

IN THE  
**Supreme Court of the United States**

CHEROKEE NATION and SHOSHONE-PAIUTE  
TRIBES OF THE DUCK VALLEY RESERVATION,  
*Petitioners,*

v.

UNITED STATES OF AMERICA; TOMMY THOMPSON,  
Secretary of the United States Department of  
Health and Human Services, *et al.,*  
*Respondents.*

TOMMY G. THOMPSON,  
Secretary of Health and Human Services,  
*Petitioner,*

v.

CHEROKEE NATION OF OKLAHOMA,  
*Respondent.*

**On Writs of Certiorari to the United States  
Courts of Appeals for the Tenth Circuit  
and for the Federal Circuit**

**OPENING BRIEF FOR CHEROKEE NATION AND  
SHOSHONE-PAIUTE TRIBES**

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## QUESTIONS PRESENTED

The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450-450n, directs the Secretary of Health and Human Services to pay Indian tribal contractors operating federal medical facilities the necessary “contract support costs” required to operate those facilities, and establishes a damages remedy under the Contract Disputes Act for any contract breach. The ISDA further provides that the “provision of funds” under self-determination contracts is “subject to the availability of appropriations,” and that in making funds available to contracting Tribes “the Secretary is not required to reduce programs, projects, or activities serving [any other] tribe,” 25 U.S.C. 450j-1(b). In order to curb an agency practice of regularly underfunding such contracts, the ISDA also instructs that the contract amount “shall not be reduced” by the Secretary to pay for “Federal functions.” *Id.*

1. Whether there were appropriations legally available in fiscal years 1994 to 1997 to fund the contracts here at issue in the amounts mandated by the ISDA, given that each year Congress enacted an unrestricted lump-sum appropriation to carry out the ISDA?

2. Whether a statutory directive that the Secretary is not required to reduce the funding of other tribes in making funds available to ISDA tribal contractors authorizes the Secretary to refuse to pay the contract amount mandated by statute rather than reprogram spending on Federal functions or spend unobligated appropriations?

**PARTIES TO THE PROCEEDINGS**

The parties to the proceedings are set forth in the petitions for writs of certiorari.

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**On Writs of Certiorari to the United States  
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**OPENING BRIEF FOR CHEROKEE NATION AND  
SHOSHONE-PAIUTE TRIBES**

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**OPINIONS BELOW**

The opinion of the Court of Appeals for the Tenth Circuit is reported at 311 F.3d 1054 and reprinted in No. 02-1472 at Pet. 1a. The District Court opinion is reported at 190 F. Supp. 2d 1248 and reprinted at Pet. 24a.

The opinion of the Court of Appeals for the Federal Circuit is reported at 334 F.3d 1075 and reprinted in No. 03-853 at

Pet. 1a. The relevant Interior Board of Contract Appeals (IBCA) opinions are reported at 01-1 B.C.A. (CCH) ¶ 31,349 and 99-2 B.C.A. (CCH) ¶ 30,462, and reprinted at Pet. 43a, 50a.

### **JURISDICTION**

The judgment of the Court of Appeals in *Cherokee* was entered November 26, 2002, a petition for rehearing was denied January 22, 2003, and the petition for certiorari was filed April 3, 2003. The judgment of the Court of Appeals in *Thompson* was entered July 3, 2003, a petition for rehearing was denied September 12, 2003, and the petition for certiorari was filed December 11, 2003. In both cases this Court's jurisdiction is invoked under 28 U.S.C. 1254(1). The petitions were granted March 22, 2004, in an Order consolidating the cases for briefing and argument. 124 S. Ct. 1652.

### **STATUTORY PROVISIONS INVOLVED**

Pertinent provisions of the Indian Self-Determination and Education Assistance Act of 1975 (ISDA), as amended, 25 U.S.C. 450-450n, the relevant Appropriations Acts, the Contract Disputes Act, 41 U.S.C. 601-613 (CDA), the Anti-Deficiency Act, 31 U.S.C. 1341 (ADA), and the Judgment Fund Act, 31 U.S.C. 1304, are reprinted in the Addendum hereto.

### **INTRODUCTION**

In these consolidated cases the Secretary refused to pay two tribal contractors their "contract support costs" of operating Federal medical facilities, even though payment of such costs is a mandatory term of contracts under the amended ISDA "subject to the availability of appropriations," 25 U.S.C. 450j-1(b). As the Federal Circuit properly concluded in *Thompson*, under time-honored principles of Federal contracting and appropriations law there were ample appropriations available in fiscal years 1994 to 1997 to fund the contracts at issue in full. Each year Congress made a lump-sum appropriation that was far in excess of all ISDA

contract obligations: there was no statutory earmark, cap or other limitation specific to ISDA contracts (or contract support costs) that would even arguably render appropriations unavailable. The Secretary's later discretionary spending of each lump-sum appropriation on other items during the course of the fiscal year has nothing to do with "the availability of appropriations" as that term has long been interpreted; even if it did, by the plain terms of the relevant Appropriations Acts necessary amounts fully to support the contracts were obligated immediately upon the effective date of the Acts. Nor did a later appropriations rider passed in 1998, declaring that recommended earmarks in *committee reports* for the FY1994-1997 Appropriations Acts are the total amounts available for contract support costs in those years, have retroactive effect. That rider addresses only the future obligation of unexpended prior appropriations. The rider neither has nor could have retroactive effect because Congress can neither abrogate the Government's own contracts, nor issue an interpretation of prior unamended law that would bind a Federal court in an action for breach of contract under that prior law.

Finally, the Secretary cannot refuse to pay the full contractual amount mandated by statute by invoking the ISDA provision that the funding of self-determination contracts does not require the Secretary to reduce spending on programs serving other tribes: not only is that provision simply a grant of reprogramming discretion, but it provides no refuge for the Government when total Indian Health Service appropriations for each fiscal year are far in excess of the combined total spent on Federal services to Indian tribes and on ISDA contracts.

The Federal Circuit's decision holding the Government bound to its contracts is faithful to, indeed mandated by, the plain language and purpose of the ISDA, which was enacted in present form to cure a decade of abusive practices by the Secretary in negotiating and funding self-determination

contracts. By contrast, the Tenth Circuit's contrary ruling freeing the Government from its contractual obligations to pay contract support costs is irreconcilable with the text, structure, and history of the Act. It also presents a radical and unwarranted departure from established contracts and appropriations law that, if accepted, would ultimately inject untold destabilizing risks into the government contracting process, increase the costs of such contracts, and undermine the foundation of the Government's reliability as a contracting partner, contrary to the foundational principles set forth in *United States v. Winstar Corp.*, 518 U.S. 839 (1996); *Lynch v. United States*, 292 U.S. 571 (1934); and *Murray v. City of Charleston*, 96 U.S. 432 (1877).

#### STATEMENT OF THE CASE

**1. The Indian Self-Determination And Education Assistance Act.** Congress in the 1975 Indian Self-Determination and Education Assistance Act committed this Nation to "the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of 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 services." 25 U.S.C. 450a(b). To carry out this commitment, Congress required the Secretary to enter into contracts whereby Tribes would receive funding to take over the administration of Federal hospitals, clinics and other Federal programs that were otherwise being operated by the Secretary of Health and Human Services (through the Indian Health Service (IHS)), or the Secretary of the Interior (mainly through the Bureau of Indian Affairs (BIA)). 25 U.S.C. 450b(i), 450f(a)(1).

In the wake of the ISDA's enactment, Congress witnessed the "agencies' consistent failures . . . to administer self-determination contracts in conformity with the law," with the BIA and IHS "systematically violat[ing]" contractors' rights.

