

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOM

CHEROKEE NATION OF OKLAHOMA, and)
SHOSHONE-PAIUTE TRIBES OF THE)
DUCK VALLEY RESERVATION, on behalf)
of themselves and all others similarly situated,)

Plaintiffs,)

vs.)

Case No. 99-092-S CIV

UNITED STATES OF AMERICA;)
DONNA E. SHALALA, Secretary of the)
United States Department of Health)
and Human Services; and MICHAEL H.)
TRUJILLO, Director of the Indian)
Health Service, United States Department o)
Health and Human Services,)

Defendants.)

**PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF
MOTION FOR DECLARATORY JUDGMENT
(THIRD CAUSE OF ACTION)**

Lloyd Benton Miller, Esq., Lead Counsel
William R. Perry, Esq.
John P. Lowndes, Esq.
Devin Odell, Esq., Of Counsel
Sonosky, Chambers, Sachse, Miller & Munson
900 West Fifth Avenue, Suite 700
Anchorage, Alaska 99501
(907)258-6377
Attorneys for Plaintiffs

Weldon Stout, Esq.
Wright, Stout, Fite & Wilburn
300 West Broadway, Suite A
P.O. Box 707
Muskogee, Oklahoma 74402-0707
(918) 682-0091

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INTRODUCTION

In arguing that § 314 permits the government to evade liability, the defendants adopt an even more extreme reading of the ISDA and self-determination contracts than the advance in opposing summary judgment. With respect to § 314, the defendants take the position (as they must if they agree that § 314 is prospective only) that the plaintiffs *never* had *any* right to contract support costs, even when and if appropriations were sufficient to provide full funding. Boldly, the defendants assert that the right to contract support may be revoked at any time, even years after tribal contractors have completed all duties under their contracts, Gov't Opp. Br. at 32, 33, 35-39. This position reduces the ISDA's contract support provisions and the government's "contracts" to mere illusory promises, not enforceable "rights."

This position is untenable. Not only does it make nonsense of the ISDA and the executed contracts and funding agreements, but it finds absolutely no support in either the legislative history or in any case law addressing the Act's contract support provisions, government contracts, or appropriations law. It is also directly contradicted by the one federal court case to directly consider § 314, a key reported case against the same defendants that is nowhere even mentioned in their brief. *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, ___ F. Supp.2d ___, 1999 WL 562715 (D. Or. 1999) (*Shoshone-Bannock III*') (Pls. Exh. 83).

The defendants argue in the alternative that § 314 prohibits the Court from granting any relief even if the plaintiffs have a right to full contract support funding. Gov't Opp. Br. at 29-31, 39-40. This argument (aside from being irrelevant to the question of liability) rests

entirely on the flawed premise that plaintiffs seek injunctive relief, *i.e.*, a court order that the agency pay the plaintiffs' full contract support needs out of the agency's appropriation. But as the plaintiffs made clear in their Amended Complaint and their opening brief in support of the declaratory judgment, they seek only money damages as provided by the Contract Disputes Act and 25 U.S.C. § 450m-1(a); they do not seek injunctive relief. Therefore, neither the terms of the permanent Judgment Fund statute nor the Appropriations Clause bars the relief sought in this case.

I. FACTS

This motion is properly viewed as a motion for declaratory judgment regarding the meaning of § 314, and its resolution does not depend on any particular set of facts. Nonetheless, to the extent a factual background is helpful to the Court's consideration of the matters, we respectfully refer the Court to the facts described and explained in Pls. Partial Summ. J. Br. at 2-23, and Pls. Exhs. 1 & 69.

II. STANDARD OF REVIEW

The plaintiffs incorporate by reference Part II of the Pls. Partial Summ. J. Reply Br. at 5-11.

III. ARGUMENT

A. The Government's Interpretation of § 314 Fails Because It Is Based on an Untenable Interpretation of the Statutory and Contractual Right to Contract Support Costs.

The defendants stake their entire opposition on the flawed proposition that the plaintiffs had only a "conditional" right to contract support costs, with the conditions being that

(1) Congress appropriates sufficient funds in any given year to fully fund those costs, and (2) the agency elects not to spend the appropriated funds on other authorized purposes. The plaintiffs have explained elsewhere why this reading of the ISDA fails. Pls. Partial Summ. J. Br. at 31-50; Pls. Partial Summ. J. Reply Br. at 11-27. But in opposing declaratory judgment on § 314 the defendants take the even more unsupportable position that the plaintiffs *never* had any right *at all* to contract support cost funding. To fully understand why the defendants are locked into taking this astonishing position requires untangling their arguments.

First, the defendants reverse the logical sequence of analysis by starting with § 314 and only later working backwards to the ISDA. Given that virtually all of their argument regarding § 314 relies on their misreading of the ISDA, it makes sense to start with the terms of that statute (and associated contracts), and only then go on to the effect (if any) of § 314.

Second, following this approach and examining the ISDA and contracts (and reducing a complex statute to its simplest terms), one must conclude that before Congress enacted § 314, plaintiffs either (1) had an enforceable right to additional contract support funding, or (2) had no such enforceable right. In other words, regardless whether that right was “conditional” or not, one may answer only “yes” or “no” to the question whether the plaintiffs had a viable claim or “right” to additional contract support costs prior to § 314’s enactment. Put differently, could they have successfully brought suit at that time

Third, if one answers “yes,” concluding that plaintiffs would have had valid claims for full contract support funding in the absence of § 314, then and only then does one reach the issue of whether § 314 extinguished that right. Had defendants reached this point, to prevail in

this case their answer would have to be that § 314 did indeed extinguish the right. (Otherwise, they would not oppose the plaintiffs' motion for declaratory judgment.)

Fourth, an existing right or claim may only be extinguished by a statute that is retroactive. prospective statute, by definition, is “applicable only to cases which shall arise after its enactment.” *Black’s Law Dictionary* 1222 (6th ed. 1990). In contrast, onl retroactive laws “take away or impair vested rights acquired under existing laws, create new obligations, impose a new duty, or attach a new disability in respect to the transactions or considerations already past.” *Id.* at 1317. Or, as the Supreme Court put it in *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994), a “new provision” is retroactive if it “attaches new legal consequences to events completed before its enactment.” Thus, if plaintiffs had a right to contract support costs prior to the enactment of § 314, that section could only extinguish the right if § 314 is retroactive. *Shoshone-Bannock III*, 1999 WL 562715 at *9 (Pls. Exh. 83) (holding that § 314 could only repeal the right to contract support funding if it is retroactive).

But, fifth, a court will only apply a statute retroactively if the statute overcomes the heavy presumption against retroactivity, either by its express terms or a clear indication o Congressional intent. *See* Pls. Decl. J. Br. at 10-12. As the defendants now readily concede, there is simply no way that § 314 can meet this burden.¹ Gov’t Opp. Br. at 34-35 (“Section 314 is clearly intended to have only prospective effect. The statute merely prohibits further *future*

¹ The government has firmly abandoned the retroactivity argument, perhaps because both the Interior Board of Contract Appeals and the *Shoshone-Bannock* court rejected it after thorough analysis. *See Appeals of Cherokee Nation of Oklahoma*, IBCA 3877-3879/98, slip op. at 18-22, 1999 WL 440047 (June 30, 1999) (Pls. Exh. 15); *Shoshone-Bannock III*, 1999 WL 562715 at *9-10 (Pls. Exh. 83); *see also* Pls. Decl. J. Br. at 2-16.

spending on new contract support costs for claims arising in 1996 and 1997”); *see also id.* at 33 (“Section 314 can only be interpreted to prohibit any *further* expenditure . . . for new contract support costs”) (emphasis added).² Therefore, if defendants are to persist in denying that § 314 bars plaintiffs’ claims, they must go back to the second step above and argue that, even in the absence of § 314, plaintiffs never had an enforceable right or valid claim to contract support costs in the first place.

And this is the approach the government now takes, positing a “right” to contract support that never vests, that may never be enforced, and that is subject to repudiation at an time. Gov’t Opp. Br. at 32, 33, 35-39. In other words, the contract support “right” is not a right at all, but merely an unenforceable statement of a policy ideal. But, if the plaintiffs are correct that their right to full contract support funding is *not* “conditional” on anything (including the amount of appropriations made during the fiscal year when the duty to pay arises, *see* Pls. Partial Summ. J. Br. at 31-50; Pls. Partial Summ. J. Reply Br. at 11-27), *a fortiori* the contract support right cannot be reduced or converted to a meaningless policy statement.

The *Shoshone-Bannock* court understood this well and squarely rejected the government’s radical interpretation of the ISDA in the context of § 314.

² In light of their position that § 314 is exclusively prospective, the defendants’ argument that § 314 “supersedes *any* provision in the Indian Self-Determination Act that allegedly requires IHS (or any other agency) to pay contracting Tribes more than a total of \$7.5 million per year for new contract support costs,” is irrelevant. Gov’t Opp. Br. at 27. If § 314 is prospective only, *i.e.*, if it does not “attach[] new legal consequences to events completed before its enactment,” *Landgraf* 511 U.S. at 269-70, such “supersession” would only apply to claims arising *after* the passage of § 314 in October 1998. *See also* Pls. Decl. J. Br. at 10-12. Indeed, the defendants later implicitly agree that § 314 “does not modify or repeal” the ISDA, arguing that no repeal was necessary given that “the Act creates no such obligations.” *See* Gov’t Opp. Br. at 32.

Defendants respond [to the argument that § 314 does not operate retroactively] that plaintiff had no contractual right, but merely a conditional, open-ended and fully revocable statement of present intent. This is illogical. Under defendants' view, had they refused to pay all tribes *any* CSC at all in FY 1994 (one of the years covered by Section 314), they would not have violated the ISDEA or breached any contract, no vested right would exist, and no claim could ever be made, because Congress might enact a Section 314-type measure some 5, 10 or 20 years later, limiting the availability of the FY 1994 appropriation and thus saving IHS from its own misdeeds. Taken to its logical conclusion, this argument means that such a refusal would never be a breach of contract or a violation of the ISDEA so long as years later Congress enacts a rider (or could enact a rider) saying that "none of the amounts appropriated to IHS in FY 1994 are available for contract support costs under the ISDEA." It is simply not reasonable to interpret the ISDEA and the plaintiff's agreements as providing the Secretary with the right to withhold payments and limit her liability at any time in the indefinite future.

Plaintiff has fully performed its duties and incurred the associated CSC at issue. Thus, its right to the promised payments are vested. Defendants' position that plaintiff's rights are merely conditional and subject to prospective repudiation is rejected.

Shoshone-Bannock III, 1999 WL 562715 at *7-8 (emphasis added) (footnote omitted) (Pls. Exh. 83).

In *United States v. Winstar Corp.*, 518 U.S. 839 (1996) the Supreme Court rejected a similar attempt by the government to reduce binding contracts to mere policy statements. As in *Winstar*, 518 U.S. at 862, here it is "fundamentally implausible" and unreasonable to suggest that the plaintiff Tribes took on the task of operating these IHS government programs without any commitment from the government to provide the Tribes with the funds necessary to administer them. Indeed, because the contracts in this case (unlike those in *Winstar*) were mandated by Congress, the government's position here is even more preposterous

because it hypothesizes that Congress *required* the agency to enter into agreements to pay contract support—specifically choosing the term “contracts” to convey the meaning of legally binding instruments—when all it really intended was that these agreements would be nothing more than empty promises, changeable at the whim of IHS or a later Congress at any time in the indefinite future. *See* Pls. Partial Summ. J. Br. at 44 n.40; *see also* Pls. Decl. J. Br. at 13-15 & n.13.

It is simply not plausible to argue that Congress expressly provided tribal contractors with the remedy of the Contract Disputes Act, precisely as a way to address shortfalls in contract support funding, but it never intended that tribes could use that remedy to enforce their contracts. *See* Pls. Partial Summ. J. Br. at 39 & n.36. There may sometimes be right without remedies, but it strains credulity to believe that Congress could expressly create a remedy where it never intended to create a right.²

² The defendants suggest that plaintiffs did not have an enforceable contract right because they “were aware . . . of the existence of the queue for new contract support costs and how the queue operated.” Gov’t Opp. Br. at 39. This is ridiculous. The extent of the plaintiffs’ “awareness” of the queue has nothing to do with whether they have an enforceable right. The plaintiffs believe and believed when they took over the programs that the IHS’s interpretation of the ISDA and their contracts was in error and brought this suit to prove it. The government’s specious argument merely begs the question.

Along with making nonsense of the ISDA, the government's position also renders § 314 itself a nullity. Defendants never explain what, in their view, Congress intended the provision to accomplish if (as they now claim) tribal contractors never had a right to additional contract support funding anyway, and if in any event no additional funds were even available. *See* Gov't Opp. Br. at 32-33.

The defendants offer nothing—and can offer nothing—to counter these points. As they concede, there is no legislative history even hinting that Congress intended § 314 to affect plaintiffs' right to contract support costs or to overturn the rulings in any of the cases in which the government's position on contract support had been rejected.³ Gov't Opp. Br. at 33 (referring to “the absence of legislative history” regarding § 314). Indeed, even the defendants' more limited claim that “Section 314 was directed at these decisions” is not supported by the only authority they cite, S. Rep. No. 105-277 (1987) at 52 (Pls. Exh. 68), a passage which never even *mentions* § 314. Pls. Decl. J. Br. at 8-9. If anything, the absence there of any mention of § 314—the only point in the entire legislative history that mentions these cases—only serves to confirm that Congress never intended § 314 to address them. Rather (and as the cited passage reflects),

³ Section 314 can be found in Pls. Exh. 76 at 6. The fact that Congress is now reenacting an FY 2000 version of § 314 (as § 312 of H.R. 2466, 106th Cong., st sess. (1999), as passed by the House and an identical § 313 as passed by the Senate, *see* Pls. Exhs. 81 & 82) only makes sense under the plaintiffs' (and the IBCA's and Oregon federal district court's) view that the provision is an annual budgeting measure aimed at the agency's unexpended balances, not some sort of permanent bar to liability for contract support. In the new fiscal year the legislative history again reflects that the measure is aimed only at the agency's “payments for contract support costs,” not the contractors' entitlement to full funding or the government's liability. *See* H.R. Rep. No. 106-222, 1999 WL 449818, at *243 (excerpt) (Pls. Exh. 82). If the defendants' view of the ISDA and § 314 were correct, reenacting such a measure in FY 2000 would be a pointless and useless act.

Congress addressed the issues raised by these cases through a GAO study, which has now been completed (*see* Pls. Exh. 2).

The relevant case law, too, contradicts their position. The defendants do not cite to a single case holding that government contracts may be repudiated at will and thus do not confer any rights on the contractor.⁴ As explained in plaintiffs’ opening brief, the cases are uniformly and firmly to the contrary: the government is bound by its contracts to the same extent as a private party.⁵ Pls. Decl. J. Br. at 13-14. Furthermore, the defendants’ position directly contradicts all of the contract support cases decided to date, which consistently hold that tribal contractors have an enforceable right to—and the Secretary a binding obligation for—full contract support funding. *See* Pls. Partial Summ. J. Br. at 24 (citing cases); *Shoshone-Bannock III, supra*.

In summary, in seeking to evade liability through § 314, the defendants are caught on the horns of a dilemma: either they must argue (as they have elsewhere) that § 314 is retroactive, contrary to its plain terms, its legislative history, and all the relevant rules of statutory construction, or (as they now argue) they must deny that plaintiffs ever had a right to full funding in the first place. Recognizing the futility of the first position, they now jump to the second

⁴ The only attempt by defendants on this score is their invocation of the “unmistakability doctrine” to argue that § 314 does not constitute a “taking” under the Fifth Amendment. As discussed below, the doctrine is not applicable in this or any other case involving a purported direct repudiation of a contract right for the purpose of saving the government money. *Infra* at 10-12.

⁵ The government is also obligated to honor a statutory right to full payment for work performed under the statute. Pls. Decl. J. Br. at 15-16, citing *United States v. Larionov*, 431 U.S. 864, 879 (1977). Nowhere in their brief do the defendants address this point or the relevant cases.

without appreciating the ramifications of doing so. The government's position, based on a fundamental misreading of the ISDA and an outright dismissal of the relevant legal authority, is not the loophole they seek but just another dead-end.

B. The “Unmistakability” Doctrine Does Not Excuse the Government’s Liability for Full Funding of Contract Support Costs in this Case.

In arguing that § 314 is not a “taking,” the defendants invoke the “unmistakability doctrine” applied in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 54-55 (1986).⁶ Gov’t Opp. Br. at 35-38. As explained by the Supreme Court in *Winstar*, under this doctrine “a contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power.” *Winstar*, 518 U.S. at 878. But the Court cautioned in both *Winstar* and *Bowen* (as do the courts in the other cases cited by the defendants) that the “sovereign power” referred to is *not* a power to “repudiate its own debts . . . simply in order to save money.” *Bowen*, 477 U.S. at 55; *Winstar*, 518 U.S. at 878-79 n.22 (“‘Sovereign power’ as used here must be understood as a power that could otherwise affect the

⁶ In raising this argument, the defendants fundamentally misconstrue the plaintiffs’ position. The plaintiffs do *not* argue that § 314 is a taking, but rather that construing it as extinguishing plaintiffs’ right to full contract support funding would raise the constitutional issue and should thus be avoided (if possible). Pls. Decl. J. Br. at 13-16. In fact, in the balance of our opening brief the plaintiffs argue that § 314 could *not* be a taking because, according to its plain language and legislative history, it has *no effect* on the plaintiffs’ rights and is merely a limitation on the agency’s authority to spend certain appropriations. *Id.* at 2-12, 16. If the court agrees, it never reaches the unmistakability doctrine, which would only come into play in the first place if § 314 somehow impaired the plaintiffs’ rights.

Government's obligation under the contract. The Government could not, for example, abrogate one of its contracts by a statute abrogating the legal enforceability of that contract, government contracts of a class including that one, or simply all government contracts.”); *see also id.* at 916 (Breyer, J., concurring) (doctrine does not prevent courts from inferring a narrow promise “not to abrogate . . . the very right that a sovereign explicitly granted by contract”); *see also Housing Auth. of Fort Collins v. United States*, 980 F.2d 624, 629 (10th Cir. 1992) (same); *Rhode Island Higher Educ. Assistance Auth. v. Secretary, United States Dep’t of Educ.*, 929 F.2d 844, 850 (1st Cir. 1991) (same); *Peterson v. United States*, 899 F.2d 799, 808 n. 16 (9th Cir. 1990) (same).⁷

In this case (according to defendants) the *entire* effect of § 314 is to release the government from its own contractual obligations for no reason other than to save the government money. Gov’t Opp. Br. 17-19. The statute—a one sentence rider attached to an unrelated appropriations measure and directed exclusively at the government’s contracts—is thus the antithesis of the type of regulatory act upheld in *Bowen* and similar cases. *See Bowen*, 477 U.S. at 55 (“the provision [at issue] simply was *part of a regulatory program* over which Congress retained authority to amend in the exercise of its *power to provide for the general welfare*”) (emphasis added). For example, the statute considered—and nonetheless still rejected—as a defense in *Winstar* “made enormous changes in the structure of federal thrift regulation,” 518 U.S. at

⁷ These cases are also inapplicable for the more fundamental reason that in each one Congress expressly amended the underlying statutory authority for the contracts. *Bowen*, 477 U.S. at 45; *Housing Auth. of Fort Collins*, 980 F.2d at 626; *Rhode Island Higher Educ. Assistance Auth.*, 929 F.2d at 848; *Peterson*, 899 F.2d at 801. Here, the defendants themselves deny that § 314 amends or repeals any portion of the ISDA at all (or the parties’ ISDA contracts). They thus fail to explain why the Court need consider the unmistakability doctrine in the first place.

(Rehnquist, C.J., dissenting), occupied “372 pages in the Statutes at Large, and under 12 substantive titles contain[ed] more than 150 numbered sections,” *id.* and was “[en]acted to protect the public,” *id.* at 903 (majority opinion). Here, far more than in *Winstar*, to the extent the defendants are correct that Congress in § 314 specifically intended to prevent the plaintiffs from asserting their statutory and contractual rights, any reliance on the unmistakability doctrine necessarily fails.⁸

C. Nothing in § 314 or Any Other Statute Prevents The Court From Awarding The Plaintiffs Damages.

1. The Award of Money Damages Is Not “Otherwise Provided For” Under the Judgment Fund Statute.

The defendants claim that damages in this case may not be paid from the Judgment Fund because such damages are “otherwise provided for” under 31 U.S.C. § 1304(a)(1). As an initial matter, this issue is irrelevant to the question of the government’s liability. Even if damages could not be paid from the Judgment Fund, the plaintiffs could still seek an appropriation from Congress based on a judgment against the government, just as judgment creditors did prior to the

⁸ The defendants go so far as to claim that “to restrict Congress’ power to enact legislation that would alter contract rights would affect its ability to determine how many resources to devote to a particular problem or program.” Gov’t Opp. Br. at 37. This stunning proposition proves far too much, and would leave Congress free to repudiate any contract—whether for paper clips, jet fighters, or IHS programs—whenever it chooses, “produc[ing] the untoward result of compromising the Government’s practical capacity to make contracts, which [is] ‘of the essence of sovereignty’ itself.” *Winstar*, 477 U.S. at 884 quoting *United States v. Bekins*, 304 U.S. 27, 51-52 (1938). Not surprisingly, the defendants support the foregoing statement only with cases that do not involve contractual or statutory rights. *National Juvenile Law Center, Inc. v. Regnery*, 738 F.2d 455, 464 (D.C. Cir. 1984) (no right to continuation of a grant); *Walker v. Dep’t of Housing and Urban Dev.*, 912 F.2d 819, 829 (5th Cir. 1990) (no right to funding not required by consent decree).

establishment of the Judgment Fund. *See To the Director, Tort Branch Civil Division, Dep't of Justice*, B-251061.2, 1993 WL 58276, *1 (Pls. Exh. 87).

The government's argument also turns the law upside down. It is true that when Congress has created a special fund or appropriated money specifically to pay for a judgment or class of judgments, *see, e.g.*, 28 U.S.C. § 1324 (creating a permanent indefinite appropriations for tax refunds), the availability of the special fund or the specific appropriation for a judgment or class of judgments may bar use of the Judgment Fund.⁹ But this rule must not be confused with the more fundamental rule, often stated by the Comptroller General (including in the opinions cited by defendants), that *damage awards may not be paid from agency appropriations*. *To the Director, Tort Branch Civil Division, Dep't of Justice*, 1993 WL 58276 *1 (Pls. Exh. 87). The Comptroller General has explained this "longstanding *restriction* on the use of appropriated funds to pay judgments" as follows:

Under a rule established by the Comptrollers of the Treasury, *agency appropriations are not, as a general proposition, available to pay litigative awards*. *See, e.g.*, 1 Comp. Gen. 540 (1922); 8 Comp. Dec. 261, 262 (1901); 8 Comp. Dec. 145, 149 (1901). Tha

⁹ In one case, the Comptroller General considered a hypothetical in which Congress would specifically appropriate some but not all of the funds necessary to pay final judgments against the government under the Price-Anderson Act, 42 U.S.C. § 2210. *To the Chairman, Senate Subcommittee on Nuclear Regulation*, B-197742, 1986 WL 63966 *6 (Aug. 1, 1986) (Pls. Exh. 86). Under such a scenario, the Comptroller General opined that "[i]f it were reasonably clear from the circumstances surrounding the 'partial appropriation' that Congress viewed the appropriations process as the appropriate vehicle for paying these claims, we would be inclined to view the judgment appropriation as not available." *Id.* However, the Comptroller General also made clear that in the *absence* of an appropriation specifically to pay the judgments against the government, or any indication that Congress intended to pay the judgments through specially appropriated funds, "final judgments obtained against the United States would appear to be payable from the judgment appropriation." *Id.*

rule rendered the appropriations that fund most agencies legally unavailable to pay such awards. Thus, in most cases, even where Congress had waived sovereign immunity from suit, the resulting judgments could not be paid unless the Congress specifically appropriated funds for that purpose. 69 Comp. Gen. 40, 42 (1989); 66 Comp. Gen. 157, 159 (1986). Congress solved this problem by establishing a permanent, indefinite appropriation, the Judgment Fund, and thereby eliminated the need for specific appropriations for most of the judgments (and later, compromise settlements) which had previously required specific appropriations.

Id. at *1 (emphasis added); *accord* B-197742, 1986 WL 63966 (Pls. Exh. 86); *accord Matter of: The Judgment Fund and Legislative Awards under [CERCLA]*, 73 Comp. Gen. 46, 48, 1993 WL 505822 (1993) (Pls. Exh. 88). As the *Shoshone-Bannock* court held in unequivocally rejecting the precise argument raised again here, the payment of a judgment against the government for money damages is not “otherwise provided for” under the terms of the judgment fund statute.¹⁰ *Shoshone-Bannock III*, 1999 WL 562715, at *12 (Pls. Exh. 83).

2. Section 314 Does Not Moot Plaintiffs’ Claims.

The defendants argue briefly that § 314 has “rendered plaintiffs’ claim moot” because those claims “cannot be redressed.” Gov’t Opp. Br. at 29. This odd assertion appears to be based on the erroneous assumption that the plaintiffs are seeking a court order commanding the agency to pay its contract support cost entitlement from the agency’s appropriations for the

¹⁰ Ironically, the defendants quote from an opinion by the Office of Legal Counsel to argue that payment of damages from the Judgment Fund should not be available in this case because “[t]o hold otherwise would allow agencies ‘to avoid certain valid obligations by using the ‘back’ door of the judgment appropriations.’” Gov’t Opp. Br. at 40 (emphasis added). The defendants apparently overlook that their own argument here, which assumes “that defendants are liable,” Gov’t Opp. Br. at 39, is aimed precisely at allowing the government to “avoid” its “valid obligations.”

relevant fiscal years.¹¹ But it is plain from the face of the Amended Complaint and the briefs that the plaintiffs only seek damages, as provided for in the Contract Disputes Act and in 25 U.S.C. § 450m-1(a). *E.g.*, Pls. Decl. J. Br. at 17 (“[A]ny judgment here will be for money damages,” not for “contract support costs.”). As discussed earlier, any such damages *must* be paid from the permanent Judgment Fund, not from agency appropriations. *Supra* at 13-14. Thus, the current availability or unavailability of past or present agency appropriations for contract support costs is simply irrelevant. *Id.* citing *Shoshone-Bannock I*, 988 F. Supp. at 1315; *Shoshone-Bannock II*, 999 F. Supp. at 1397; Pls. Decl. J. Br. at 17-18 (citing cases making clear that the availability of agency appropriations does not constrain payment from the judgment fund); *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892) (holding that “insufficiency” of an appropriation “does not pay the Government’s debts nor cancel its obligations, nor defeat the rights of other parties”); *see also* Pls. Partial Summ. J. Br. at 47 (citing cases).

3. Payment of Damages from the Judgment Fund Does Not Violate the Appropriations Clause.

Finally, the defendants contend that awarding relief in this case would violate the Appropriations Clause, art. I, § 9, cl. 7, of the United States Constitution. Gov’t Opp. Br. at 30-31. This issue, like the defendants’ claim that the Judgment Fund is not available to pay plaintiffs’ damages, once again misses the mark because it does not go to the government’s liability, but

¹¹ Alternatively, the defendants may be arguing obliquely that § 314 somehow bars payment from the Judgment Fund that otherwise would be available. If so, this argument fails because the plain terms of § 314 address only the use of agency appropriations, not Judgment Fund appropriations. *Shoshone-Bannock III*, 1999 WL 562715, at *11 (Pls. Exh. 83) (“Nothing in [§ 314’s] terms or its legislative history reveals that Congress intended to limit the ability of the courts to award money damages under 25 U.S.C. § 450m-1”); *see also* Pls. Decl. J. Br. at 17-18.

only to how the plaintiffs will satisfy any judgment this Court may award.

Furthermore (and as just explained), the question of agency appropriations is irrelevant because any damages awarded will (and by law must) be paid from the permanent Judgment Fund, which is duly appropriated by Congress in accord with the Constitution. In the very case relied on by defendants, *Office of Personnel Management v. Richmond*, the Supreme Court explained that an award of damages may be paid from the Judgment Fund “on the basis of judgment based on a substantive right to compensation based on the express terms of a specific statute.” 496 U.S. 414, 432 (1990). As the *Shoshone-Bannock* court held in rejecting this very argument, the plaintiffs easily meet each of these conditions: they seek a payment of money damages on the basis of this Court’s judgment, based on their substantive rights to compensation under the express terms of the ISDA. *Shoshone-Bannock III*, 1999 WL 562715, at *13 (Pls. Exh. 83). Therefore, the payment of an award of money damages from the Judgment Fund cannot violate the Appropriations Clause.

IV. CONCLUSION

For the foregoing reasons, and the reasons set forth in the plaintiffs' opening brief, the plaintiffs' motion for a declaration that Section 314 does not affect the plaintiffs' claims to money damages asserted in this action, should be granted.

Respectfully submitted this 19th day of October 1999.

Lloyd Benton Miller, Esq., Lead Counsel
William R. Perry, Esq.
John Lowndes, Esq.
Devin Odell, Esq. Of Counsel
Sonosky, Chambers, Sachse, Miller & Munson
900 West Fifth Avenue, Suite 700
Anchorage, Alaska 99501
(907) 258-6377

Weldon Stout, Esq.
Wright, Stout, Fite & Wilburn
300 West Broadway, Suite A
P.O. Box 707
Muskogee, Oklahoma 74402-0707
(918) 682-0091
Attorneys for Plaintiffs

I hereby certify that I mailed,
or caused to be mailed, a true and
correct copy of the foregoing document
to the following attorneys of record
on the 19th day of October 1999:

Lisa A. Olson, Esq.
Sheila M. Lieber, Esq.
United States Department of Justice
Civil Division
901 E Street NW, Room 104
Washington, D.C. 20530

Lloyd Benton Miller, Esq.