

CIVILIAN BOARD OF CONTRACT APPEALS

ARCTIC SLOPE NATIVE ASSOCIATION,)
LTD.,)
)
Appellant,)
vs.) IBCA Nos. 4794 through 4803/06
)
MICHAEL O. LEAVITT, SECRETARY)
U.S. DEPARTMENT OF HEALTH AND)
HUMAN SERVICES, *et al.*,)
)
Appellees.)
_____)

**REPLY MEMORANDUM IN SUPPORT OF APPELLANT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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**REPLY MEMORANDUM IN SUPPORT OF APPELLANT’S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. SUMMARY OF PROCEEDINGS

On November 3, 2006, the Indian Health Service (IHS) moved to dismiss Appellant Arctic Slope Native Association’s (ASNA’s) appeal seeking damages for certain “contract support costs” (CSCs) claimed under ASNA’s contracts and the Indian Self-Determination Act (25 U.S.C. §§ 450–458aaa-18) (ISDA). IHS’s motion raised limitations and federal appropriations law defenses.¹

On November 20, 2006, ASNA filed its opposition to IHS’s motion to dismiss.² Simultaneously, ASNA cross-moved for a judgment of liability under ASNA’s First Cause of Action.³ ASNA’s cross motion sought a ruling that (1) under the ISDA and controlling federal appropriations law principles, IHS is liable for failing to pay ASNA’s full CSC requirement as determined by IHS in the relevant years (ASNA S.J. Mem. at Parts V-B & C); and (2) under the

¹ See Appellee Motion to Dismiss (“Aples’ Mot. to Dismiss at ___”).

² See Memorandum in Opposition to Appellees’ Motion to Dismiss and in Support of Appellant’s Motion for Partial Summary Judgment (“ASNA S.J. Mem. at ___”).

³ See Appellant’s Motion for Partial Summary Judgment (“ASNA’s S.J. Mem. at ___”).

ISDA and controlling federal contract law principles, ASNA may recover expectancy damages measured by the reasonably foreseeable amounts IHS would have paid ASNA under its later contracts but for IHS's breach (*id.* at Part V-D).

On December 11, 2006, IHS filed a Reply in support of its motion to dismiss, focused mainly on its limitations defense.⁴ On January 4, 2007, ASNA filed a Surreply devoted exclusively to the limitations issues.

On January 10, 2007, IHS filed its Opposition to ASNA's cross-motion for partial summary judgment on the issues of appropriations law and expectancy damages.⁵ This concluding Reply Memorandum in support of ASNA's summary judgment motion responds to Part II (appropriations law) and Part III (expectancy damages) of IHS's Opposition. ASNA's response to IHS's new cross summary judgment motion – specifically, the new issues raised in Part I of IHS's January 10, 2007 brief (relating to satisfaction of the contract) – is set forth in a separate opposition memorandum filed simultaneously herewith.

II. ARGUMENT

A. ASNA Is Entitled to Partial Summary Judgment Holding That Under Federal Appropriations Law, the Government Is Liable for Any Failure to Pay Full Contract Support Costs in Fiscal Years 1996, 1997 and 1998.

IHS does not respond to ASNA's argument that, under controlling federal appropriations law, funds were legally available to IHS to pay ASNA's full CSC requirement as determined by IHS in fiscal years 1996 and 1997. *Compare* ASNA S.J. Mem. at 33-35 (making 1996 and 1997

⁴ Reply to Appellant's Opposition to the Government's Motion to Dismiss ("Aples' Reply at ___")

⁵ Brief in Opposition to Appellant's Motion for Partial Summary Judgment and in Support of Appellee's [Cross] Motion for Summary Judgment ("Aples' S.J. Opp. at ___"). Oddly, IHS also named this filing as one in support of its own cross motion for "summary judgment," even though IHS has filed no such motion, has sought no such relief, and has not explained how a motion for "summary judgment" differs from its pending motion to dismiss.

argument in the context of *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) (“*Cherokee III*”) with Aples’ S.J. Opp. at 27-28 (omitting any discussion of 1996 and 1997). The issue is thus conceded. *See In re Incident Aboard the D/B Ocean King*, 758 F.2d 1063, 1071 n.9 (5th Cir. 1985) (“We treat the failure to respond to [opponent’s] arguments as a concession”).

When it comes to fiscal year 1998, the parties disagree. ASNA contends that in fiscal year 1998 funds were legally available to pay ASNA’s full CSC requirement in connection with ASNA’s “new and expanded” contract. The language of the fiscal year 1998 appropriation to the “ISD Fund” was identical to the language employed in prior years. Thus, the rulings of the Supreme Court and the Federal Circuit regarding the 1996 and 1997 appropriations language are equally applicable to the identical 1998 language. *See* ASNA S.J. Mem. at 35-36 (discussing *Cherokee III* and *Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003) (“*Cherokee II*”). Under those rulings, the full IHS appropriation was available to pay CSCs associated with “new and expanded” contracts.⁶

IHS responds by contending that the 1998 language addressing CSCs payable on “new and expanded” contracts should be construed as coming within the ‘cap’ that Congress set up in 1998 for “contract support costs associated with ongoing contracts.” 111 Stat. 1543, 1582. IHS supports its argument with a citation to the Appropriations Act’s legislative history. Aples’ S.J. Opp. at 27 n.21 (relying on IHS’s argument set forth in Aples’ Reply at 15-16). But legislative history is, at best, relevant only if the statutory language itself is ambiguous, and both *Cherokee II* and *Cherokee III* found no ambiguity in the language of the ISD Fund provision covering “initial or expanded”

⁶ In this brief we continue to use the term “new and expanded” as synonymous with “new or expanded” and “initial or expanded,” consistent with IHS practice. ASNA S.J. Mem. at 10 n.11. In 1998, IHS classified all of ASNA’s contracts as new or expanded, *see* ASNA S.J. Mem. at Exh. 15 (queues and lists of “new and expanded” contracts).

contracts.⁷

Indeed, although payments for CSCs associated with “new and expanded” contracts in FY 1998 were not limited by a “not to exceed” cap, that year payments for CSCs associated with “ongoing” contracts were so limited. IHS’s argument thus founders because it ignores Congress’s deliberate decision in 1998 to exclude “new and expanded” CSCs from the statutory “not to exceed” cap that Congress established in the same statute for “ongoing” CSCs. *Rusello v. United States*, 464 U.S. 16, 23 (1983) (“[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”) (internal citation omitted). This is a difference Congress surely appreciated, for two years later Congress changed the appropriations structure to place CSC payments associated with “new and expanded” CSCs inside an overall “not to exceed” cap covering all CSCs. *See* ASNA S.J. Mem. at 14 (chart) (quoting fiscal year 2000 appropriation “not to exceed \$228,781,000 shall be for payments ... for [CSCs] ... of which not to exceed \$10,000,000 may be used for new and expanded contracts ...”). These plain differences in statutory expression cannot be papered over by resort to isolated snippets of ambiguous legislative history.

IHS’s argument also fails because it ignores the distinction Congress drew in the Act between two unique terms of art under the ISDA, “ongoing” contracts and “initial or expanded” (or “new and expanded”) contracts. They are well-understood terms under the ISDA, employed for years by Congress (and even by IHS in the CSC Circulars), and Congress is presumed to know the

⁷ Legislative history such as committee reports are generally suspect because they are drafted by staff and “are not themselves subject to the requirements of Article I,” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, ___, 125 S. Ct. 2611, 2626 (2005), a danger particularly present in the appropriations arena. *Int’l Union v. Donovan*, 746 F.2d 855, 860-61 (D.C. Cir. 1984) (Scalia, J.) (cited approvingly in *Cherokee III*, 543 U.S. at 637).

meaning of these “‘terms of art.’” *INS v. St. Cyr*, 533 U.S. 289, 312 n.35 (2001) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)); *see also* *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 615 (2001) (Scalia, Thomas, JJ., concurring) (“[w]ords that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning”) (emphasis in original); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (Congress presumed “knowledgeable about existing law pertinent to the legislation it enacts”).

Finally, even IHS does not believe its fiscal year 1998 appropriations for CSC payments on “new and expanded” contracts were capped by that year’s ISD Fund language. This is plain from IHS’s conduct in connection with ASNA: in 1998 IHS decided to use a different part of its appropriation (*i.e.*, the Catastrophic Health Emergency Fund (or “CHEF” fund)) to pay a portion of ASNA’s CSC requirement that year. *See* AR 25, at p.9 (“This amendment adds the CHEF Indian Self-Determination (Non-recurring) funds into the current compact in the amount of \$1,636,833.”) Obviously if the ISD Fund language had capped the payment of CSCs for “new and expanded” contracts, IHS would have been prohibited by law from using any other portion of its appropriation for this purpose.⁸

In sum, IHS’s effort to distinguish the 1998 Appropriations Act provision concerning the ISD Fund from the identical 1996 and 1997 provisions is unconvincing. In each of these three years the entire IHS appropriation was legally available to pay ASNA’s CSC requirements associated with its “new and expanded” contract. Under *Cherokee III*, these CSC requirements should accordingly have been paid in full.

⁸ It appears in the prior years IHS made similar (albeit smaller) partial payments of ASNA’s CSC requirement from non-ISD Fund sources. *See* ASNA S.J. Opp. at Exh. 22, Aff. of L. Olson, Aples’ S.J. Opp. at 12-13 (referring to \$504,255 paid in FY 1996), 13-14 (referring to \$665,560 paid in FY 1997).

B. ASNA Is Entitled to Partial Summary Judgment Holding That Under Federal Appropriations Law, the Government Is Liable for Any Failure to Pay Full Contract Support Costs in Fiscal Years 1999 and 2000.

As it did in its failed defense in *Cherokee III*, IHS begins by invoking the Appropriations Clause (U.S. CONST. art. I, § 9, cl. 7) and the Anti-Deficiency Act (31 U.S.C. § 1341) as bars to recovery of damages for unpaid CSCs for 1999 and 2000. Aples' S.J. Opp at 28. But as the Supreme Court in *Cherokee III* made abundantly clear, if IHS failed to pay ASNA the CSC's that ASNA was entitled to be paid, the agency "leave[s] the contractor free to pursue appropriate legal remedies arising because the Government broke its contractual promise." 543 U.S. at 642-643 (citing *inter alia* the Judgment Fund Act, 31 U.S.C. § 1304). *See also Cherokee II*, 334 F.3d at 1093 ("Damages for breach of contract may be awarded out of the Judgment Fund when payment is not otherwise provided for"); *id.* at 1095 (discussing Appropriations Clause and noting that since "in this case, there was statutory authority for the contract support costs" "[t]here was, therefore, no violation of the Appropriations Clause"). The core issue for 1999 and 2000, thus, is not a constitutional issue, but a statutory issue: were the appropriations in each of those two years sufficient to pay ASNA's contract support cost requirements. For the reasons set for in our opening Memorandum and those that follow, we submit that they were.

In our opening argument ASNA contended that under *Cherokee III*, *Ferris v. United States*, 27 Ct. Cl. 542 (1892), *Dougherty v. United States* 18 Ct. Cl. 496 (1883), *Sutton v. United States*, 256 U.S. 575 (1921) and other authorities, the government is liable because the appropriations for CSCs in 1999 and 2000, although capped, each were undeniably sufficient to pay ASNA's full CSC requirement, even if one accepts (as IHS claims) that each appropriation was insufficient to pay the CSC requirements of all government contractors doing business with IHS under the ISDA. ASNA

S.J. Mem. at 38-44. In so arguing, ASNA underscored the Supreme Court’s agreement that:

as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of “insufficient appropriations,” even if the contract uses language such as “subject to the availability of appropriations,” and even if an agency’s total lump-sum appropriation is insufficient to pay all the contracts the agency has made. *See Ferris v. United States*, 27 Ct.Cl. 542, 546 (1892) (“A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects”); *see also Blackhawk*, *supra*, at 135, and n. 9, 622 F.2d, at 552, and n. 9.

Cherokee III, 543 U.S. at 637-638.

To overcome the application of these principles to the contract payments owed ASNA in 1999 and 2000, IHS invokes *Babbitt v. Oglala Sioux Tribal Public Safety Dep’t*, 194 F.3d 1374 (Fed. Cir. 1999) and *Ramah Navajo Chapter v. Norton*, No. 90-957, Mem. Op. and Order (D.N.M. Aug. 31, 2006) (Dkt. No. 1042) (the latter a New Mexico decision relying on *Oglala*). Aples’ S.J. Opp. at 29-30. But those opinions rejected an entirely different argument – whether the ISDA confers “contract authority” on the Secretary that would allow him to obligate the government without regard to appropriations. Those opinions did not address the *Cherokee–Ferris* principles outlined above, and IHS’s reliance upon them here thus misses the mark. *See also* ASNA S.J. Mem. at 44 n.31 (acknowledging that *Oglala* is binding on this Board with respect to the “contract authority” argument).

IHS next argues that the *Sutton* rule (which limits the government’s liability when an appropriation for a specific project or contract is capped) is not confined to that situation alone, and can also apply when the appropriation covers multiple contracts and projects. Aples’ S.J. Opp. at 30-32. But there are several problems with that position. First, it is directly contradicted by the *Cherokee–Ferris* Rule, restated by the Supreme Court in *Cherokee III*. After all, one cannot

confront the situation the Supreme Court described – where an appropriation “is insufficient to pay all the contracts the agency has made” (emphasis in original) – unless the appropriation covers multiple contracts but is too small to cover them “all”.

Second, it is not enough simply to call the CSC lump-sum amount at issue in 1999 and 2000 an “earmark” because it said “not to exceed” (Aple’s S.J. Opp. at 30). Instead, the question is what kind of an earmark it was – one limited to a single contract or project (as in *Sutton*) or one broadly covering a whole range of contracts and projects (as here and as assumed in the *Cherokee–Ferris* Rule). Because it was the latter type of earmark, *Ferris* and *Cherokee* make clear that *Sutton* does not apply and the general “cap” language does not restrict the payment owed by contract to any individual contractor.

Finally, IHS cannot distinguish *Ferris* on the ground that there was no “funds available” clause at issue in that case, but rather concerned a “general appropriation” to fund multiple projects. *Id.* at 31. *Ferris* rested squarely on the principle that the contractor could recover only if funds were legally available to pay the contractor. ASNA S.J. Mem. at 38 n.30. Just as in *Ferris*, where the appropriation covered a multitude of projects, here the CSC appropriations in 1999 and 2000 each covered hundreds of projects under contract to over 330 contractors running such diverse government programs as an IHS hospital in Barrow, Alaska; IHS private sector “contract health” referral programs in California and Nevada; and a child abuse prevention program on the Navajo Reservation. See ASNA Exh. 23, Indian Health Service ISD Queue # 99-1 (Oct. 23, 1998).

The rationale behind *Ferris* is this: a government contractor whose contract is to be paid via funds from an appropriation covering multiple contracts would have no reason to know that his or her particular payment might be impaired by a limitation on the aggregate total amount of the

appropriation. Exactly the same is true here, where the “funds available” to pay CSCs, although limited in the aggregate, were more than sufficient to pay ASNA’s CSC requirement. ASNA had no way of knowing that IHS would determine that the payments to it would be limited, notwithstanding that those payments were required by law.

Indeed, the unpredictability of IHS’s internal funding decisions vis-a-vis ASNA is highlighted by precisely what occurred in 1999. Going into fiscal year 1999 (which commenced October 1, 1998), ASNA was at the top of the IHS Queue. *Id.* Under IHS’s policy in effect since before 1996,⁹ ASNA expected it would be fully paid its CSC requirement in the coming new fiscal year – particularly since in FY 1999 the CSC earmark was increased by \$35 million. ASNA S.J. Mem. at 14 (summarizing appropriations). But that is not what IHS did. Instead, mid-year IHS abandoned its own CSC policy and developed a new, theretofore unknown, methodology to pay ASNA and all other contractors. AR 16, at p. 1, Letter from Michael H. Trujillo, Director IHS, to “Dear Tribal Leader” (Oct. 8, 1999) (explaining Director Trujillo in FY1999 “adopt[ed] ... an allocation methodology that distributed the [FY1999] funding increase in a manner that is a departure from the allocation provisions contained in our present policy”). Just as unexpectedly, at the last moment the new approach also eliminated the promise in IHS’s circulars that eventually ASNA would be repaid its “startup” contract support costs from prior years. *Id.* at 2 (explaining that “[j]ust prior to my adoption of the methodology,” Director Trujillo, on the advice of counsel, decided “not [to] pay any startup costs for fiscal years 1994-1998.”) As a consequence, ASNA was not fully paid its CSC requirement after all, and the startup portion of its CSC requirement was simply wiped out. This lack of predictability continued into fiscal year 2000, when not until the

⁹ See IHS Cir. 96-04, sec. 4(A)(4)(a)(ii), reproduced in AR 20, at p. 10; ASNA S.J. Mem. at 10.

second quarter of the fiscal year did IHS develop yet another methodology for paying CSC requirements. IHS Cir. 2000-01, AR 21, at p. 1 (adopted Jan. 20, 2000). This is precisely the kind of unpredictability that influenced the courts in *Ferris* and *Dougherty* to conclude that contractors must not, and can not, be charged with knowledge of the condition of an appropriation on the government's books. "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*, 27 Ct. Cl. at 546.

No one would ever seriously argue that if Congress capped at several billion dollars the total amount of payments the Defense Department could make to reconstruction contractors in Iraq, then individual contractors would have no right to be paid their particular contracts in full, and would instead be at the whim of the Secretary – and without legal recourse – as he developed whatever new 'circular' he might devise to allocate an anticipated total shortfall. There is no reason in law, logic or justice why a different outcome should control here.

This is not to say that Congress is unable to limit contract payments in a "subject to the availability" setting, only that Congress must do so with precision. For instance, Congress can use the *Sutton* approach and limit payments for a particular contractor or for the particular project he is contracting to perform. Or, Congress can say that in a given coming year no contractor shall receive more than 90% of its CSC requirement, putting all contractors on clear notice from the face of the appropriation. See *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 552 (Ct. Cl. 1980) (addressing a class of contracts by limiting agency's authority to pay any individual construction contract settlement over \$1,000,000 without an independent audit). But absent such

actions, the *Cherokee–Ferris* Rule controls and a bulk appropriation sufficient to pay any given contractor is deemed to be legally available to pay the contractor notwithstanding the fact that ultimately the agency has “insufficient [funds] to pay all the contracts the agency has made.” *Cherokee III*, 543 U.S. at 40.¹⁰

Finally, IHS’s reliance on *Star-Glo Assocs., LP v. United States*, 59 Fed. Cl. 724 (2004), *aff’d in part and rev’d in part*, 414 F.3d 1349 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 2286 (2006) is entirely misplaced, for the *Star-Glo* litigation involved the denial of benefits claimed under a citrus tree destruction compensation program, not breach of contract claims. 414 F.3d at 1352. As the Federal Circuit explained, the different context is decisive. *Id.* at 1355 (distinguishing *Cherokee III* by explaining that “[h]ere, by contrast, the government is not seeking to limit contractual liability, but to limit benefit payments. In this context, considerations of predictability are far less significant”) (emphasis added). As the court’s opinion underscored, the Federal Circuit is far more rigorous when considering a cap in a contract setting than it is in a benefits setting. *Id.* *Star-Glo* thus only helps ASNA, supporting the proposition that none of the appropriations at issue here ought to be construed as capping the payment of ASNA’s CSC requirements – payments that are contractual in nature, and not mere government benefits.¹¹

C. ASNA Is Entitled to Partial Summary Judgment Holding That, to the Extent

¹⁰ Even if additional funds were not available from the regular appropriation for each individual contract – and as discussed herein ASNA submits they were — additional funds to pay the contracts were available from the Secretary’s collections from Medicare, Medicaid, and private health insurance. Nothing in the annual appropriations Acts foreclosed the use of these collections to pay IHS’s CSC obligations (*see* table at ASNA’s S.J. Mem. at 13-14), and payments for such costs certainly would be “for facilities, and to carry out the programs . . . to provide health care services to Indians.” 25 U.S.C. § 1621f(a), and “necessary [for the Barrow hospital] to achieve compliance” with applicable accreditation requirements. 42 U.S.C. § 1395qq(c) (Medicare); 25 U.S.C. § 1642(a) (Medicaid).

¹¹ ASNA does not address further the “contract authority” argument raised in ASNA’s opening brief at ASNA S.J. Mem. at 44-48, and in IHS’s response at Aples’ S.J. Opp. at 33-35, because ASNA recognizes this Board is bound by the Federal Circuit’s ruling on this issue in *Oglala*. *See* ASNA’s S.J. Mem. at 44 n.31 (noting same).

IHS Failed to Pay ASNA its Full Contract Support Cost Requirement in a Particular Year, ASNA's Expectancy Damages Include the Reasonably Foreseeable Amounts IHS Would Have Paid ASNA in Later Years under 25 U.S.C. § 450j-1(b)(2)'s 'No Reduction' Clause.

In our opening memorandum ASNA contends that the ISDA and IHS's own internal circulars required that IHS not reduce CSC payments to ASNA from one year to the next (absent a reduction in appropriations which did not occur in the relevant years). ASNA S.J. Mem. at 48-52 (discussing, *inter alia* 25 U.S.C. § 450j-1(b)(2) and IHS Circulars reproduced at AR 20 and AR 21). ASNA thus argues that in a given year when IHS failed to pay ASNA the full CSC requirements to which it was entitled, ASNA is entitled as additional expectancy damages the higher CSC payments IHS would have made to ASNA in later years. (This argument is an alternative to the primary argument that IHS is independently liable in each of those later years for its CSC underpayments.)

IHS's main response is to invoke *Samish Indian Nation v. United States*, 419 F.3d 1355 (Fed. Cir. 2005). Aples' S.J. Opp. at 35, 36-37. But *Samish* has absolutely nothing to do with this case. In *Samish* a Tribe sought to establish a right to damages under the Tucker Act (28 U.S.C. § 1491) for the government's wrongful actions years earlier in removing the Tribe from the official list of "federally-recognized" tribes — an action which (among other things) had disqualified the Tribe from receiving IHS funded health care services and for contracting to operate those services under the ISDA. The Federal Circuit ruled that since the Tribe never had an ISDA contract to begin with, it could not sue to recover damages under the theoretical contracts it might have had. Throughout its opinion the Federal Circuit repeatedly limited its ruling to situations where the claimant never had a contract, 419 F.3d at 1367 ("damages ... on contracts never created), because the Tribe was not federally recognized at the time. *See also id.* ("Samish ... never obtained a self-determination contract in the years at issue"). Obviously ASNA had ISDA contracts in all the years at issue here.

Although IHS faults ASNA for failing to “point[] to any specific contract provision” supporting this claim (Aples’ S.J. Opp. at 36), it is IHS that is at fault. Not only is the prohibition against the Secretary reducing contract amounts “in subsequent years” set forth directly in the ISDA, but the ISDA, by turn, is expressly “incorporated” into ASNA’s contracts as if fully set forth therein. AR 3, at p. 34 (art. I, sec. 1) (“The provisions of title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) are incorporated in this agreement”). ASNA’s right not to have its contracts reduced in subsequent years, and IHS’s knowledge of that right, could not be clearer.¹²

III. CONCLUSION

For the foregoing reasons, ASNA respectfully requests that the Board grant ASNA’s Motion for Partial Summary Judgment. Appropriations were legally available to pay ASNA’s full CSC requirement, as calculated by IHS, in fiscal years 1996 through 2000. Further, within the measure of damages incurred each year, ASNA is entitled to recover expectancy damages reflecting the minimum amounts both parties expected IHS would have paid ASNA in subsequent years under § 450j-1(b)(2)’s ‘no reduction’ clause had there been no breach.

Respectfully submitted this __ day of February 2007.

SONOSKY, CHAMBERS, SACHSE,
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¹² IHS’s recitation of its payment history under the contracts further supports ASNA’s claim under 25 U.S.C. § 450j-1(b)(3) under an alternate theory. In FY1998 IHS asserts that it paid ASNA \$2,136,833 in CSC funding, but concedes that in FY1999 it paid ASNA only \$1,293,681. IHS’s failure to pay in FY1999 at least the same amount it actually paid in FY1998 is a direct violation of § 450j-1(b)(3), entitling ASNA to damages for the FY1999 underpayment on that basis, too.

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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 ____ day of _____ 2007:

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

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 of 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.

Exhibits to ASNA’s Memorandum in Opposition to Appellees’ Motion for Summary Judgment:

16. FY 2000 CSC Shortfall Report (Alaska Area)

17. Cherokee Nation's FY 1997 Annual Funding Agreement
18. Excerpt, U.S. Pet. for Cert., *Cherokee Nation v. Leavitt*, No. 03-853 (U.S. Dec. 11, 2003)
19. Excerpt, Joint App., *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) (*Cherokee III*)
20. Aff. of Eben Hopson
21. Aff. of Lloyd B. Miller
22. Aff. of Lee Olson

Exhibits to ASNA's Reply Memorandum in Support of Appellant's Motion for Partial Summary Judgment:

23. ISD Queue #99-1 (Oct. 23, 1998)