

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

CHEROKEE NATION OF OKLAHOMA; and )  
SHOSHONE-PAIUTE TRIBES OF THE )  
DUCK VALLEY RESERVATION, on behalf )  
of themselves and all others )  
similarly situated, )  
 )  
Plaintiffs, )  
 )  
v. ) Civil Action No. CIV99-092-S  
 )  
UNITED STATES; 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 of Health and Human )  
Services, )  
 )  
Defendants. )  
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**DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

Plaintiffs' semantic gymnastics cannot erase the plain declaration in the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n ("Act"), and plaintiffs' own self-determination contracts that those contracts are subject to the availability of appropriations, see Def. SJ Memo.<sup>1</sup> at 40-44, even in the absence of the statutory funding cap established by Section 314, Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, Sec. 314, 112 Stat. 2681, 2681-288 (1998) (see Exhibit A, Def. SJ Memo.). And as defendants have already shown, no appropriations are in fact "available" to satisfy plaintiffs' demands for additional contract support costs: IHS can only supply plaintiffs such costs by deducting funding from programs that serve other Tribes and individual Indians, thereby violating IHS' responsibility with respect to them. See Def. SJ Memo. at 44-52.

Similarly, the flood of paper with which plaintiffs have deluged the Court, while perhaps distracting, offers plaintiffs no escape from the straightforward command of Section 314. That statute definitively prescribes that no further appropriations

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<sup>1</sup> Memorandum in Support of Defendants' Motion for Summary Judgment, and in Opposition to Plaintiffs' Motions for Summary Judgment (hereinafter "Def. SJ Memo.").

are available to pay for plaintiffs' fiscal year 1996 and 1997 contract support costs for their new and expanded programs ("new" contract support costs) undertaken in those years, and it thereby moots their claim. See Def. SJ Memo. at 27-30.

In their most recent series of briefs,<sup>2</sup> plaintiffs argue that defendants' alleged duty to disburse contract support cost funding is subject to the availability of appropriations, but their alleged liability for full contract support costs is subject to no limitation. This manufactured distinction is at odds with the decisions of two United States Court of Appeals, which have now ruled unqualifiedly that despite a Tribes' claim that it is entitled to funds under the Act, "if the money is not available, it need not be provided." Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't, 1999 WL 974155, at \*4 (Fed. Cir. 1999),

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<sup>2</sup> The following conventions will be used for plaintiffs' briefs:

Plaintiffs' Opposition to Defendants' Cross-Motion for Summary Judgment ("Pl. Opp");

Plaintiffs' Reply Memorandum in Support of Motion for Partial Summary Judgment of Liability on the First and Second Causes of Action ("Pl. 1st Reply");

Plaintiffs' Reply Memorandum in Support of Motion for Declaratory Judgment (Third Cause of Action) ("Pl. 3rd Reply").

citing Ramah Navajo Sch. Bd., Inc. v. Babbitt, 87 F.3d 1338, 1345 (D.C. Cir. 1996). Moreover, plaintiffs ignore the fact that no appropriations are available to pay for the additional contract support costs for their new and existing programs, nor were such appropriations available during 1996 and 1997. Defendants' annual appropriation is largely pre-obligated to pay for Indian health care program costs that recur automatically every year (including renewal of self-determination contracts) and whose funding cannot legally be reduced. The remainder of the appropriation is used for functions that directly benefit other contracting and noncontracting Tribes or individual Indians, or for functions that remain the exclusive province of IHS (e.g., providing direct health care services to noncontracting Tribes, reviewing proposed self-determination contracts for contracting Tribes, etc.). A reduction in funding for those programs could seriously jeopardize their viability and would thereby impair IHS' ability to discharge its responsibilities to the other Tribes and individuals, in violation of the prohibition against doing so.

Relying on convoluted logic and a nonbinding, erroneous decision by another court, plaintiffs also contend that interpreting Section 314 to limit or reduce prior appropriations

available to pay contract support costs will in the future induce IHS to withhold payments it is otherwise obligated to make on the chance that it can persuade Congress to enact a law excusing its alleged wrongdoing. Aside from posing an extremely improbable scenario, plaintiffs' argument misconstrues Section 314, which prospectively prohibits the use of any funds beyond those already appropriated or earmarked in Congressional Committee Reports to pay for new contract support cost shortfalls in fiscal years 1996 and 1997. It therefore provides no alleged incentive for IHS to hoard its already appropriated funding for those years (all of which has been spent anyway) in order to avoid alleged obligations.

For these reasons, as set forth more fully below, defendants' motion for summary judgment should be granted, and plaintiffs' motions for summary judgment should be denied.<sup>34</sup>

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<sup>3</sup> Plaintiffs have submitted a chart constituting plaintiffs' "reply" to defendants' statement of undisputed facts. See Plaintiffs' Exhibit ("Pl. Exh.") 69. Defendants have already set forth all material facts as to which no genuine issue exists, on the basis of which defendants are entitled to judgment as a matter of law. See Defendants' Statement of Undisputed Material Facts. Nothing in plaintiffs' chart disputes the material facts necessary to such a decision. Indeed, plaintiffs' "responses" consist largely of legal arguments which should more appropriately have been included in plaintiffs' voluminous briefs.

Plaintiffs have also filed a class "Response" to defendants'

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statement of material facts. See Pl. Exh. 70. Since no class has yet been certified in this case, the submission is irrelevant and should be disregarded. Defendants soon intend to file a motion for this Court to resolve the class certification issues prior to ruling on the merits, on the ground that the Court is required to rule on class certification "as soon as practicable after the commencement of an action brought as a class action." Fed. R. Civ. P. 23(a)(1); see Eisen v. Carlisle & Jacqueline, 417 U.S. 156 (1974); Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270, 273-74 (10th Cir. 1977). To the extent this submission becomes relevant to these proceedings, defendants reserve the right to respond as appropriate.

ARGUMENT

**I. JUDICIAL REVIEW IN THIS CASE IS GOVERNED BY THE  
ADMINISTRATIVE PROCEDURE ACT<sup>5</sup>**

This Court has original jurisdiction over the present case pursuant to the Indian Self-Determination Act, which confers original jurisdiction "over any civil action or claim against the appropriate Secretary arising under this subchapter [dealing with self-determination] . . . ." 25 U.S.C. § 450m-1(a).<sup>6</sup> Because the Indian Self-Determination Act does not specify any standard

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<sup>5</sup> In this brief defendants address arguments that plaintiffs included in their reply briefs but which, as plaintiffs themselves indicate, overlap with arguments in their opposition brief. See Pl. 1st Reply at 4 n.4. For example, in their motion for summary judgment defendants first asserted that the Administrative Procedure Act standard of review governs this case. Def. SJ Memo. at 25. In rebutting that assertion, plaintiffs' contend that the Contract Disputes Act establishes the standard of review, see Pl. 1st Reply at 5-11, an argument that should more appropriately have been included in plaintiffs' opposition rather than their reply brief. Hence, defendants address plaintiffs' argument here.

<sup>6</sup> The Indian Self-Determination Act provides as follows: "The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter." 25 U.S.C. § 450m-1(a).

Subsection (d), 25 U.S.C. § 450m-1(d), provides that "[t]he Contract Disputes Act . . . shall apply to self-determination contracts . . . ."

of review, the narrow APA standard applies.<sup>7</sup> See United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963); Sierra Club v. Glickman, 67 F.3d 90, 96 (5th Cir. 1995); Tribal Village of Akutan v. Hodel, 869 F.2d 1185, 1193 (9th Cir. 1988); Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 685 (D.C. Cir. 1982); see also Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 619 n.17 (1966). Three other district courts have recently held that the APA standard of review applies in actions under the Indian Self-Determination Act. See Suquamish Tribe v. Deer, No. C96-5468RJB (W.D. Wash., Sept. 2, 1997) (attached as Exhibit J); California Rural Indian Health Bd. v. Shalala, No. C-96-3526 (N.D. Cal., April 24, 1997) ("CRIHB") (attached as Exhibit K); Yukon-Kuskokwim Health Corp. v. Shalala, No. A-96-155CV (D. Alaska, April 15, 1997) (attached as Exhibit L).<sup>8</sup>

Plaintiffs erroneously claim that the standard of review in this case is de novo because they have sued under the Contract Disputes Act. Reply 1st at 5. Plaintiffs have apparently

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<sup>7</sup> Under the APA, 5 U.S.C. § 706(2)(A), the Court must uphold an agency decision unless plaintiffs can show that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-14 (1971).

<sup>8</sup> An unpublished opinion may be cited if it has persuasive value with respect to a material issue, and if a copy is attached to the brief in which it is cited. Citation of Unpublished Opinions/Orders and Judgments, 151 F.R.D. 470 (10th Cir. 1993).

invoked the Contract Disputes Act because, besides conferring original jurisdiction on United States District Courts as described above, the Indian Self-Determination Act also confers jurisdiction on a United States District Court over claims for money damages, after certain administrative remedies provided by the Contract Disputes Act have been exhausted. 25 U.S.C. § 450m-1(a), (d). However, plaintiffs in the instant case are not actually seeking money damages resulting from a breach of their contracts. Rather, they are simply requesting additional contract support funding to which they are allegedly entitled under those contracts and the Indian Self-Determination Act. See First Amended Complaint ¶¶ 45, 48 ("[D]efendants have failed and refused to meet their contractual obligations by refusing to pay all contract support costs required to be paid under [plaintiffs' Compacts]"; id. ¶¶ 54-55 ("The failure and refusal of the defendants to pay the [plaintiffs] full contract support costs associated with all IHS programs . . . is a violation of the [Indian Self-Determination Act] statutory requirements").

In Bowen v. Massachusetts, 487 U.S. 879 (1988), the Court drew a distinction between a claim for money damages to compensate an injury and a claim like the present one for specific relief that would require the payment by the federal

government of money otherwise allegedly due. The Court explained that "[d]amages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." Id. at 895 (internal quotations omitted).

Plaintiffs are actually seeking an injunction enforcing defendants' alleged contractual and statutory obligation to pay sums allegedly due. Indeed, this case involves the question of whether defendants have properly interpreted the Indian Self-Determination Act rather than a dispute over how much they owe in alleged damages, so a de novo trial would be inappropriate. As the Court stated in Bowen, "[this] is not a suit seeking money in compensation for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce the [alleged] statutory mandate itself, which happens to be one for the payment of money." Id. at 900; see also id. at 893 (citing Joyce v. Davis, 539 F.2d 1262, 1265 (10th Cir. 1976) (Action was equitable where the court ordered specific performance of a promise to pay a money bonus under a royalty contract)); S. Rep. No. 100-274, at 34 (1997), reprinted in 1988 U.S.C.C.A.N. 2620, 2653 ("Under [25 U.S.C. § 450m-1], a tribal

contractor may secure relief in the United States District Courts, including orders that require the offending agency to pay amounts required by the plaintiff's contract") (emphasis added). Since plaintiffs' claim cannot properly be characterized as a suit for money damages, the Contract Disputes Act does not apply.<sup>9</sup>

Even if plaintiffs' claim were properly one for money damages, the de novo standard of review set forth in the Contract Disputes Act would not apply, since that standard only applies to suits brought in the Claims Court. 41 U.S.C. § 609(a)(3). The Indian Self-Determination Act provides for appeal of the contracting officer's decision to the United States District Court. 25 U.S.C. § 450m-1(a). However, neither the Contract Disputes Act nor the Indian Self-Determination Act specify any standard of review for District Court actions. Therefore, once again, the Administrative Procedure Act provides the correct

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<sup>9</sup> The absence of a claim for money damages in this case defeats plaintiffs' argument that their award of money damages must be paid from the Judgment Fund, since damage awards allegedly may not be paid from agency appropriations. Pl. 3rd Reply at 13. It similarly defeats plaintiffs' contentions that Section 314 does not render moot their claim for money damages, Pl. 3rd Reply at 15, and that awarding them money damages would not violate the Appropriations Clause, id. at 16.

standard of review.<sup>10</sup> United States v. Carlo Bianchi & Co., 373 U.S. at 715; Sierra Club v. Glickman, 67 F.3d at 96; Tribal Village of Akutan v. Hodel, 869 F.2d at 1193; Cabinet Mountains Wilderness v. Peterson, 685 F.2d at 685.

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<sup>10</sup> Plaintiffs cite Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala, 988 F. Supp. 1306 (D. Or. 1997), in support of their argument that they are entitled to de novo review. Pl. 1st Reply at 7. However, the Magistrate's decision rested on the flawed assumption that IHS' alleged failure "to pay [plaintiffs] contract support costs," 988 F. Supp. at 1312, constituted money damages and that the case was subject to the Contract Disputes Act, id. at 1315.

Moreover, contrary to the decision in Shoshone, see 988 F. Supp. at 1314, two of the other district courts that have addressed the language of the two statutes rejected the notion that the mere use of the term "civil action" in 25 U.S.C. § 450m-1 denoted de novo review. CRIHB, slip op. at 5; Yukon, slip op. at n.5. In doing so, they distinguished the holding in Chandler v. Roudebush, 425 U.S. 840 (1976), on which the Magistrate (and the instant plaintiffs, see Pl. 1st Reply at 10) erroneously relied. CRIHB, slip op. at 5 (In Chandler, Congress indicated a clear desire to create de novo rights of action); Yukon, slip op. at n.5 (In Chandler, other terms besides "civil action," such as "assign the case for hearing" and "schedule . . . for trial," were indicative of trial de novo).

Finally, in Shoshone, the Magistrate erroneously concluded that the legislative history of the Indian Self-Determination Act called for de novo review. 988 F. Supp. at 1315-16; see CRIHB, slip op. at 11 ("Congress clearly knows how to make this intention [to require de novo review] plain, and its failure to do so in this case must be read as an intention not to"); Yukon, slip op. at 10 ("Given the rather detailed discussion in the legislative history of just what Congress wanted to accomplish with its new provision for judicial review, Congress' failure to set out a desire for de novo review leads this court to conclude that it was not one of Congress' objectives").

Plaintiffs cite Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1462 (10th Cir. 1997), for the proposition that the canon of construction favoring Native Americans controls over the "more general rule of deference to agency interpretations of ambiguous statutes" and thereby justifies de novo review. Pl. 1st Reply at 6. Assuming, arguendo, that the Indian Self-Determination Act is ambiguous, which it is not, that canon of construction is effectively neutralized in the present case, where favoring plaintiffs by awarding them the full contract support costs they seek would require a reduction in funding for other contracting and noncontracting Tribes.<sup>11</sup> Declaration of Carl L. Fitzpatrick ("Fitzpatrick Dec.") ¶¶ 17-19 (Def. SJ Memo. Exhibit E); see 25 U.S.C. § 450j(g) ("[T]he Secretary shall not make any contract which would impair his ability to discharge his trust responsibilities to any Indian tribe or individuals"); Lincoln v. Vigil, 508 U.S. 182, 195 (1993) (The "Federal Government does have a fiduciary obligation to the Indians; but it is a fiduciary obligation that is owed to all Indian tribes") (internal quotations omitted).

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<sup>11</sup> Ramah Navajo is relevant to the present case, however, insofar as it acknowledged the "general rule of deference" to agency statutory interpretations in district court proceedings. Ramah Navajo, 112 F.3d at 1462.

In any event, defendants have demonstrated that Section 314, the Indian Self-Determination Act, and plaintiffs' own contracts clearly bar the payment of plaintiffs' claims for contract support costs, and "[t]he canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 505-06 (1986); Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't, 1999 WL 974155, \*4.

**II. THE INDIAN SELF-DETERMINATION ACT EXPRESSLY LIMITS IHS' ALLEGED LIABILITY FOR CONTRACT SUPPORT COSTS TO AVAILABLE APPROPRIATIONS**

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Plaintiffs argue that the fact that contract support costs are "subject to the availability of appropriations" limits only the Secretary's alleged ministerial duty to disburse funds but not her ultimate alleged liability for full contract support costs. Pl. 1st Reply at 3, 13. This fabricated distinction finds no foundation in the law. Two United States Courts of Appeals have now held that "[t]he language of [25 U.S.C.] § 450j-1(b) is clear and unambiguous; any funds provided under an ISDA contract are 'subject to the availability of appropriations.'" Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't, 1999 WL 974155,

at \*3 (also reversing the decision of the Interior Board of Contract Appeals in Alamo Navajo Sch. Bd., Inc. and Miccosukee Corp., IBCA 3560-3562); Ramah Navajo Sch. Bd., Inc. v. Babbitt, 87 F.3d at 1345. Neither court drew any distinction between the Secretary's alleged ministerial duty to disburse available funds and her alleged liability for full contract support costs. Rather, both courts simply held "that despite a tribe's claim that it is entitled to the funds under the ISDA, if the money is not available, it need not be provided." Oglala,<sup>12</sup> 1999 WL 974155, at \*4 (emphasis added), citing Ramah Navajo, 87 F.3d at 1345. The Federal Circuit's discussion of its agreement with this conclusion by the D.C. Circuit in Ramah Navajo exposes

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<sup>12</sup> In Oglala, the plaintiff tribal organization claimed entitlement to all of its contract support costs on its 1995 fiscal year self-determination contracts with the Department of the Interior. 1999 WL 974155, at \*1. Interior had provided only a portion of the contract amount for such costs due to a shortage in congressional appropriations. Id. In Oglala, Congress had established a statutory cap on Department of the Interior payments for contract support costs in 1995. Id.

However, the distinction between a statutory cap and an earmark like the one in the present case has no bearing on the court's holding in Oglala that according to the "clear and unambiguous" statutory and contractual language, IHS need not provide - [and is not liable for] - funds under a self-determination contract in the absence of available appropriations. See Oglala, 1999 WL 974155, at \*3. Oglala also established that a statutory funding cap - like Section 314 - places a legal limitation on what appropriations may be deemed "available."

plaintiffs' patent misinterpretation of that case and distortion of its holding.<sup>13</sup> See Oglala, 1999 WL 974155, at \*4 ("[T]he D.C. Circuit found the language of § 450j-1(b) as clear as we do"); Pl. 1st Reply at 19-20; cf. Def. SJ Memo. at 41.

Plaintiffs argue that Congress used the term "the provision of funds" in the 106(b) proviso, 25 U.S.C. § 450j-1(b), because it did not intend to refer to the "amount of funding." Pl. 1st Reply at 14. A more plausible explanation for Congress' choice of terminology is that it intended to leave to the parties' discretion the amount of funding that could be negotiated into each contract but was careful to ensure through the "subject-to-the-availability-of-appropriations" clause that the amount for which IHS would be liable did not exceed actual appropriations. Furthermore, plaintiffs fail to account for the fact that other sections of the Act use the term "amount" in the same context as the term "provision" was used in the section they cite. See 25 U.S.C. §§ 450j(c) ("The amounts of such contracts shall be subject to the availability of appropriations") (emphasis added); 450l(b)(4) ("Subject to the availability of appropriations, the

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<sup>13</sup> Moreover, plaintiffs' suggestion that Congress intended for the Secretary to pay what contract support costs could be funded every year but otherwise allow the annual shortfalls to accumulate indefinitely and create an ever mounting debt that IHS could never realistically expect to pay is illogical.

Secretary shall make available to the Contractor the total amount specified in the annual funding agreement . . . .") (emphasis added); see also Oglala, 1999 WL 974155, at \*3 (citing the above provisions).

Plaintiffs' continued reliance on New York Airways, Inc. v. United States, 369 F.2d 743 (Cl. Ct. 1966), for the notion that the Indian Self-Determination Act affirmatively requires the government to enter into contracts for a specified amount of contract support and to be held liable for that amount regardless of appropriations, Pl. 1st Reply at 24-25, is misguided. The court in Oglala rejected a similar misinterpretation and misapplication of New York Airways. Oglala, 1999 WL 974155, at \*4. It explained that New York Airways involved a situation in which the government, as a contracting party, had an unqualified contractual obligation for which it had simply failed to appropriate money and pay. Oglala, 1999 WL 974155, at \*4. According to the court, that situation was fundamentally different from one like the present, where the agency's ability to bind the Government contractually was expressly conditioned, by statute and contract, on the availability of appropriations. Id.; see Def. SJ Memo. at 43.

Moreover, plaintiffs' assertion that New York Airways

"involved obligations incurred under authorizing statutes that expressly restricted an agency's ministerial duty to pay contractual obligations in excess of Congressional appropriations, in language similar or identical to that used in the ISDA," Pl. 1st Reply at 24, is a misrepresentation of that case. The statute in New York Airways did not indicate that the government's payments were "subject to the availability of appropriations," like the instant case, but merely that the government should "make payments out of appropriations." New York Airways, 369 F.2d at 745.

As defendants have already shown, Def. SJ Memo. at 42-43, none of the cases cited by plaintiffs for the argument that the government is liable for full contract support costs involved a situation in which a federal statute (*i.e.*, the Indian Self-Determination Act) expressly restricted the government's authority to pay contractual obligations in excess of appropriations. *See, e.g., Train v. City of New York*, 420 U.S. 35 (1975); Healy Co. v. United States, 576 F.2d 299 (Cl. Ct. 1978); New York Airways, Inc. v. United States, 369 F.2d 743 (Cl. Ct. 1966); Gibney v. United States, 114 Ct. Cl. 38 (1949); Ferris v. United States, 27 Ct. Cl. 542 (1892). Despite their misleading denial of this fact, Pl. 1st Reply at 23-24,

plaintiffs have not, and cannot, cite any specific statutory language in those cases that contains such an express restriction.<sup>14</sup> Thus, the holdings in Sutton v. United States, 256 U.S. 575, 579 (1921), and Shipman v. United States, 18 Ct. Cl. 138, 146-47 (1883), apply and compel the conclusion that, given the express statutory injunction that all funding of contract support costs shall be subject to the availability of appropriations, 25 U.S.C. §§ 450j(c)(1), 450j-1(b), IHS is not liable beyond the limits of available funds.

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<sup>14</sup> Plaintiffs' citation to District of Columbia v. Potomac Elec. Power Co., 402 A.2d 430 (D.C. 1979), is unavailing. Pl. 1st Reply at 24. That case merely involved an appropriations act prohibiting the city's use of appropriations for the payment of electrical costs at rates higher than two cents per hour. 402 A.2d at 433. At issue was whether this statutory limitation could take precedence over the statutory authority of the utility company to fix and charge the city higher rates. For a variety of reasons wholly irrelevant to the present case, the court upheld the jurisdiction of the utility company to charge higher rates and the obligation of the city to pay them. Id. at 436-39.

The other authority that plaintiffs cite, Pl. 1st Reply at 23-24, is merely an opinion letter from the Comptroller General to a House Committee regarding an unrelated boating safety statute. This letter is neither relevant nor binding, and it concerns neither a set of facts nor a legal controversy which would even render it informative to this Court.

### **III. NO APPROPRIATIONS ARE "AVAILABLE" TO PAY ADDITIONAL CONTRACT SUPPORT COSTS**

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Plaintiffs' argument that defendants' lump-sum appropriation for fiscal years 1996 and 1997 is available to pay plaintiffs full contract support costs is without merit. See Pl. 1st Reply at 27-35. As defendants have already shown, see Fitzpatrick Dec. ¶¶ 9-15 (Def. SJ Memo. Exhibit E), most of IHS' annual appropriations are distributed to Area Offices for the payment of recurring costs, i.e., costs that automatically recur from year to year and that must be funded without reduction. Id. at ¶ 10. Once IHS enters into a self-determination contract with a Tribe, it is legally prohibited from reducing the funding for that contract in subsequent years (with certain inapplicable exceptions), 25 U.S.C. § 450j-1(b), so the costs "recur" every year. Similarly, IHS is obligated to provide funding to programs that it operates directly for the benefit of noncontracting Tribes on the same basis as it provides funding for Tribes with self-determination contracts. 25 U.S.C. § 1680a. Thus, it also cannot reduce funding from year to year for those programs. Id. In the same vein, if IHS increases funding for self-determination contracts as a result of cost-of-living adjustments, IHS must provide corresponding increases in the funding of programs benefitting noncontracting Tribes. Id. As a result of these

legal constraints, the bulk of IHS appropriations (\$1.3 billion out of \$1.8 billion in 1996, and \$1.3 billion out of \$1.7 billion in 1997, Fitzpatrick Dec. ¶ 10) are available only to pay recurring costs.

The remainder of IHS' total annual lump-sum appropriation is used in part to pay for nonrecurring costs associated with Headquarters functions that are essential to IHS' ability to operate Indian health programs and that cannot be subject to contracting in any event. See 25 U.S.C. §§ 450f(a)(1), 450j-1(a)(1); Fitzpatrick Dec. ¶ 11. In addition, it pays for administrative support functions for all Tribes or unanticipated program expenses that arise in Area Offices during the course of the fiscal year. Fitzpatrick Dec. ¶ 11. Only a negligible amount of IHS' annual appropriations is unobligated, and it is not known to exist until the end of the fiscal year, after which it is spent to balance the accounts for that fiscal year. Id. ¶ 16.

Plaintiffs' contention that IHS has ample funds to pay plaintiffs Cherokee and Shoshone an additional total of \$6.9 million and to pay the purported class members an additional \$125 million in contract support costs for fiscal years 1996 and 1997 is therefore unfounded. See id. ¶¶ 18-19; Complaint ¶¶ 14-15,

18-19, 31-32. IHS could not divert any of its annual appropriations to pay plaintiffs' contract support costs without impairing its ability to discharge its responsibilities with respect to other Tribes and individual Indians. See 25 U.S.C. § 450f, Sec. 303(a)(7); 450j(g). Indeed, a \$131.9 million reduction in funding could severely cripple or even eradicate many health programs serving other Tribes or individual Indians. See Fitzpatrick Dec. ¶¶ 18-19.

In any event, IHS is not required to reduce funding for programs, projects, or activities serving a Tribe to make funds available to another Tribe or Tribal organization to fund their self-determination contracts. 25 U.S.C. §§ 450f, Sec. 306; 450j-1(b). Thus, it is under no obligation to withdraw funding from any of programs now serving other Tribes or individuals in order to supplement plaintiffs' self-determination contracts.<sup>15</sup> The

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<sup>15</sup> Plaintiffs argue that Congress intended Tribes to receive full contract support costs but that insufficient funds have been appropriated simply because IHS failed to request sufficient funding to meet its alleged commitments. Pl. 1st Reply at 12 n.16. These accusations are unfounded. Although IHS' budget requests fell short of their actual needs in fiscal years 1996 and 1997 (because IHS' budget requests are required to be submitted two years before Congress appropriates the money and in any event are reduced by HHS and OMB), Congress nevertheless appropriated even less funding than IHS requested. Fitzpatrick Dec. ¶¶ 6-7. Thus, it would have been futile for IHS to request even more funding, and plaintiffs' argument is therefore moot. See Church of Scientology of Cal. v. United States, 506 U.S. 9,

Court should therefore reject plaintiffs' argument that IHS has any appropriations available to pay plaintiffs their full contract support costs.

**IV. SECTION 314 DIRECTS THAT FUNDS ALREADY APPROPRIATED ARE THE ONLY FUNDS LEGALLY AVAILABLE FOR THE PAYMENT OF NEW CONTRACT SUPPORT COSTS**

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Plaintiffs argue that Section 314 renders their alleged contractual rights unenforceable because it allows the agency to avoid any contract breach. Pl. 3rd Reply at 5-6. In support of this contention plaintiffs rely on Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala, 58 F. Supp. 2d 1191 (D. Ore. 1999), where the Magistrate reasoned that if plaintiffs' rights were merely conditional, then Section 314 would allow the Secretary to withhold payments on the gamble that Congress might enact legislation years later limiting the availability of prior appropriations and thereby saving IHS from its own alleged misdeeds. Shoshone, 58 F. Supp. 2d at 1199. This conclusion is flawed for several reasons. First, Section 314 does not immunize defendants from violating the Act or breaching their contracts. Rather, plaintiffs have an enforceable right to contract support costs as long as the express contractual and statutory condition

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12 (1992).

is met that appropriations be available. See 25 U.S.C. §§ 450j-1(b), 450j(c), 450f at Sec. 304, 4501(a)(1); Cherokee Compact (Pl. Exh. 37) at 4, Sec. 3; Shoshone Compact (Pl. Exh. 19 at 10) at 7, Sec. 3.

Second, Section 314 neither repudiates nor extinguishes plaintiffs' conditional right, but rather, reinforces it. Contrary to the scenario posed by the Magistrate in which future legislation might "limit" prior appropriations and thereby excuse a failure to pay, Shoshone, 58 F. Supp. 2d at 1199, Section 314 does nothing of the kind. Instead, it provides that aside from the funds already appropriated and available for the payment of new contract support costs, no future appropriations will be available. See Section 314 ("Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for [IHS' contract support cost payments] are the total amounts available for fiscal years 1994 through 1998 for such purposes").

Indeed, when Congress enacted Section 314 in 1998, it was aware that IHS had already exhausted its 1996 and 1997 funding for contract support costs and had even suffered a shortfall in those years. See Fitzpatrick Dec. ¶ 8 (In 1996 IHS informed Congress of a \$43,000,000 shortfall in contract support costs for that year, and in 1997 it informed Congress of an \$81,996,000

shortfall for that year). Therefore, Section 314 would have been superfluous if it were intended to target prior funding. See Walters v. Metropolitan Educ. Enters., Inc., 117 S. Ct. 660, 664 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect"); Finley v. United States, 123 F.3d 1342, 1347 (10th Cir. 1997) (same). Instead, it established that IHS could not use future funding to pay shortfalls for previous years.<sup>16</sup>

Third, the notion that IHS would routinely withhold contractual payments it was legally required to make on the gamble that it could cozen the United States Congress into passing a future law to exonerate it for having failed to fulfill its obligations is extremely far-fetched. The Court should therefore reject plaintiffs' arguments and conclude that Section 314 limits the future availability of appropriations to pay for new contract support costs under plaintiffs' self-determination contracts in fiscal years 1996 and 1997.

#### CONCLUSION

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<sup>16</sup> Plaintiffs' characterization of Section 314 as "an annual budgeting measure aimed at the agency's unexpended balances," Pl. 3rd Reply at 8 n.3, is therefore inaccurate. Section 314 would be superfluous if it were aimed only at unexpended balances. See Fitzpatrick Dec. ¶ 8. Rather, Section 314 was a directive prohibiting the agency from expending additional appropriations on contract support costs.

For the foregoing reasons, in addition to those stated in defendants' memorandum in support of their motion for summary judgment, and in opposition to plaintiffs' motions for summary judgment, defendants' motion for summary judgment should be granted, and plaintiffs' motions should be denied.

Respectfully submitted,

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Dated: Nov. 15, 1999

CERTIFICATE OF SERVICE

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