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. 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.	))))))))))))))))))	Case No. 99-092-S CIV

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

I. FACTS

The plaintiff incorporates herein Pls. Exhs. 70 & 71, constituting their Class Plaintiffs' Response to Statement of Material Facts Offered in Support of the Government's Cross-Motion for Summary Judgment and accompanying table. As noted therein, the bulk of the defendants' statement of "material facts" is instead comprised of erroneous statements of law, unsupported allegations of fact, immaterial matters, or matters involving facts peculiarly within the defendants' domain and not yet subject to the rigors of the discovery process. Although we offer Exhs. 70 & 71 to clarify all these matters, ultimately the issues presented by the defendants' motion do not turn on *any* of those alleged facts. Thus, the plaintiffs oppose summary judgmen on legal grounds, not on the presence of any disputed facts.

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 Defendants' Motion for Summary Judgment Fails as a Matter of Law Because the Plaintiffs' Right to Contract Support Costs Is Not "Conditional."

As explained in plaintiffs' partial summary judgment briefs, the defendants' position that the statutory and contractual right to contract support cost funding is "conditional" both on subsequent appropriations and on IHS's decisions regarding how to spend those

appropriations, contradicts the plain language of the ISDA, the relevant legislative history, and a the relevant authority addressing the contract support provisions in particular and government contracting and appropriations law in general–including the very cases relied on most heavily by the defendants. Pls. Partial Summ. J. Br. 31-50; Pls. Partial Summ. J. Reply Br. 11-27.

As all of these sources reflect, the ISDA and the Tribes' contracts provide the Tribes with a right to full contract support costs as determined under that Act, and the availability of appropriations limits only the agency's ability to pay down those contract support obligations–not the government's legal liability (a liability which remains subject to vindication in actions like this). Since the government's summary judgment motion is based on an erroneous legal argument, the motion must be denied.

B. In the Alternative, the Defendants' Motion For Summary Judgment Fails Because it Misconstrues as a Matter of Law When Appropriations Are "Available" to Fund Contract Support Costs.

1. All funds in a "lump sum" appropriation not specifically earmarked by statute for particular purposes are legally "available" to pay contract support cost requirements.

Even if it were true that the right to contract support funding is "conditional" on the legal availability of appropriations, the defendants cannot show that appropriations were not legally available to fully fund that right during the years focused on by defendants. As discussed elsewhere, IHS's entire lump-sum appropriation was legally "available" in those years to fund the mandatory statutory entitlement and contractual right as a matter of law. This is so because– as defendants concede–the relevant Appropriations Acts did not contain any statutory restrictions or limitations on the use of those appropriations to pay contract support costs. Pls. Partial Summ. J.

Br. at 26-31; Pls. Partial Summ. J. Reply Br. at 27-35.[1] Thus, even if the "availability" issue was relevant, the defendants' motion fails.

2. The availability of appropriations is determined as of the beginning of the fiscal yea .

The defendants' entire factual presentation presupposes that the question of "availability" is determined after the agency has made all of its other spending decisions. As a legal matter this is simply wrong. Appropriations are "available" upon the beginning of the fisca year. The Fitzpatrick Declaration avoids this obvious proposition, by only supporting the unremarkable assertion that by now–"[*a*]*s of the present time*"–IHS has spent its entire appropriations for fiscal years 1996 and 1997. Fitzpatrick Decl., ¶ 16, at 7-8 (emphasis added).

As even the defendants implicitly admit, the mere fact that IHS *eventually* spent all of its appropriation over time could not, under any reading of the relevant law and contracts, excuse them from liability.[2] Otherwise, the funding mandates of the contracts and the

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[1] In fiscal year 1996 the defendants had a total "Indian Health Services" appropriation o roughly $1.75 billion, of which approximately $373.9 million was earmarked in the Appropriations Act for specific non-contract support cost purposes, leaving an unrestricted lump sum appropriation of $1.374 billion available to meet the agency's mandatory obligations and other discretionary activities.

In fiscal year 1997 the defendants had a total "Indian Health Services" appropriation o $1.43 billion, of which $380 million was earmarked in the Appropriations Act for specifi purposes, leaving an unrestricted lump sum appropriation of $1.43 billion available to meet the agency's mandatory obligations and other discretionary activities. *See* Pls. Partial Summ. J. Repl Br. 34 n.37 (detailing same).

[2] The defendants' brief mistakenly attempts to portray the Fitzpatrick Declaration as dealing with obligations at the beginning of each fiscal year. Gov't Opp. Br. at 44 ("Moreover, all o those funds were obligated for Tribal purposes at the beginning of the fiscal years in question, with the exception of some minor unobligated funds," citing Fitzpatrick Decl. ¶ 3, at 1-2). That is

ISDA–mandates that Congress in 1988 and 1994 explicitly strengthened for the specific purpose of *eliminating* IHS discretion[3]–would mean nothing, since the IHS could (and presumably would) always find some useful way to eventually spend its appropriation and thus create an after-the-fac rationale for denying contract support costs. *See Shoshone-Bannock I*, 988 F. Supp. at 1332 ("Permitting IHS to first allocate a certain amount of funding from its lump sum appropriation for [contract support costs] and then deny [contract support] funding if the requests exceed the allocation would create an enormous loophole, granting the Secretary nearly unfettered discretion to determine when appropriated funds are available. That methodology clearly violates the ISDEA."); *Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1346 n.10 (D.C. Cir. 1996) (rejecting contrary interpretation as not "a credible reading of the provision").

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not what the Declaration says. Rather, what Mr. Fitzpatrick says is that once IHS receives its money, a portion is sent ("allocated") to the agency's various Area Offices, and a portion is "retained" by Headquarters where it is then further "subdivided." Fitzpatrick Decl., ¶ 9-12 at 4-6. And as one would expect, eventually everything is spent (or "obligated," *id.* ¶ 3, at 1-2) whether it is called "recurring" or "non-recurring," and whether it is first "allocated" to Area Offices or "retained" and "subdivided" in Headquarters. *Id.* at ¶¶ 3, 13, 14, at 1-2, 6-7. Mr. Fitzpatrick *never* says "all of those funds were obligated . . . at the beginning of each fiscal year," a statemen which is patently false.

[3] This legislative history is discussed in Pls. Partial Summ. J. Br. at 41-45.

Therefore, even if the plaintiffs' statutory and contractual rights were enforceable only on the condition that appropriations were available, ample appropriations *were* available on the relevant date. The government's motion therefore fails.[4]

IV. CONCLUSION

In sum, the defendants' motion for summary judgment should be denied on three legal grounds: their mistaken views regarding (1) the right to contract support costs, (2) the scope of "available" appropriations and (3) the time when appropriations are "available."

The facts presented by the government in the Fitzpatrick Declaration are not material to any of these issues and the government's motion for summary judgment should therefore be denied because it is based on positions that fail as a matter of law.[5]

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[4] To the extent the defendants base their summary judgment motion on the theory that plaintiffs' right to contract support costs is contingent on congressional action at any time in the indefinite future, even years after the Tribes fully performed all obligations under their contracts, and that § 314 represents such action, the motion fails for the reasons set forth in plaintiffs' declaratory judgment briefing.

[5] We note, however, that in the event the Court rejects the plaintiffs' arguments on *all* three legal issues, it is possible some of the "facts" presented in the Declaration could become materia under some other formulation. In that event, summary judgment for the government would st be inappropriate, as the plaintiffs have not yet had the opportunity to undertake discovery on those "facts," all of which are in the government's exclusive control. *See* Fed. R. Civ. P. 56(f); *Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828, 833 (10th Cir. 1986) (cautioning against "premature or unprovident grant of summary judgment"); *Weir v. Anaconda Co.*, 773 F.2d 1073, 1081 (10th Cir. 1985) (permitting discovery first, "especially . . . when relevant facts are exclusively in the control of the opposing party");*Snook v. Trust Co. of Georgia Bank o Savannah*, 859 F.2d 865, 870 (11th Cir. 1992) (remarking that the Eleventh Circuit "has often noted that summary judgment should not be granted until the party opposing the motion has an adequate opportunity for discovery," and citing cases); 10B Charles Alan Wrigh *et al*., *Federal Practice & Procedure* § 2739, at 395 & n. 27 (3d ed. 1998) (stating that denying summar judgment is appropriate to allow opposing party to pursue discovery on material facts).

For the foregoing reasons, the government's motion should be denied.

Respectfully submitted this 19th day of October 1999.

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