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February 12, 2003

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United States Court of Appeals
For The Federal Circuit

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Mr. Jan Horbaly
Clerk, United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW, Room 401
Washington, D.C. 20439

Re: Rule 28(j) responsive letter in *Thompson v.
Cherokee Nation*, No. 02-1286.

Dear Mr. Horbaly:

For the following reasons, the recent Tenth Circuit *Cherokee-Shoshone* decision is not persuasive:

1. The Tenth Circuit's conclusion that IHS was free to follow committee recommendations and was not legally required to pay its contract obligations to "ongoing" contracts out of an unrestricted lump-sum appropriation (311 F.3d at 1063-65), is directly contrary to this Circuit's *Blackhawk* rule: a contract payment contingent on the "availability of appropriations" becomes "vested" upon enactment of an unrestricted appropriation. AppBr. 32-33.

2. The Tenth Circuit's conclusion that the "ISD Fund" language constitutes a "cap" on the appropriation for CSCs available in the then-current fiscal year for new contracts (311 F.3d at 1063-65) is contrary to the controlling authorities and rules of statutory construction. AppBr. 37-41. The Court's rejection of the Comptroller General's directly applicable opinion is unconvincing, as is the Court's reliance on an entirely *different* "family of earmarking language" that speaks in the present tense. *Id.*

3. In reviewing the ISDA's "notwithstanding" clause and the admittedly "ambiguous" ISD Fund language (311 F.3d at 1063), the Court fails to consider the ISDA's mandatory rule of statutory construction, the Indian canon, and additional well-settled rules of statutory construction. AppBr. 25-6, 33, 40.

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4. Contrary to *Holloway v. U.S.*, 526 U.S. 1, 9 (1999), the Court's interpretation of the "reduction" clause – granting the Secretary complete discretion to commit all of his unrestricted appropriation to other purposes – permits the precise conduct the Act expressly prohibits in the very same section, converting ISDA contracts into variably-funded discretionary grants. AppBr. 44; *Pierce v. Guillen*, 123 S.Ct. 720, 730 (2003) (rejecting reading that renders amendment "an exercise in futility").

5. Unlike *Cherokee-Shoshone*, the Secretary below never moved for summary judgment. Further, the Secretary never offered any proof on the availability of funds in FY1994 and FY1995. Thus, even if the Secretary's proof raised a genuine issue as to FY1996, *but see* AppBr. 49-55, the failure to offer any evidence on the earlier years is fatal, particularly given the Secretary's burden. *Id.* at 49-50; *Laforge v. U.S.*, 48 Fed. Cl. 566, 570 (2001) (government burden to prove affirmative defense).

Sincerely,

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON



By: Lloyd Benton Miller
Counsel for Appellee Cherokee Nation

cc: Jeffrica Jenkins Lee, Esq.
(via overnight mail)