

requests additional CSC funds to support programs that it had operated prior to 1995 (ongoing programs) and to support programs that IHS transferred to it in 1997 (new and expanded programs). Appellant acknowledges that it waived its challenge to funding for the new and expanded programs when it failed to appeal a contracting officer decision on an earlier claim based on the same facts. See Appellant's Response to Motion to Dismiss at 35-36. Further, its remaining claims for additional payments is not supported by the agreements themselves, the ISDEAA, or the Supreme Court's decision in Cherokee Nation v. Leavitt, 543 U.S. 631 (2005).

The IHS has already moved to dismiss Appellant's claims for lack of jurisdiction because they were untimely presented to the agency and because an appropriation cap precludes any relief for fiscal years 1998 and 1999. By this reference, this motion incorporates those arguments as if fully set forth in this brief. IHS is entitled to summary judgment because the undisputed facts show that it fully performed under its agreements¹ and Appellant has no legal entitlement to funds not contained in the four corners of the agreements.

BACKGROUND

I. INDIAN HEALTH SERVICE

The Indian Health Service (IHS) is an agency within the U.S. Department of Health and Human Services (HHS). The principal mission of the IHS is to provide primary health care for the approximately 1.6 million American Indians and Alaska Natives throughout the United States. See S.Rep.No. 102-392, at 2-3 (1992), reprinted in 1992 U.S.C.C.A.N. 3943. IHS'

¹ As noted above, the IHS performed with the exception of the ISD queue amount referenced in the FY 1997 AFA, which Appellant concedes is not pending before the Board. Appellant's Response to Motion to Dismiss at 35-36.

authority to provide health care services to American Indians and Alaska Natives derives from two primary statutes. The Snyder Act, 25 U.S.C. § 13, is a general and broad statutory mandate authorizing the IHS to “expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians,” and for the “relief of distress and conservation of health.” 25 U.S.C. § 13. The Indian Health Care Improvement Act, 25 U.S.C. § 1601 et seq., establishes numerous programs specifically created by Congress to address particular Indian health initiatives, such as alcohol and substance abuse treatment, diabetes, medical training, and urban Indian health.

Under these authorities, the IHS provides health care services directly through its own facilities; through contracts with tribal governments and tribal groups pursuant to the Indian Self Determination and Education Assistance Act that allow those tribes to independently operate health care delivery programs previously provided by IHS; and through contracts and grants to urban Indian organizations operating health programs. As of 2006, the IHS directly operated approximately 25% percent of all facilities, including 73% of all inpatient facilities. See Department of the Interior, Environment, and Related Agencies Appropriation Bill, 2006, H.R. Rep. No. 109-80, at 152 (2006).² The remaining 75% of the facilities were operated by tribes and tribal organizations, including Appellant, that had entered into self-determination contracts and self-governance compacts with the Secretary of HHS, pursuant to the Indian Self-Determination Education and Assistance Act. 25 U.S.C. § 450 et seq.

² The House Report can be viewed online at GPO Access:
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr080.109.pdf

II. INDIAN SELF-DETERMINATION & EDUCATION ASSISTANCE ACT

In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. No. 93-638, 88 Stat. 2203, to promote “effective and meaningful participation by the Indian people in the planning, conduct, and administration” of federal programs and services for Indians. 25 U.S.C. § 450a(b). Title I of the ISDEAA, 25 U.S.C. §§ 450f-450n, authorizes the Secretary of HHS to enter into “self-determination contracts” with Indian tribes for the administration of programs the Secretary otherwise would administer himself. 25 U.S.C. § 450f. A self-determination contract is a contract for “the planning, conduct and administration of programs or services which are otherwise provided [by the IHS or Department of Interior (DOI)] to Indian tribes and their members pursuant to Federal law. 25 U.S.C. § 450b(j). At issue in this lawsuit are Appellant’s ISDEAA agreements with IHS.³

An ISDEAA contract mainly consists of: the contract itself, modifications or amendments thereto, and annual funding agreements (AFA). See 25 U.S.C. § 450l(c) for model agreement. In its initial year, a tribe or tribal organization must submit a contract pricing proposal, that must contain the amount of funding requested for the contract. See 25 C.F.R. § 900.8(h). The AFA generally describes the funding levels available under the contract for the relevant year. Although self-determination contracts can remain in effect for an indefinite period, 25 U.S.C. § 450j(c)(1)(B), funding under Title I contracts is subject to re-negotiation each year in the form of AFAs, 25 U.S.C. §§ 450j(c)(2), 450j-1(a)(3)(B).

³ While tribes may enter ISDEAA agreements under Title I (contracts) or Title V (compacts), for the purposes of these appeals the differences between compacts and contracts are not material, and both agreements will be referred to as “contracts.”

Once the Secretary has received a proposal, he has 90 days either to (1) approve the proposal and proposed funding levels and award the contract, or (2) issue a written notification declining all or part of the proposal for one of five justifications. 25 U.S.C. § 450f(a)(2); 25 C.F.R. § 900.16. The Secretary is directed to approve all severable portions of a proposal. 25 U.S.C. § 450f(a)(4). A tribe may appeal the Secretary's declination decision by appealing administratively. 25 U.S.C. § 450f(b)(3). Alternatively, the tribe may bring suit in federal district court to compel award of its contract proposal. 25 U.S.C. § 450m-1(a).

III. FUNDING FOR ISDEAA CONTRACTS

Funding under an ISDEAA contract includes two separate funding amounts. The base amount of funding, often referred to in the contract documents as the "program funding," is the amount the Secretary would have allocated to the program if the IHS had continued to operate the program directly. The Secretarial amount (or "program funding") includes expenses for a broad array of functions and activities that support the delivery of health services.

25 U.S.C. § 450j-1(a)(1) (the "amount of funds . . . shall not be less than the appropriate [HHS or DOI] Secretary would have otherwise provided for the operation of the programs"). The Secretarial amount does not necessarily cover all of the tribe's or tribal organization's expenses to operate or administer a particular program; a self-determination contract generally also includes funding for "contract support costs" (CSC). 25 U.S.C. § 450j-1(a)(2). CSC are costs that a tribe or tribal organization incurs in operating a program that the Secretary either did not incur when directly administering the program, or covered using other federal resources that are not available for contracting. Id. CSC can be separated into three categories: direct CSC,

indirect CSC and start-up costs. 25 U.S.C. § 450j-1(a)(3)(A). Direct CSC are direct program expenses for the operation of the contracted program, such as unemployment taxes or workers' compensation insurance. 25 U.S.C. § 450j-1(a)(3)(A)(i). Indirect CSC are any other general administrative costs that may be shared by multiple programs, such as financial and personnel management or facilities and equipment. 25 U.S.C. § 450j-1(a)(3)(A)(ii). Additionally, in the initial year of a contract, CSC may include start up costs consisting of reasonable costs that have been incurred or will be incurred on a one-time basis, such as computers, office furniture or specialized training. 25 U.S.C. § 450j-1(a)(5).

All funding under the ISDEAA is subject to the availability of appropriations. 25 U.S.C. § 450j-1(b) (“Notwithstanding any other provision in [the ISDEAA], the provision of funds under this subchapter is subject to the availability of appropriations . . .”); see also 25 U.S.C. § 450j(c) (same).

Nothing in the ISDEAA includes a specific amount or a specific formula for determining the necessary and appropriate funding levels for any particular contract. Instead, the tribe or tribal organization must request specific funding levels in their contract proposal for program funding, direct CSC, and indirect CSC. 25 C.F.R. § 900.8(h).

IV. CONGRESSIONAL APPROPRIATIONS FOR IHS SERVICES AND CSC

As discussed above, the IHS provides contract funds “subject to the availability of appropriations.” 25 U.S.C. § 450j-1(b). Congress appropriates funds to the IHS in two finite appropriation accounts: one is for Indian Health Services and the other is for Indian Health Facilities. Only the Indian Health Services Account is at issue in this case.

A. Indian Self-Determination (ISD) Fund

In the fiscal year 1988 appropriation, Congress directed IHS to establish the Indian Self-Determination (ISD) Fund to pay for CSC associated with new or expanded programs.

Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329-245 (1987).

When demand for these funds exceeded supply, IHS created a waiting list to track the new and expanded programs. In 1992, after consulting with tribes, IHS published guidelines to explain how it would fund tribal requests for CSC for new or expanded programs. See Indian Self-Determination Memorandum No. 92-2, AF Tab 29. A tribe or tribal organization could submit an application for additional funds, known as an ISD request. IHS placed these CSC requests on a list based on the date of the request and awarded full funding for CSC on a first-come, first-served basis each year until the fund was exhausted. This list was otherwise known as the “ISD queue.” During the fiscal years 1994 through 1998, Congress appropriated \$7.5 million to the fund annually. Tribal contractors were given the option to begin a contract without the ISD funding or defer until the funds were available, which could be a year or longer. In FY 1998, Congress imposed an overall cap of \$168,702,000 on the total amount of CSC for both new and ongoing programs, but also earmarked \$7.5 million of those funds for the ISD fund.

In FY 1999, Congress again capped the amount of funds IHS could award for CSC and did not provide a separate appropriation for the ISD Fund. Instead, it appropriated a \$35 million increase in the IHS CSC funding over the \$168,702,000 appropriated for FY 1998. The Conference Report accompanying the FY 1999 Appropriation Act explained that the \$35 million increase to the line item appropriation was to be used to lessen the disparities in CSC funding

between all contractors and compactors, not just those with ISD requests on the queue. See H. R. Rep. No. 114-825 (Conf. Rep.), Making Omnibus Consolidated and Emergency Supplemental Appropriations For Fiscal Year 1999, 144 Cong. Rec. H11044, 11382 (Oct. 19, 1998).

In response to these changes, the IHS held numerous tribal consultation meetings during FY 1999 to discuss what would be the most appropriate method for distributing the \$35 million increase. See Dr. Trujillo letter, AF Tab 25 at 11-12. In addition, Congress held two hearings on the issue. As a result, the IHS adopted a “bottom-up” approach to distribution whereby the \$35 million was allocated, in ascending order, to those tribes and tribal organizations having the greatest overall CSC shortfalls for both ongoing programs as well as new and expanded programs under contract or compact.

Congress continues to cap the IHS appropriations for CSC to the present.⁴

V. THE SUPREME COURT CASE CHEROKEE NATION v. LEAVITT

On March 1, 2005, the Supreme Court issued its decision in Cherokee Nation v. Leavitt,

⁴ See Dep’t of the Interior & Related Agencies 9 Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1582-83, 1589 (1997) (appropriating an amount not to exceed \$161,202,000 for ongoing CSC to be available to the IHS for obligation for one year) (Ex. 41); Omnibus Consol. & Emergency Supp. Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-278-79, 2681-286 (1998) (appropriating an amount not to exceed \$203,781,000 for ongoing CSC to be available to the IHS for one year); Consol. Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-181-82, 1501A-190 (1999) (appropriating \$228,781,000 for CSC, to be available to the IHS for one year); Dep’t of the Interior & Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, 114 Stat. 922, 978-79, 987 (2000) (appropriating, after rescission, \$248,233,682 for CSC to be available to the IHS for one year); Dep’t of the Interior & Related Agencies Appropriations Act, Pub. L. No. 107-62, 115 Stat. 411, 456, 465 (2001) (appropriating an amount not to exceed \$268,234,000 for CSC to be available to the IHS for one year); Dep’t of the Interior & Related Agencies Appropriations Act, Pub. L. No. 108-7, 117 Stat. 11, 260, 270 (2003) (appropriating an amount not to exceed \$270,734,000 for CSC to be available to the IHS for one year).

543 U.S. 631 (2005). Appellant, along with more than sixty other contractors, filed its claims shortly thereafter. In Cherokee Nation, the Supreme Court first had to determine the nature of an ISDEAA contract. Id. at 638-40. The government had argued that an ISDEAA contract is not a contractually binding agreement, but a unique, government-to-government agreement to which general contract law did not apply. Id. at 638. Rejecting this argument, the Court held that ISDEAA contracts are like any other procurement contract in which the government is bound by its promises. Id. at 639. Next, the Court had to assess a single defense raised by the Secretary to the specific contracts at issue in that case, i.e., that the Secretary did not have sufficient appropriations to pay the amounts promised in the plaintiffs' contracts. Id. at 640-43. It was undisputed that the Secretary had failed to pay the funding amounts specified or agreed upon in the contracts of the two Cherokee plaintiffs. Id. at 636 ("The Government does not deny that it promised to pay the relevant contract support costs. Nor does it deny that it failed to pay."). Given these circumstances, the Court held that (1) when the Secretary promised a specific amount in an ISDEAA contract for indirect CSC, and (2) when appropriations were legally available for that purpose, the Secretary could not defend against a breach of contract action by arguing that it had insufficient appropriations. Id. at 642-47. Moreover, the Court held that when Congress appropriated an unrestricted, lump-sum appropriation, that appropriation was legally available to satisfy contractual promises. Id. at 642.

The Court did not consider whether the Cherokee plaintiffs had a right to funding in excess of the amounts listed in their agreements, nor did it hold that parties could read into the contract funding amounts and reports that are not otherwise incorporated into the four corners of

an agreement. Since the case was limited to fiscal years 1994-1997, the Court also did not consider the effect of an appropriation cap on the agreements.

STATEMENT OF FACTS

During the fiscal years at issue (FY 1995 through FY 1999), the IHS and Appellant negotiated and entered into contracts for the delivery of health services. The contracts incorporated annual funding agreements (AFA) which set forth the payment amounts.⁵ The focus of these appeals is on contract support cost payments due under six agreements. To determine whether the IHS fulfilled its promises, the Board must review the six contracts for FY 1995 - FY 1999.

1. FY 1995 (October - March): Modification No. 54 effective October 1, 1995 - April 5, 1995, incorporated into Contract No. 243-88-1084.
2. FY 1995 (April - September): Annual Funding Agreement effective April 1, 1995 - September 30, 1995, incorporated into Contract No. 243-95-6001.
3. FY 1996: Annual Funding Agreement effective October 1, 1995 - September 30, 1996, incorporated into Contract No. 243-95-6001.
4. FY 1997: Annual Funding Agreement effective October 1, 1996 - September 30, 1997, incorporated into Compact No. 58G970043.
5. FY 1998: Annual Funding Agreement effective October 1, 1997 - September 30, 1998, incorporated into Compact No. 58G970043.
6. FY 1999: Annual Funding Agreement effective October 1, 1998 - September 30, 1999, incorporated into Compact No. 58G970043.

⁵ While the authority for these agreements may be based on Title I, III, or V of the ISDEAA, the differences in the titles are immaterial to these appeals.

FY 1995

In 1988, Appellant entered into a Title I contract with the IHS to provide various health and related services for the Alaska Native residents of the Annette Island Reserve. Contract No. 243-88-0184, Appeal File (AF) Tab 3 at 1-31. By Modification No. 54, the parties extended the contract to cover FY 1995 and agreed that the IHS would pay \$1,953,854 to Appellant in FY 1995. These funds would be used in accordance with Appellant's approved FY 1995 operation budget. AF Tab 4 at 1, Item 14. See Contract Pricing Proposal⁶ (August 1994), AF Tab 4 at 4-9. Of the total funding agreed upon by the parties, \$441,252 was allocated as "Total Contract Support Costs," consistent with the Contract Pricing Proposal. See "Accounting and Appropriation Data," AF Tab 4 at 2. Of the \$441,252 amount, \$357,735 was considered indirect CSC and \$83,517 was considered direct CSC. Id.

Mid-way through FY 1995 and effective April 1, 1995, the parties entered into a new Title I Model Contract (25 U.S.C. § 450*l*, which had been added to the statute by Congress in 1994). Contract No. 243-95-6001, AF Tab 5, pp. 1-24. Under Article III section 2, the contract provided that the total amount of funds to be paid under the contract shall be determined in an AFA entered into between the parties and incorporated into the contract as Attachment 2. AF Tab 5 at 14. See also AF Tab 5 at 23. This funding agreement became effective on April 1, 1995, and expired on September 30, 1995. AF Tab 6 at 6, paragraph 5.

As set forth in Section 2(A) and 2(E) of the second AFA, the parties agreed that the IHS

⁶ In submitting the Contract Pricing Proposal, Appellant's Acting Service Unit Director certified that the cost pricing data was "accurate, complete, and current." AF Tab 4 at 5.

shall provide Appellant \$220,626 for CSC.⁷ See Section 2A “Status of Funds” and “Accounting and Appropriations Data,” AF Tab 6 at 3, 4.

Section 2(E) of the second AFA, specifies, in part, that the indirect cost amount that the IHS shall pay to Appellant “shall be included in the amount identified in Section 2(A) of this Agreement.”⁸ Appeal File Tab 6 at 5. Immediately prior to the end of the fiscal year, the parties increased the promised amount for CSC to \$221,567. Amendment 6 to Attachment 2, AF Tab 7 at 19, 21. This CSC amount was considered part of Appellant’s “recurring base” to be provided in subsequent years. AF Tab 7 at 19.

Thus, there are two agreements governing payments for FY 1995: the first AFA for Contract No. 243-88-0184, as amended, promised a CSC amount of \$220,626; the second AFA for Contract No. 243-95-6001 promised a CSC amount of \$221,567. The IHS paid a total of \$442,193 for CSC in FY 1995. Of the \$442,193 amount, \$357,735 was considered indirect CSC and \$84,458 was considered direct CSC. Moreover, there is no contention that the IHS failed to pay Appellant the contract support costs specified in the AFA, as amended. See Compl. ¶¶ 14 n.3, 25 (acknowledging full payment of direct CSC and payment of \$357,753 indirect CSC).

FY 1996

On September 28, 1995, the parties entered into an Annual Funding Agreement for FY 1996 (FY 1996 AFA), pursuant to Contract 243-95-6001. Amendment 8, AF Tab 8 at 1-3. The IHS agreed to pay Appellant one annual lump sum amount of \$1,984,011. AF Tab 8 at 1. Of

⁷ The parties also amended the prior AFA for Contract No. 243-88-0184 to reduce the contractual promise for CSC to \$220,626 and transfer the remaining \$220,626 for CSC into the new Contract No. 243-95-6001. AF Tab 4 at 18-20.

⁸ The amount listed in Section 2(A) for CSC was \$220,626. AF Tab 6 at 3.

this annual lump sum amount, the parties specified a sum of \$441,252⁹ as “Total CSC.” See “Accounting and Appropriations Data,” AF Tab 8 at 2. A few months later, the parties amended the annual funding agreement by increasing the total amount of CSC to \$442,193, which is the amount the IHS paid for FY 1996 CSC. Amendment No. 13, AF Tab 9 at 12-14. Of the \$442,193 amount, \$357,735 was considered indirect CSC and \$84,458 was considered direct CSC. Moreover, there is no contention that the IHS failed to pay Appellant the contract support costs specified in the AFA, as amended. See Compl. ¶ 27 (acknowledging payment of \$357,735 indirect CSC).

FY 1997

In FY 1997, Appellant and the IHS entered into a compact under Title III of ISDEAA. AF Tab 10 at 1-32. On July 17, 1996, the parties entered into an Annual Funding Agreement for FY 1997, as provided in the Compact. AF Tab 11. The parties agreed that the IHS would pay Appellant \$2,053,282 as the “recurring base,” with \$442,193 allocated as Contract Support. AF Tab 11 at 4.

The parties agreed to schedule negotiations prior to October 1, 1996, for Appellant’s proportional share of certain IHS Area Office and Headquarters level programs (known as “tribal shares”). AF Tab 11 at 5. No non-recurring CSC was listed, and the Area Office and Headquarters tribal shares were scheduled to be negotiated prior to October 1, 1996. Once tribal shares were negotiated, Appellant’s request for additional CSC to support these new programs

⁹ This sum of \$441,252 includes the amount that the IHS promised to pay for indirect costs (\$357,735) for FY 1996, pursuant to Section 2E of Attachment 2. AF Tab 6 at 5.

was to be placed on the ISD queue with the request date of May 7, 1996. AF Tab 11 at 5.

Appellant's FY 1997 AFA added funding amounts to Section 4. AF Tab 12 at 2-4. These amounts included \$44,033 for CSC on the tribal shares.¹⁰ Id. Additionally, the AFA included a request for start-up costs in the amount of \$88,845.¹¹ This request was subject to review by IHS and negotiation prior to October 31, 1996. Id.

The IHS paid Appellant \$442,193 for FY 1997 CSC. Of the \$442,193 amount, \$357,735 was considered indirect CSC and \$84,458 was considered direct CSC. Moreover, there is no contention that the IHS failed to pay Appellant the contract support costs specified in the AFA, as amended. See Compl. ¶ 29.

FY 1998

The parties entered into an Annual Funding Agreement for FY 1998 as provided in the Compact. AF Tab 15. The parties agreed that the IHS would pay Appellant \$1,619,071 in "program costs" and \$442,193 in contract support costs.¹² AF Tab 15 at 10.

Appellant was paid \$2,241,168, \$349,792, \$82,985 and \$127,515 for a total of \$2,801,460. AF Tab 16, at 8-9, 6-7, 4-5 & 1-3. Appellant received \$442,193 in CSC. AF Tab 16 at 9. Of the \$442,193 amount, \$357,735 was considered indirect CSC and \$84,458 was considered direct CSC. Moreover, there is no contention that the IHS failed to pay Appellant the

¹⁰ A notation was included in footnote 3 that the "Area Office may not be in a position to pay the full 100% [of tribal shares] in FY 1997. If less than 100% was available, the section would be adjusted to reflect a proportionate amount and place Appellant's request on the ISD queue. AF Tab 12 at 3.

¹¹ The original amount of \$88,845 was placed on the ISD queue along with \$44,033 for indirect CSC. Again, these amounts on the ISD queue are not at issue in these appeals.

¹² Under footnote 5, a notation is made that Appellant has an ISD request on the queue for \$44,033 for CSC on tribal shares. AF Tab 15 at 10.

contract support costs specified in the AFA, as amended. See Compl. ¶ 31.¹³

FY 1999

For FY 1999, the parties agreed that the IHS would pay Appellant \$2,166,024 as the recurring base, including \$ 442,193 in contract support.¹⁴ AF Tab 18 at 11.

In Amendment No. Six (6) to the FY 1999 AFA, the parties agreed to increase the contract support cost amount by \$21,904 for a total contractual promise of \$464,907. AF Tab 19 at 1.

The IHS paid Appellant \$464,097 for FY 1999 CSC. Of the \$464,097 amount, \$368,290 was considered indirect CSC and \$95,807 was considered direct CSC. Moreover, there is no contention that the IHS failed to pay Appellant the contract support costs specified in the AFA, as amended. See Compl. ¶ 33.¹⁵

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where, as in this case, “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “Summary Judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” Celotex

¹³ Appellant asserts that the IHS paid \$485,084 in CSC. This calculation includes program funds in the amount of \$42,891 that the IHS paid, but because they cover the same kinds of costs as CSC, they are considered “available” for CSC.

¹⁴ Under footnote 6, a notation is made that Appellant had an ISD request on the queue for \$44,033 for CSC on tribal shares. AF Tab 18 at 11.

¹⁵ Appellant asserts that the IHS paid \$500,422 in CSC. This calculation includes program funds in the amount of \$36,325 that the IHS paid, but because they cover the same kinds of costs as CSC, they are considered “available” for CSC.

Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1); Appeal of Blaze Construction Co., Inc., No. 2863, 91-3 B.C.A., ¶ 24071, 1991 WL 201663 (June 6, 1991).

The initial burden is on the moving party to point out the absence of any genuine issue of material fact. See Celotex, 477 U.S. at 323. “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, 247-48 (1986). A determination of which facts are material depends on the underlying substantive law. “Factual disputes that are irrelevant or unnecessary” do not preclude the entry of summary judgment. Id. at 248. Once the initial burden of the moving party is satisfied, the burden shifts to the responding party to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. Id. at 250. In considering a motion for summary judgment, “the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.” Worth v. Jackson, 377 F. Supp. 2d 177, 181 (D.D.C. 2005), vacated in part on other grounds, 451 F.3d 854 (D.C. Cir. 2006). However, “the non-moving party cannot rely on mere allegations or denials . . . but . . . must set forth specific facts showing that there [are] genuine issue[s] for trial.” Id. at 180-81.

This case is particularly appropriate for summary judgment because there is no dispute that the IHS paid Appellant the amounts specifically promised in its agreements for Appellant’s ongoing programs (See Answer at 7-8), and Appellant acknowledges that it waived any claim to additional funds for its new and expanded programs. See Appellant’s Response to Motion to

Dismiss at 35-36. Appellant's request that the IHS retroactively award it more funds than negotiated in the contract is not based on any factual allegations, but on its misreading of Cherokee Nation and Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't, 194 F.3d 1374 (Fed. Cir. 1999). If the Board does not dismiss Appellant's claims for lack of jurisdiction, it should grant summary judgment to the IHS.

ARGUMENT

I. THE IHS PAID ALL CSC AT ISSUE IN THESE APPEALS

Appellant alleges that the Secretary breached its contracts and is entitled to judgment under the Supreme Court holding Cherokee Nation. The facts in this case are not similar to Cherokee Nation. In Cherokee Nation, the IHS failed to pay the amounts stated in the contracts because the IHS believed that it was not required to pay when payment of the full amount would require it to divert funds serving other tribes. See id. at 636-37. In these appeals, however, the IHS paid to Appellant all of the promised CSC funding at issue. Therefore, no claim of breach lies against the IHS.

Contract interpretation begins with the plain language of the contract. Coast Fed. Bank, FSB v. United States, 323 F.3d 1035, 1038 (Fed. Cir. 2003) (en banc). A contract should be interpreted as a whole and in a manner which gives "reasonable meaning to all its parts and avoids conflict or surplusage of its provisions." Granite Constr. Co. v. United States, 962 F.2d 998, 1003 (Fed. Cir. 1992). Moreover, the words of a contract "must be given their plain and ordinary meaning . . . in defining the rights and obligations of the parties[.]" Elden v. United States, 617 F.2d 254, 260-61 (Ct. Cl. 1980). The goal of contract interpretation is to ascertain the

intent of the parties through the plain language that they chose. Beta Sys., Inc. v. United States, 838 F.2d 1179, 1185 (Fed. Cir. 1988). Contract interpretation is a question of law that is appropriate for summary judgment. Martin v. United States, 20 Cl. Ct. 738, 745 (1990).

As set forth in the uncontroverted facts, there was no breach because the IHS fully performed the contractual promises at issue in these appeals. Instead, Appellant seeks to read the specific funding provisions out of the contract, in favor of general provisions that reference 25 USC 450j-1(a) and what Appellant refers to as a “stable funding rule.” See Appellant’s Motion for Summary Judgment at 2, 4. However, Appellant has offered no reason or applicable authority to ignore the precise terms that set forth the funding amounts upon which both parties relied. There is no evidence of fraud, duress, coercion, or mistake of fact. Instead, in FY 1995-1999, the IHS agreed to pay Appellant a specific amount of CSC each year; each year, the IHS paid the amount promised and did not receive any notice during the performance period that funds were insufficient.¹⁶ The IHS fully performed Appellant’s contracts at issue in these appeals.

II. APPELLANT’S CONTRACTS COMPLY WITH THE ISDEAA

To claim breach, Appellant alleges that the amount of funding promised by IHS under their contracts was less than what was required under the ISDEAA. Compl. ¶ 22. Appellant claims that section 106(a) of the ISDEAA, as incorporated into its contracts, required a different and greater amount than the amount the IHS paid. Compl. ¶ 4, 25 U.S.C. 450j-1(a). But this

¹⁶ Nearly all of the contracts in effect in FY 1995-1999 included a “Limitation of Costs” clause, which required the Contractor to provide notice if it had reason to believe the funding amount was insufficient. See, e.g., AF Tab 5 at 14, AF Tab 14 at 21.

general provision does not trump the specific promises to pay because the ISDEAA does not prescribe a funding amount. It instead calls for a negotiation, which is precisely what happened.

In construing a statute such as 25 U.S.C. § 450j-1, the Board must review its plain language. United States v. Barnes, 295 F.3d 1354, 1359 (D.C. Cir. 2002). An analysis of a statute “begins with the language of the statute. . . . [a]nd where the statutory language provides a clear answer, it ends there as well.” Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438, 119 S. Ct. 755, 760 (1999) (citation and internal quotation marks omitted). Moreover, in interpreting statutes, Congress is assumed to know the law and legislate against the backdrop of existing legal principles. See Cannon v. Univ. of Chicago, 441 U.S. 677, 696-699 (1979); Wash. Legal Found. v. U.S. Sentencing Comm’n, 17 F.3d 1446, 1450 (D.C. Cir. 1994). When “Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.” Neder v. United States, 527 U.S. 1, 21 (1999) (citation and internal quotation marks omitted).

The ISDEAA speaks only in the most general of terms about the amount of CSC to be added to a contract. It directs the Secretary to add to the contract the amount to which the contractor is entitled under 25 U.S.C. § 450j-1(a). See 25 U.S.C. §§ 450j-1(g), 450l(c)(b)(4). This amount is subject to the availability of appropriations. 25 U.S.C. §§ 450j-1(b), 450j(c).

Contract support costs are defined as “reasonable” costs for activities which must be carried on by the contractor to ensure compliance with the terms of the contract and “prudent management.” 25 USC 450j-1(a)(2). The ISDEAA further provides that the CSC eligible for

reimbursement must also be “reasonable” and “allowable” but does not specify an amount or a formula for determining those that are reasonable and allowable. 25 U.S.C. § 450j-1(a)(3)(A). As a starting point, the terms “reasonable” and “allowable,” as used in these funding provisions, are general terms. They do not direct the IHS to promise a certain amount of CSC or to use a certain formula for the funding of CSC. See, e.g., Samish Indian Nation v. United States, 419 F.3d 1355, 1364-1365 (Fed. Cir. 2005) (explaining that the funding provisions of the ISDEAA do not curtail the IHS’ discretion to pay funds, do not have clear standards for the payment of funds, do not specify precise amounts to be paid, and do not compel the payment of funds). In addition, because all funding is subject to the availability of appropriations, reading into these funding provisions a requirement to fund a specific amount is contrary to their explicit terms.

Instead, the amounts of indirect CSC must be “determined.” 25 U.S.C. § 450l(c)(b)(4). The ISDEAA leaves the “determination” of indirect CSC funding to the parties pursuant to a negotiation. 25 U.S.C. § 450j-1(a)(3)(B) (providing tribe or tribal organization the ability to negotiate with the IHS on an annual basis the amount of funds that it is entitled to receive); 25 U.S.C. § 450l(c)(b)(14) (AFAs subject to negotiation); 25 U.S.C. § 450j(c)(2) (“The amounts of [self-determination contracts] may be renegotiated annually to reflect changed circumstances and factors”); 25 U.S.C. § 450l(a) (self-determination contracts shall contain or incorporate the model contract and “such other provisions as are agreed to by the parties”); 25 U.S.C. § 450j-1(b)(2)(C) (funds may be reduced pursuant to a tribal authorization); 25 U.S.C. § 450j-1(b)(5) (the IHS may increase funds promised upon request by a tribal organization); see also 25 U.S.C. § 450f(b) (requirement that the IHS work with tribe or tribal organization to overcome

objections to the proposal).

To determine the amount of funds to be included in an AFA, the tribe or tribal organization must propose specific funding levels and funding terms, 25 U.S.C. §§ 450f(a)(2), 450j- 1(a)(3)(B); 25 C.F.R. §§ 900.12, 900.8(h), and the IHS must ensure that total funding promised in self-determination contracts not exceed available appropriations, 25 U.S.C. §§ 450j- 1(b), 450j(c); see Cherokee Nation, 543 U.S. at 641-43; Ramah Navajo Sch. Bd., Inc. v. Babbitt, 87 F.3d 1338, 1345 (D.C. Cir. 1996); Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't, 194 F.3d 1374, 1378 (Fed. Cir. 1999); Ramah Navajo Chapter v. Norton, No. 90-957, slip op. at 14-15 (D.N.M. 2006) (Ex. A).

The ISDEAA further specifies that, upon receipt of a contract proposal, if the IHS agrees to the proposed terms, the contract will be executed, without further review.

25 U.S.C. § 450f(a)(2). If the IHS declines the proposal, in full or in part, the ISDEAA gives the Tribe or Tribal organization two statutory options: (1) it can challenge the IHS' full or partial declination in an administrative proceeding or directly in federal court as inconsistent with the ISDEAA, or (2) it can acquiesce in the terms offered by the IHS and accept the contract and funding thereunder. The actual funding amount is thus determined by an agreement by the parties, or by a court order directing the Secretary to accept the proposal of the tribe or tribal organization. Id., 25 U.S.C. § 450m-1(a). Once the amounts are "determined" by a contract entered into in one of these two ways, the parties are bound by them.

By providing tribe and tribal organizations with these two statutory options, the ISDEAA recognizes that the tribe or tribal organization is in the best position to know the amount of

funding that it needs in order to perform under the contract and provides that, for ongoing contracts, it need not perform the contract if sufficient funds are not offered. 25 U.S.C. § 4501(c)(b)(5). The availability of the generous judicial review provisions in the ISDEAA demonstrate Congress's intent that if there is a dispute between the parties regarding the funding levels or funding terms, the tribe or tribal organization must take advantage of the judicial review procedures and challenge the funding levels proposed by the Secretary before contract execution. Once the parties have negotiated and executed a contract, the contract governs the rights and duties of the parties. Thereafter, Congress intended the parties to enforce their rights pursuant to the CDA. 25 U.S.C. § 450m-1(d).

The funding levels and terms in Appellant's AFAs are in full compliance with the ISDEAA and their terms control. Although Appellant may be dissatisfied with the funding levels that it negotiated and agreed to, it is bound by them. The IHS is entitled to summary judgment on these appeals.

III. CONGRESS HAS LIMITED THE TOTAL AMOUNT OF CSC THAT THE IHS CAN AWARD ON ALL CONTRACT YEARS IN FY 1998 AND 1999

Whether Appellant seeks additional funding under its contracts or under the ISDEAA, such claims for contract years 1998 and 1999 cannot succeed in light of an appropriations cap limiting the total amount of CSC available to the IHS. Starting in 1998, Congress capped the IHS' CSC appropriation¹⁷ and, for these years, the total capped CSC appropriation was less than the total of all of the requests from tribal contractors to the IHS for CSC. Therefore, in each year

¹⁷ See fn 3.

since 1998, the IHS has divided the available appropriations pursuant to published policies in order to provide as much funding as possible to its tribal contractors. For each year, the IHS obligated the vast majority of the CSC appropriation, and the minor unobligated amounts were due to deobligations, refunds or administrative errors. Moreover, Congress made the CSC appropriations available for only one year. Therefore, the minor amounts, if any, that were not obligated during the years at issue have lapsed as a matter of law. See 31 U.S.C. § 1301(c); City of Houston v. Dep't of Hous. & Urban Dev., 24 F.3d 1421, 1427 (D.C. Cir. 1994).

All funding under the ISDEAA is subject to the availability of appropriations. 25 U.S.C. §§ 450j-1(b), 450j(c). These express conditions limited the amount of CSC funding under all of Appellant's post-1997 contracts. Ramah Navajo Sch. Bd., 87 F.3d at 1345 (explaining that the statutory language making funding of CSC "subject to the availability of appropriations" means that "the Secretary need only distribute the amount of money appropriated by Congress under the Act," but "if the money is not available, it need not be provided, despite a Tribe's claim that the ISDEAA "entitles" it to the funds"); Oglala Sioux, 194 F.3d at 1377-78 (explaining that the ability of BIA "to bind the Government contractually was expressly conditioned on the availability" of appropriations and that "to repeal the unambiguous language of [ISDEAA]" and conclude that the tribe had either a "statutory or contractual right to additional funding for its [CSC]" would exceed the judicial function). Cf. Cherokee Nation, 543 U.S. at 642 (explaining that whether appropriations are available for purposes of ISDEAA contracts depends on express limitations or the absence thereof in the appropriations acts and concluding that the IHS' 1995-1997 appropriations were unrestricted). While the IHS fully performed its promises under all of

Appellant's contracts, under no circumstances can they recover any additional CSC funding under its post-1997 contracts. Appellee is entitled to summary judgment on Appellant's claims.

CONCLUSION

In summary, Appellant accepted funding from the Secretary for many years under agreements that they now allege--after funds have either been provided to them, obligated to other contractors, or lapsed--conflict with the ISDEAA. The IHS fully performed the terms of the contract at issue in these appeals. Basic principles of contract interpretation dictate that the Appellee be granted summary judgment on Appellant's claims alleging that their contracts violate the ISDEAA.

Dated this 8th day of January, 2007.

Respectfully submitted,

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