequent years under the protective provisions of § 450j-1(b)(2).

Finally, the amount of expectancy damages that were directly and foreseeably caused by IHS's breach can be assessed with a "reasonable degree of certainty." Although at this stage in these proceedings the Board can reserve judgment on whether the ascertainment of these reasonably foreseeable damages can be determined at trial with sufficient certainty (and may at this stage thus enter summary judgment only on ASNA's entitlement to prove these expectancy damages), it is self-evident here that proof will not be a problem. Once ASNA establishes the amount by which IHS underpaid its CSC requirement in a given year, that amount will directly translate into the consequential damage ASNA suffered when the same amount was not paid in full in a subsequent year. Thus, quantification will not present a problem.

For the foregoing reasons, ASNA respectfully requests from the Board a ruling that it is entitled to recover expectancy damages under 25 U.S.C. § 450j-1(b)(2) for the reasonably foreseeable and direct consequences in future years of the Secretary's failure to pay the full CSC amounts to which ASNA was otherwise entitled in each of the fiscal years at issue here. In requesting this ruling, ASNA recognizes that it is not entitled to more than is necessary and appropriate to make ASNA whole. Thus, to the extent this Board rules in ASNA's favor with regard

to the availability of appropriations in all five years, the issue of consequential damages will only involve years following fiscal year 2000. Similarly, in the event this Board rules in ASNA's favor only on fiscal years 1996, 1997 and 1998, the ruling ASNA seeks would entitle ASNA to recover expectancy damages associated with the 1998 breach – a breach which, irrespective of subsequent appropriations issues – directly caused IHS to pay ASNA less funding in FY1999 and later years than would have otherwise occurred had ASNA been fully paid in 1998.³³

VI. CONCLUSION

For the foregoing reasons, ASNA respectfully requests that the Board deny the Motion to Dismiss and grant ASNA's Motion for Partial Summary Judgment.

Respectfully submitted this 20th day of November 2006.

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON, LLP

By: /s/ Lloyd B. Miller by ALJr.
Lloyd B. Miller
D.C. Bar No. 317131
AK Bar No. 7906040

Melanie Baca Osborne
AK Bar No. 9911068

900 West Fifth Avenue, Suite 700
Anchorage, Alaska 99501-2029
Telephone: 907-258-6377
Facsimile: 907-272-8332

³³ When it comes to expectancy damages, the amounts earmarked for CSCs in the FY1999 and FY2000 Appropriations Acts (and later Acts) do not come into play because ASNA is seeking damages for IHS's earlier breach in fiscal years 1996-1998 when appropriations were available and ASNA should have been paid. *Cf. Appeals of Mississippi Band of Choctaw Indians*, 06-1 BCA (CCH) ¶ 33,253, 2006 WL1009210 (Apr. 14, 2006) (determining that in appropriate circumstances payment is available from the Judgment Fund to recover damages over an improper CSC underpayment, even where a CSC appropriation in the subject year was capped and fully spent).

SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP

Arthur Lazarus, Jr.
D.C. Bar No. 7682

Vanessa L. Ray-Hodge
D.C. Bar No. 489053

1425 K Street, N.W., Suite 600
Washington, D.C. 20005
Telephone: 202-682-0240
Facsimile: 202-682-0249

CERTIFICATE OF SERVICE

I hereby certify that I mailed, or caused to be mailed, a true and correct copy of the foregoing document by first class mail to the following parties of record this 20th day of November 2006:

Sean Dooley
Senior Attorney, Public Health Division
Office of the General Counsel
Room 4A-37 Parklawn Building
5600 Fishers Lane
Rockville, Maryland 20857

/s/ Lloyd B. Miller, by ALJr.

LIST OF EXHIBITS

1. *Appeals of Cherokee Nation*, Nos. 3877-3879, 99-2 B.C.A. (CCH) ¶ 30,462, 1999 WL 440045 (June 30, 1999)
2. March 27, 2000 Memorandum to Area Directors, IHS Headquarters Division of Financial Management Director Carl Fitzpatrick
3. Department of the Interior and Related Agencies Appropriations Hearings Before A Subcomm. of the House Comm. On Appropriations, 105th Cong., 2nd Sess. (1998)
4. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES: INDIAN SELF-DETERMINATION ACT, SHORTFALLS IN INDIAN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED (June 1999) (“1999 GAO Report”)
5. *Ramah*, No. 90-957 Partial Settlement Agreement,(D.N.M. Aug. 31, 1998)
6. ISD Queue Sept. 17, 1997
7. *Zuni* Compl., No. CV 01-1046 (filed Sept. 10, 2001) (Dkt. No. 1)
8. *Zuni* First Am. Compl., No. CV 01-1046 (filed Dec. 12, 2001) (Dkt. No. 5)
9. *Zuni* Order Granting Stay, No. CV 01-1046 (Dec. 28, 2001) (Dkt. No. 8)
10. *Zuni* Order Lifting Stay, No. CV 01-1046 (Mar. 17, 2005) (Dkt. No. 32)
11. *Zuni* Pl. Mem. in Support of Class Certification, No. CV 01-1046 (excerpts) (filed June 6, 2006) (Dkt. No. 281)
12. Excerpts Statutes
13. *Ramah*, No. 90-957 Mem. Op. and Order (D. N.M. Aug. 31, 2006) (Dkt. No. 1042)
14. *Ramah*, No. 90-957, Order & Mem. Op. (D.N.M. Oct. 1, 1993) (Dkt. Nos. 95 & 96)
15. ISD Queue Lists 1996- 1998.