

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 PARTIAL SUMMARY JUDGMENT OF LIABILITY  
ON THE FIRST AND SECOND CAUSES OF ACTION**

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## TABLE OF CONTENTS

Table of Authorities .....	iii
INTRODUCTION .....	1
I. FACTS .....	4
II. STANDARD OF REVIEW .....	5
A. Contrary to the Defendants’ Assertion, the Standard of Review under the Contract Disputes Act and the Indian Self-Determination Act is Expressly <i>De Novo</i> .....	5
B. Even if This Case Did Not Arise Under the Contract Disputes Act, Review Here Would Be <i>De Novo</i> .....	7
III. ARGUMENT .....	11
A. The Plaintiffs’ Statutory and Contractual Right to Receive Contract Support Costs Is Not “Conditional” .....	11
1. The Plain Language of the ISDA Defeats the Government’s Position .....	13
2. The Case Law Interpreting 25 U.S.C. § 450j-1 Rejects the Government’s Position .....	19
3. The Plaintiffs’ Compacts and AFAs Do Not Support the Government’s Position .....	21
4. Case Law Dealing with Government Contracts, Including Contracts Pursuant to Statutes Similar to the ISDA, Defeat the Government’s Position .....	23
B. Assuming, <i>Arguendo</i> , That the Plaintiffs’ Underlying Statutor and Contractual Rights Could Somehow Be Construed as Conditioned on the Availability of Appropriations Despite Contrary Precedent, the Plaintiffs Would Be Entitled to Fu Contract Support Costs in Fiscal Years 1996 and 1997 and Other “Lump Sum” Years Because the Appropriations Acts for Those Years Contained No Caps on Contract Support Funding .....	27

IV. CONCLUSION ..... 36

## TABLE OF AUTHORITIES

### CASES

<i>Al Johnson Constr. Co. v. United States</i> , 854 F.2d 467 (Fed. Cir. 1988) .....	21
<i>American Mining Congress v. Thomas</i> , 772 F.2d 617 (10 <sup>th</sup> Cir. 1985) <i>cert. denied</i> , 476 U.S. 1158 (1986) .....	7
<i>Cabinet Mountains Wilderness v. Peterson</i> , 685 F.2d 678 (D.C. Cir. 1982) .....	8
<i>Chandler v. State of Alaska</i> , 425 U.S. 840 (1976) .....	10
<i>Christo v. Merit Systems Protection Bd.</i> , 667 F.2d 882 (10 <sup>th</sup> Cir. 1981) .....	11
<i>Colorado Springs Prod. Credit Ass’n v. Farm Credit Admin.</i> , 666 F.Supp. 1475 (D. Colo. 1987), on reconsideration, 669 F.Supp. 1044 (D. Colo. 1987), appeal dismissed, 848 F.2d 200 (10 <sup>th</sup> Cir. 1988) .....	21
<i>District of Columbia v. Potomac Elec. Power Co.</i> , 402 A.2d 430 (D.C. 1979) .....	24
<i>Delta Rocky Mountain Petroleum, Inc. v.</i> <i>United States Dep’t of Defense</i> , 726 F. Supp. 278 (D. Colo. 1989) .....	7
<i>Harbison v. Goldschmidt</i> , 693 F.2d 115 (10 <sup>th</sup> Cir. 1982) .....	11
<i>Lincoln v. Vigil</i> , 508 U.S. 182 (1993) .....	<i>passim</i>
<i>Native Village of Venetie I.R.A. Council v.</i> <i>State of Alaska</i> , 944 F.2d 548 (9 <sup>th</sup> Cir. 1991) .....	10
<i>New York Airways, Inc. v. United States</i> , 369 F.2d 743 (Ct. Cl. 1966) .....	24, 25
<i>Olenhouse v. Commodity Credit Corp.</i> , 42 F.3d 1560 (10 <sup>th</sup> Cir. 1994) .....	7
<i>Parklane Hosiery Co., Inc. v. Shore</i> , 439 U.S. 322 (1979) .....	21
<i>Pueblo of San Ildefonso v. Ridlon</i> , 103 F.3d 936 (10 <sup>th</sup> Cir. 1996) .....	6
<i>Ramah Navajo Chapter v. Lujan</i> , 112 F.3d 1455 (10 <sup>th</sup> Cir. 1997) .....	2, 6, 19, 28
<i>Ramah Navajo School Bd., Inc. v. Babbitt</i> , 87 F.3d 1338 (D.C. Cir. 1996) .....	2, 20

<i>Shipman v. United States</i> , 18 Ct. Cl. 138 (1883) . . . . .	25, 26
<i>Sierra Club v. Glickman</i> , 67 F.3d 90 (5 <sup>th</sup> Cir. 1995) . . . . .	8
<i>Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala</i> , 988 F. Supp. 1306 (D. Or. 1997) ( <i>Shoshone-Bannock I</i> ”) . . . . .	<i>passim</i>
<i>Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala</i> , 999 F. Supp. 1395 (D. Or. 1998) ( <i>Shoshone-Bannock II</i> ”) . . . . .	7
<i>Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala</i> , No. CV-96-459-ST (D. Or. 1999) ( <i>Shoshone-Bannock III</i> ”) . . . . .	32
<i>Sutton v. United States</i> , 256 U.S. 575 (1921) . . . . .	25, 26
<i>Tribal Village of Akutan v. Hodel</i> , 869 F.2d 1185 (9 <sup>th</sup> Cir. 1988) . . . . .	7
<i>True Oil Co. v. Comm’r</i> , 170 F.3d 1294 (10 <sup>th</sup> Cir. 1999) . . . . .	9
<i>United States v. Mendoza</i> , 464 U.S. 154 (1984) . . . . .	21
<i>United States v. Nichols</i> , 184 F.3d 1169 (10 <sup>th</sup> Cir. 1999) . . . . .	9
<i>Wall v. United States</i> , 871 F.2d 1540 (10 <sup>th</sup> Cir. 1989) . . . . .	11

**STATUTORY PROVISIONS**

5 U.S.C. § 701 <i>et seq.</i> . . . . .	5
16 U.S.C. § 1536(n) . . . . .	8
25 U.S.C. § 303(a)(7) . . . . .	35
25 U.S.C. § 306 . . . . .	35
25 U.S.C. § 450f note . . . . .	2, 15, 23, 35
25 U.S.C. § 450j-1 . . . . .	6, 19, 31
25 U.S.C. § 450j-1(a) . . . . .	3
25 U.S.C. § 450j-1(a)(1) . . . . .	13, 16, 22

25 U.S.C. § 450j-1(a)(2)	2, 13
25 U.S.C. § 450j-1(a)(3)	2, 13
25 U.S.C. § 450j-1(a)(3)(B)	2
25 U.S.C. § 450j-1(a)(4)	13
25 U.S.C. § 450j-1(a)(5)	2, 13
25 U.S.C. § 450j-1(a)(6)	13
25 U.S.C. § 450j-1(b)	<i>passim</i>
25 U.S.C.A. § 450j-1(c) (West Supp. 1998)*	12
25 U.S.C.A. § 450j-1(g) (West Supp. 1998)*	2, 35
25 U.S.C. § 450j(i)	35
25 U.S.C. § 450j(c)	15, 21
25 U.S.C. § 450j(g)	21, 35
25 U.S.C. § 450k(a)(1)	9
25 U.S.C. § 450l(c)	15
25 U.S.C. § 450l(c)(§1(b)(4))	2, 22
25 U.S.C. § 450l(c)(§1(b)(11))	22

\* For consistency with the legislative history and all recent cases and reports concerning the ISDA, where necessary plaintiffs in this brief cite to the ISDA as of 1998, prior to the repeal of subsection 450j-1(c) late last year (and the corresponding redesignation of all remaining subsections). *See* Pub. L. No. 105-362, § 801(g), 112 Stat. 3288 (1998).

25 U.S.C. § 450m-1(a) .....	5, 7, 9, 35
25 U.S.C. § 450m-1(d) .....	8
31 U.S.C. § 1341 .....	15
31 U.S.C. § 1341(a)(1)(A) .....	24
41 U.S.C. § 601 <i>et seq.</i> .....	5
41 U.S.C. § 609(a)(3) .....	5
Pub. L. No. 103-332, 109 Stat. 2499 (1994) .....	29, 32
Pub. L. No. 104-134, 110 Stat. 1321 (1996) .....	29, 31, 32
Pub. L. No. 104-208, 110 Stat. 3009 (1997) .....	29, 31, 32
Pub. L. No. 105-83, 111 Stat. 1543 (1998) .....	29
Pub. L. No. 105-277, 112 Stat. 2681 (1999) .....	16, 17, 18, 29

**LEGISLATIVE MATERIAL**

S. Rep. No. 100-274 (1987) .....	1
S. Rep. No. 103-374 (1994) .....	2, 9
H.R. Conf. Rep. No. 105-825, 1998 WL 751396 (1998) .....	17
H. Rep. No. 105-609, 1998 WL 915496 (1998) .....	17

**REGULATIONS**

43 C.F.R. 4.100 (1998) .....	8
------------------------------	---

**ADMINISTRATIVE MATERIALS**

*Appeals of Alamo Navajo School Bd., Inc. and Miccosukee Corp.*,  
IBCA Nos. 3463-3466 and 3560-3562,  
1997 WL 759441 (Dec. 4, 1997) ..... *passim*

*Appeals of Cherokee Nation of Oklahoma*, IBCA No. 3877-3879/98,  
1999 WL 440047 (June 30, 1999) ..... 2, 20, 22

*Devil’s Lake Sioux Tribe*, IBCA No. 1953, 1987 WL 40770  
(Mar. 25, 1987) ..... 21

*Navajo Community College*, IBCA No. 1834,  
1986 WL 20155 (Aug. 27, 1986), modified on other grounds  
1987 WL 40896 (May 8, 1987) ..... 21

*Rock Point Community School Bd.*, IBCA Nos. 3008, 3010,  
1992 WL 390992 (Dec. 30, 1992) ..... 21

*Southern Ute Indian Tribe v. Amoco Production Co.*,  
119 F.3d 816, 830 (10<sup>th</sup> Cir. 1997),  
aff’d on narrower grounds on rehearing *en banc* 151 F.3d 1251 (1998);  
rev’d on these narrower grounds sub nom.  
*Amoco Production v. Southern Ute*, 119 U.S. 1719 (1999) ..... 6

*To the Administrator, Veterans Administration*,  
39 Comp. Gen. 422, 1959 WL 1710 (Dec. 4, 1959) ..... 15

*To the Chairman, House Committee on Merchant  
Marine and Fisheries*, No. B-211190,  
1983 WL 207412 (April 5, 1983) ..... 24

**OTHER**

II U.S. General Accounting Office, Office of the General Counsel,  
*Principles of Federal Appropriations La* (2d ed. 1992) ..... 15, 33

## INTRODUCTION

The government’s entire “conditional” right defense is constructed on six words: “subject to the availability of appropriations.” As the government would have it, this single passage—added at the very end of the legislative process leading to the 1988 ISDA amendments, never mentioned anywhere as among the “more important changes being made,” and contained in an overall contract support section described as “*guarantee[ing]* the tribes an adequate level of funding for full contract support costs”<sup>1</sup>—effectively nullifies the primary stated purpose of the entire legislation.

The government’s argument simply proves too much, particularly in the face of the overwhelming legislative goals:

- ◆ to address “the consistent failure of federal agencies to fully fund tribal indirect costs.” S. Rep. No. 100-274 at 8 (1987);<sup>2</sup>
- ◆ to remedy the agencies’ “fail[ure] to request from the Congress the full amount of funds needed to fully fund indirect costs associated with self-determination contracts.” *Id.* at 9;
- ◆ to recognize that “[f]ull funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed.” *Id.* at 13;
- ◆ to address the fact that “the single most serious problem with implementation of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-

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<sup>1</sup> See Pls. Partial Summ. J. Br. at 44 (citations omitted).

<sup>2</sup> As noted in our opening brief and the accompanying undisputed facts, “indirect costs” comprise the largest component of contract support costs. Pls. Partial Summ. J. Br. at 6, n.11.

determination contracts.” *Id.* at 8;

- ◆ to remedy the fact that “[s]elf-determination contractors’ rights under the Act have been systematically violated particularly in the area of funding indirect costs.” *Id.* at 37;
- ◆ to “cease the practice of requiring tribal contractors to take indirect costs from the direct program costs.” *Id.* at 12, and “to assure that there is no diminution in program resources when programs . . . are transferred to tribal operation.” S. Rep. No. 103-374 at 9 (1994); and
- ◆ to repeatedly declare in the Act that contract support costs are amounts a tribe “is entitled to receive,” are an “entitle[ment],” are “required to be paid,” “shall be added to the Secretarial (program) amount, “shall [be] add[ed]” to the contract in “the amount of funds to which the contractor is entitled,” “shall consist of” specified items, “shall include” various amounts under the Act, and are among the amounts a tribe “is eligible to receive. . . including . . . indirect costs.” 25 U.S.C. §§ 450j-1(a)(2), (a)(3), (a)(3)(B), (a)(5), (g); 450l(c) (§1(b)(4)); § 450f note (Title III, § 303(a)(6)).

Nowhere in the government’s brief is there ever an effort to explain how its reading of the six-word “availability” clause can be reconciled with the balance of the Act and these legislative goals. Indeed, although the government relegates all of the directly relevant contrary precedents to a mere footnote (Gov’t Opp. Br. at 50-51 n. 18), its arguments have been universally rejected by *every* tribunal to have considered them.<sup>3</sup> They should be rejected here as well.

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<sup>3</sup> *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997); *Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996); *Appeals of Alamo Navajo School Bd., Inc. and Miccosukee Corp.*, IBCA Nos. 3463-3466, 3560-3562, 1997 WL 759441 (Dec. 4, 1997), appeal pending *sub nom.* *Babbitt v. Miccosukee*, No. 98-1457 (Fed. Cir.); *Appeals of Cherokee Nation*, IBCA No. 3877-3879/98, 1999 WL 440047 (June 30, 1999). All the government can do is insist these cases “are wrongly decided” and that “none is binding on this Court.” Gov’t Opp. Br. at 50 n. 18.

The government's reliance on the phrase “subject to the availability of appropriations” repeatedly begs the crucial question: *What is it*, precisely, that is “subject to the availability of appropriations”? As discussed in the plaintiffs' opening brief, the Court need look no further than the availability clause itself, 25 U.S.C. § 450j-1(b). Pls. Partial Summ. J. Br. at 33-39. That clause limits only the Secretary's “provision of funds”—her ministerial duty to disburse funds and “to make funds available.” The “availability” clause does *not* limit amounts specified in § 450j-1(a), for the simple reason that that is not what the “availability” clause says.

Thus, the “availability” clause never touches upon the issue here—the right to fund contract support funding specified elsewhere in the Act (and hence the government’s liability for non-payment)—much less render that right “conditional” (to use the government’s favorite mischaracterization). Indeed, the plaintiffs’ interpretation of the “availability” clause is the only one that accords with the balance of the ISDA, the Tribes’ contracts, the statute’s legislative history, the relevant case law, and common sense.

Moreover, even if defendants could show that the Tribes’ contract support entitlement was itself “subject to the availability of appropriations,” the government’s position would still collapse because it has failed to address the necessary next question: Under what circumstances are an agency’s appropriations legally “available?” Basic appropriations law provides the answer, including the very case on which the government so mistakenly (and centrally) relies, *Lincoln v. Vigil*, 508 U.S. 182 (1993); Pls. Partial Summ. J. Br. at 26-31. Here the law is beyond debate that “the availability of appropriations” is determined by reference to restrictions in an appropriations act or other statute, and not (as defendants would have it) on

whether the agency chooses to spend its appropriation in some other way. Because the agency's lump-sum appropriation was not restricted by statute during most of the years in question, in those years the entire amount of that appropriation was "available" *as a matter of law* to pay contract support costs. By ignoring this hornbook and bedrock principle, the government would carve out for IHS an absolutely unfettered discretion over all contract support funding, making a mockery of the mandatory terms of the ISDA and self-determination contracts.<sup>4</sup>

## **I. FACTS**

Attached hereto is a chart setting forth the plaintiffs' statement of undisputed material facts, the defendants' objections thereto, and the plaintiffs' reply. Pls. Exh. 69. As the chart makes clear, the defendants have failed to raise a genuine issue of material fact precluding the entry of the requested partial summary judgment. Indeed, the defendants fail to even mention any supposed disputed facts, no less explain in their brief how any of those disputes bear on the issues at hand.

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<sup>4</sup> This reply brief focuses on the plaintiffs' motion of partial summary judgment as to liability, leaving the issue of Section 314 and the defendants' cross-motion for summary judgment to two separate responsive briefs. *See* Local Rule 7.2. Necessarily, however, the arguments presented with regard to all three motions before the Court involve many of the same issues. For example, the government's argument regarding Section 314 is based almost entirely on its position that plaintiffs' contract support right is "conditional." To the extent these arguments overlap, each brief incorporates sections of the other briefs by cross-referencing the appropriate pages.

## II. STANDARD OF REVIEW

In addressing the applicable standard of review the government deftly manages to avoid even citing, no less discussing, the controlling statute (the Contract Disputes Act), the controlling law of this Circuit, and the only reported case in the country concerning non-CDA litigation arising under the Indian Self-Determination Act.

**A. Contrary to the Defendants’ Assertion, the Standard of Review under the Contract Disputes Act and the Indian Self-Determination Act is Expressly *De Novo*.**

The defendants’ legal argument goes awry from the start with their incorrect assertion that Congress did not specify a standard of review applicable to this action. Gov’t Opp. Br. at 25. As is apparent from the First Amended Complaint (¶¶ 2, 17, 34), the Answer (¶¶ 2, 17 (second sentence), 34 (second sentence)), and the plaintiffs’ opening brief, this action is brought under the Contract Disputes Act (CDA), 41 U.S.C. § 601 *et seq.* That Act expressly provides that such actions “shall proceed de novo,” 41 U.S.C. § 609(a)(3). Pls. Partial Summ. J. Br. a 12.<sup>5</sup> Given this express and unequivocal statutory standard, incorporated into the ISDA along with the rest of the CDA, 25 U.S.C. §§ 450m-1(a) & (d), the government’s insistence that the Court look instead to the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* (APA) for guidance borders on the frivolous.

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<sup>5</sup> Under 25 U.S.C. § 450m-1(a), this court’s jurisdiction under the CDA is “concurrent” with the jurisdiction of the United States Court of Federal Claims (formerly the “United States Court of Claims”).

As for issues of statutory interpretation, the Tenth Circuit has already squarely determined that the deferential “Chevron” standard urged by the government does not apply to the ISDA’s contract support provisions.<sup>6</sup> *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462-63 (10<sup>th</sup> Cir. 1997). In construing the ISDA, including § 450j-1, this Circuit has ruled that “the canon of [statutory] construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes.” That canon requires a court to resolve any statutory ambiguities in favor of the Tribes. *Ramah* at 1462; *see also* Pls. Partial Summ. J. Br. at 39-40. Thus, “if the [Act] can reasonably be construed as the Tribe would have it construed, it must be construed that way.”*Id.* at 1462, quoting *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988).<sup>7</sup>

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<sup>6</sup> Gov’t Opp. Br. at 25-27, citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Even if *Chevron* were in play (and at the risk of overstating the obvious), the Court here is hardly dealing with a statute which Congress “entrusted” the agency to administer. *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936, 940 (10<sup>th</sup> Cir. 1996). Quite to the contrary, Congress believed the agency could not be trusted at all. *See* Pls. Partial Summ. J. Br. at 6-9. *See also Southern Ute Indian Tribe v. Amoco Production Co.*, 119 F.3d 816, 830 (10<sup>th</sup> Cir. 1997) (“an agency requesting Chevron deference to its statutory interpretation must show that it has been delegated authority to address the question,” citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990)), *aff’d* on narrower grounds on rehearing en banc 151 F.3d 1251 (1998); *rev’d* on those narrower grounds sub nom. *Amoco Production v. Southern Ute*, 119 U.S. 1719 (1999). And though the government invokes “Chevron” in theory, it never goes on to explain what is the long-standing interpretation of the law to which this Court ought to defer.

<sup>7</sup> Certainly the government has an obligation to the Court to at least cite and attempt to distinguish *Ramah*. But as elsewhere in its brief, it simply ignores any precedent that does not fit with its theory of defense. The omission is telling not only for the cited proposition, but because just this summer the government paid some \$80 million in settlement of pre-1994 contract support cost damage claims in connection with Bureau of Indian Affairs (BIA) self-determination contracts, with substantially more claims yet to be litigated from fiscal year 1994 to the present. *See* Pls. Exh. 85 (containing the relevant court-approved settlement documents from

**B. Even if This Case Did Not Arise Under the Contract Disputes Act, Review Here Would Be *De Novo*.**

At the risk of following the government down a rabbit path of irrelevant law, we begin by noting the government's error in asserting that the Act "authorizes judicial review." Gov't Opp. Br. at 25. The language of the ISDA does nothing of the kind; to the contrary, the Act confers upon federal district courts "original jurisdiction" over "civil action[s]," in which a court may then order appropriate relief, including "money damages." 25 U.S.C. § 450m-1(a).

The provision reflects a unique statutory scheme radically different from the defendants' APA cases, particularly those where the APA standard was not even contested.<sup>8</sup> As elsewhere in its brief, here the government fails to even cite (no less discuss) the only reported decision on this very issue. In the *Shoshone-Bannock* litigation<sup>9</sup> the Oregon District Court rejected the precise argument made here and concluded that § 450m-1(a) provides for *de novo* review in non-CDA cases arising under the Act. In so doing, the district court was influenced b

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*Ramah*).

<sup>8</sup> See Gov't Opp. Br. at 25-26, citing in part *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 172 (10<sup>th</sup> Cir. 1994) (parties never disputed that APA "arbitrary and capricious" standard was appropriate); *American Mining Congress v. Thomas*, 772 F.2d 617, 625 (10<sup>th</sup> Cir. 1985) *cert. denied*, 476 U.S. 1158 (1986) (statute expressly provided that "the court shall have jurisdiction to review the rule in accordance with [the APA], and to grant appropriate relief as provided in such chapter"); *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1189 (9<sup>th</sup> Cir. 1988) (statute provided that Secretary's recommendations were final unless "arbitrary and capricious"); and *Delta Rocky Mountain Petroleum, Inc. v. United States Dep't of Defense*, 726 F. Supp. 278 (D. Colo. 1989) (APA standard of review not at issue).

<sup>9</sup> *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306, 1314 (D. Or. 1997) (*Shoshone-Bannock I*), reconsidered on other grounds, *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 999 F. Supp. 1395 (D. Or. 1998) (*Shoshone-Bannock II*).

three factors.

First, the court considered the plain words of the operative section—including the terms “original jurisdiction,” “civil action,” and “order appropriate relief including money damages”—and concluded that “in combination, these three phrases are sufficient to connote the right to *de novo* review.” *Shoshone-Bannock I*, 988 F. Supp. at 1314.<sup>10</sup> The court supported this reading by noting that under the very same section, district courts possess jurisdiction “concurrent” with the Court of Federal Claims under the CDA, reasoning that:

The standard of review under that Act is one of a “proceed[ing] *de novo* in accordance with the rules of the appropriate court.” 41 U.S.C. § 609(a)(3). Hence, review by a district court of such claims also must be *de novo* absent any statutory basis to distinguish between the two courts.

*Id.* at 1315.<sup>11</sup>

Second, the court considered the legislative history accompanying the ISDA’s “massive amendments” and the severe “bureaucratic recalcitrance” that led to those reforms,

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<sup>10</sup> In contrast, the two Endangered Species Act (ESA) cases relied upon by the government *Sierra Club v. Glickman*, 67 F.3d 90 (5<sup>th</sup> Cir. 1995); and *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982). Both involved ESA provisions citing the APA. *See, e.g.*, 16 U.S.C. § 1536(n) (“any person ... may obtain judicial review, under chapter 7 of title 5 of the United States Code, of any decision of the Endangered Species Committee. . . .”). It is no small wonder that the two cited Circuits found no justification to apply any standard of review other than the cited APA provision. Clearly Congress knows how to call for APA review when it wishes to, and it just as clearly chose not to in the ISDA.

<sup>11</sup> Along similar lines, the court observed that “A tribe should be entitled to the same full discovery, hearing and *de novo* review when it elects to proceed directly to court as it is entitled to receive if it elects to proceed before the agency or an ALJ.” *Shoshone-Bannock I*, 988 F. Supp. at 1317 (comparing § 450m-1(a) with § 450f(b)(3)). As the pertinent regulations provide, had the plaintiff Tribes pursued their option of going to the Interior Board of Contract Appeals under § 450m-1(d), review would have been *de novo*, and not “on the record.” 43 C.F.R. 4.100-4.128 (1998) (detailing discovery and hearing procedures).

including § 450m-1(a):

In construing a statute, courts must “look to the provisions of the whole law, and its object and policy.” *United States Nat’l Bank o Oregon v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 [parallell citations omitted] (1993). The ISDEA’s object and polic are best achieved, and any agency mischief best redressed, b affording tribes the right to *de novo* review of their claims.

\* \* \*

*Given this history of Congressional concern with agency malfeasance, it would be ironic indeed if Congress offered the tribes nothing more than a record-based, deferential court revie of agencies’ actions which they already enjoyed under the APA for administrative appeals.*

*Id.*, at 1315-1317 (emphasis added). Given Congress’s express decision to deprive the Secretar of all discretion save in narrowly specified areas not germane here,<sup>12</sup> there is simply no basis or rationale for also attributing to Congress an unspoken intent to ‘let the fox guard the hen house.’ *See also United States v. Nichols*, 184 F.3d 1169, 1171 (10<sup>th</sup> Cir. 1999) (“Our goal in analyzing the meaning of any statute is to ‘give effect to the will of Congress’”); *True Oil Co. v. Comm’r*, 170 F.3d 1294, 1299 (10<sup>th</sup> Cir. 1999) (in construing particular phrase the court will consider “the language and design of the statute as a whole”).

Third, the court applied the longstanding canon of statutory construction applicable to Indian legislation: “Statutes are to be construed liberally in favor of the Indians; ambiguous provisions are to be interpreted to the Indians’ benefit. [*Montana v.*] *Blackfeet Tribe*,

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<sup>12</sup> *See* Pls. Partial Summ. J. Br. at 8-9 n.14; 25 U.S.C. § 450k(a)(1); S. Rep. No. 103-374 at 14 (1994) (“[b]eyond the areas specified in subsection (a), . . . *no further delegated authority is conferred*”) (emphasis added).

471 U.S. at 766, 105 S.Ct. at 2403.” *Shoshone-Bannock I*, 988 F. Supp. at 1317, quoting *Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548, 553 (9<sup>th</sup> Cir. 1991).<sup>13</sup> As noted earlier, *supra* at 5-6, this is precisely the law of this Circuit too, including in matters pertaining to the Indian Self-Determination Act.

Finally, it bears mention that in *Chandler v. Roudebush*, 425 U.S. 840 (1976) the Supreme Court similarly found the term “civil action” in other legislation to require *de novo* review.

*Given the clear expression of congressional intent, as revealed in both the plain language . . . and the legislative history of the . . . amendments [to Title VII of the Civil Rights Act], we find unpersuasive the respondents’ reliance on decisions by this Court indicating that “De novo review is generally not to be presumed.”*

*Id.* at 858 (emphasis added) (citation omitted). The *Shoshone-Bannock I* court noted that consistent with *Chandler*, the Ninth Circuit had found *de novo* review appropriate under other

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<sup>13</sup> In *Venetie I.R.A. Council*, the Ninth Circuit construed the Indian Child Welfare Act (25 U.S.C. § 1901 *et seq.*) to authorize tribes to bring original actions in federal courts, observing that “[i]t would thus be ironic indeed if Congress then permitted only state courts, never believed by Congress to be the historical defenders of tribal interests, to determine the scope of tribal authority under the Act.” 944 F. Supp. at 553-54.

similar statutes, 988 F. Supp. at 1314, discussing *Nabors v. United States*, 568 F.2d 657 (9<sup>th</sup> Cir. 1978) (involving Age Discrimination in Employment Act and, like the ISDA, a statutory option between an administrative appeal or a “civil action”).<sup>14</sup>

In sum, even if this case did not involve CDA appeals from contracting officers’ decisions, it would be inconceivable that Congress would amend the ISDA to arm district court with an arsenal of remedies (including damages and extraordinary equitable remedies), yet restrict such courts’ review to limited APA standards, particularly given Congress’s commitment to end “bureaucratic recalcitrance” and to severely cabin the Secretary’s discretion in contract support cost matters.

### **III. ARGUMENT**

#### **A. The Plaintiffs’ Statutory and Contractual Right to Receive Contract Support Costs Is Not “Conditional.”**

The defendants stake their defense on the proposition that the ISDA provides only an empty “conditional” right to contract support costs.<sup>15</sup> Gov’t Opp. Br. at 11, 28, 32-39, 40-43. To support this position, the defendants rely primarily on 25 U.S.C. § 450j-1(b) (the “106(b)

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<sup>14</sup> The Tenth Circuit’s case law is to the same effect. *See, e.g., Harbison v. Goldschmidt*, 693 F.2d 115 (10<sup>th</sup> Cir. 1982) (right to trial *de novo* in Title VII action); *Christo v. Merit Systems Protection Bd.*, 667 F.2d 882, 885 (10<sup>th</sup> Cir. 1981) (“In discrimination cases where review is provided in district court under [5 U.S.C. §] 7703(b)(2) [claims filed under Civil Rights Act, ADEA and the Fair Labor Standards Act] , the employee has the right to trial *de novo*”); *see also Wall v. United States*, 871 F.2d 1540, 1543 (10<sup>th</sup> Cir. 1989) (noting availability of trial *de novo* under *Christo* and 5 U.S.C. §§ 7702 and 7703).

<sup>15</sup> As discussed more thoroughly in the plaintiffs’ reply in support of their motion for declaratory judgment, Pls. Dec. J. Reply Br. at 2-10, the defendants at times take the more extreme position that the ISDA and the plaintiffs’ contracts do not even create “any obligation” or “entitlement” at all. *See, e.g.,* Gov’t Opp. Br. at 32-33.

proviso” or “availability clause”) and the provisions incorporating this section in the plaintiffs’ compacts and annual funding agreements (“AFAs”). But as explained in the opening brief, the plain language of this proviso and the balance of the ISDA, in conjunction with the Act’s legislative history and relevant case law, demonstrates that Congress meant to—and did—“guarantee” to the plaintiffs and other tribal contractors an unconditional right to contract support costs regardless of appropriations. Congress made this guarantee ironclad by embodying it in mandatory statutory language *and* requiring its restatement in contractual provisions that tribal contractors may enforce through the mechanism of the Contract Disputes Act.<sup>16</sup> The defendants’ effort to evade the terms of the statute and their contracts with plaintiffs finds no support in the ISDA, cases applying the ISDA, the agreements executed pursuant to the ISDA, the ISDA’s legislative history, or any of the cases cited by defendants.

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<sup>16</sup> Congress had hoped enforcement here would be unnecessary and that IHS would both request the full amount required in the ordinary appropriations process, and would timely comply with Congress’s mandatory reporting requirements (so that any appropriations deficiencies could be corrected). 25 U.S.C.A. § 450j-1(c) (West Supp. 1998). But now in the context of litigation we are led to understand why IHS simply failed to do so over the years: i apparently never took the ISDA seriously in the first place, and all along viewed the Act’s apparent mandatory requirements as merely “conditional.” (This, of course, is just grist for litigation. What really happened is plain. IHS simply never had the political will to insist on contract support funding sufficient to meet its commitments to tribal contractors. All the rest is ‘Monday morning quarter-backing’ to try and save IHS from the consequence of that failure.)

## 1. The Plain Language of the ISDA Defeats the Governments' Position.

All parties agree that the plain language of the statute, including the 106(b) proviso, must control if unambiguous, and that all portions of the statute should be given effect if possible. Gov't Opp. Br. at 29, 41. The plaintiffs' interpretation accomplishes this goal by demonstrating that the 106(b) proviso addresses only the Secretary's "provision of funds" and her duty "to make funds available" (*i.e.*, the Secretary's ministerial duty to pay out funds to tribal contractors). Pls. Partial Summ. J. Br. at 33-35. As the precise words chosen by Congress make clear, the proviso does *not* go further and address (or in any other way limit) the mandator contract support funding "amount" which is established in detail by 25 U.S.C. §§ 450j-1(a)(2)-(6).<sup>17</sup> By using different terms in the proviso than in the balance of the section, Congress made a distinction between the agency's ministerial duty to disburse whatever funding it may have to the tribal contractor, and a tribal contractor's right to full funding—and hence the United States' liability to the tribe.<sup>18</sup>

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<sup>17</sup> The government's attempts to confuse the issue by implying that contract support costs are included in the so-called "Secretarial amount" established by 25 U.S.C. § 450j-1(a)(1). Gov't Opp. Br. at 40 n.15. But this case is not about the Secretarial amount; it is about the required amount of contract support costs addressed in § 450j-1(a)(2) and elsewhere. As subsection (2) makes perfectly clear, the amount of contract support is distinct and "added to" the Secretarial amount paid under subsection (1). *See* Pls. Partial Summ. J. Br. at 4-5.

<sup>18</sup> As explained below, this distinction between (1) an agency's duty to disburse funds and (2) the government's underlying liability, is well illustrated by the case law dealing with "contract authority" under statutes and government contracts similar to the ISDA. *See infra* at 24-27.

The defendants never address (much less explain) this distinction or directly respond to the plaintiffs' interpretation. Instead, they jump to their preordained conclusion of a "conditional" right, doing so without any analysis or supporting authority. Nor do they address the many problems raised by their position. For example, the defendants' theory does not explain why Congress used the term "the provision of funds" in the 106(b) proviso if it actually meant to refer to the "amount of funding" (a term used repeatedly elsewhere). Their theory does not explain why Congress would bother to require that the agency embody the right to contract support cost funding in binding "contracts" at all (rather than in discretionary grants), if Congress actually intended contract support funding to be merely "conditional." And their theory does not explain why Congress specifically assured tribes a "damages" remedy under the CDA, reflecting that ISDA contracts were enforceable as written, if in fact there is never a right to any "su certain" at all.

Although the defendants again and again charge the plaintiffs with "ignoring" the plain language of the statute, *see, e.g.*, Gov't Opp. Br. at 32, 35, the fact is that only the plaintiffs' interpretation explains in detail how *all* parts of the statute, each limited by its precise language, fit together in a coherent, logical system. The defendants' interpretation gives a meaning to the 106(b) proviso that renders the balance of the Act's carefully crafted contract support provisions wholly meaningless. The defendants' failure to harmonize their construction of the proviso with the balance of the statute is both telling and decisive.

In their one attempt to defend against the plaintiffs' natural reading, the defendants contend (albeit again without any analysis), that the plaintiffs' interpretation "reduces [the 106(b) proviso] to mere surplusage." Gov't Opp. Br. at 41-42. But they never explain why the proviso is meaningless if it operates as a real limit on the Secretary's ministerial duty to disburse funds.<sup>19</sup> Pls. Partial Summ. J. Br. at 34-35. To the contrary, only by limiting the proviso's effect in accordance with its express terms, so that it governs the duty to pay out funds, but not the right to contract support funding and the government's liability, can it be fully harmonized with the mandatory provisions governing the "amount" of funding and not render *those* provisions superfluous.<sup>20</sup>

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<sup>19</sup> The government might argue that the plaintiffs' reading of the § 106(b) proviso renders it "mere surplusage" because the Secretary is always prohibited by the Antideficiency Act, 31 U.S.C. § 1341, from paying out funds beyond those appropriated. But such an argument would fail, because from time to time the Comptroller General has interpreted various mandator funding provisions in statutes as *overriding* the ordinary limitations imposed by the Antideficiency Act. For example, in an opinion letter to the Veterans Administration, the Comptroller General stated that the "mandatory provisions" of a statute dealing with wage increases "manifests a clear intent of the Congress to sanction an exception to the Antideficiency statute in respect of authorizing obligations or expenditures for pay increases granted to Wage Board employees i excess of annual appropriations made for the compensation of such employees." *To the Administrator, Veterans Administration*, 39 Comp. Gen. 422, 426, 1959 WL 1710 (Dec. 4, 1959) (Pls. Exh. 89). *See also* II U.S. General Accounting Office, Office of General Counsel, *Principles of Federal Appropriations La* (2d ed. 1992) at 6-53# - #6-55 and cases cited therein (discussing in detail the "authorized by law" exception to the Antideficiency Act). The § 106(b) proviso thus has real meaning and is certainly not "surplusage." It makes clear that the Secretary's contrac authority under the ISDA is only a partial exception to the Antideficiency Act; the IHS's "spending authority" remains limited by the "availability" clause, and so in this instance the Secretary is not "authorized by law" to exceed the annual appropriations.

<sup>20</sup> The defendants also cite to three other provisions of the ISDA, but offer no explanation as to how any of these measures might support their position. Gov't Opp. Br. at 11-12, 20, citing 25 U.S.C. § 450j(c), Sec. 304 of Title III (25 U.S.C. § 450f note), and Sec. 1(b)(4) of the Model Contract set forth at § 450l(c). Defendants acknowledge that § 450j(c), by its

The defendants heavily ‘spin’ the story of recent congressional actions regarding contract support costs. While much of this story is focused on the defendants’ “Section 314” defense and is thus addressed elsewhere (including—for what it would be worth—the unsupported implication that Congress believes every recent court decision rendered under the ISDA’s funding provisions to have been wrongly decided, Gov’t Opp. Br. at 18), they neglect to tell the Court of

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terms, addresses only contracts with multi-year or indefinite terms, not the one-year funding agreements at issue here. Gov’t Opp. Br. at 11. Moreover, the reference to “amounts” in § 450j(c)—which dates back to the original 1975 Act—does not even deal with contract support costs but instead with the Secretarial amount now set forth in § 450j-1(a)(1). (The notion of “contract support costs” was not brought into the statute until the 1988 amendments.)

Similarly, Sec. 304 of Title III addresses only “the use of funds,” not the amount of funds, and incorporates, for example, the statutory limitation in recent appropriations acts limiting the manner in which a tribal contractor may invest certain ISDA contract funds pending their disbursement. *See, e.g.* Pub. L. No. 105-277, §111, 112 Stat. 2681, at 2681-254 (FY 1999 appropriation) (Pls. Exh. 76 at 2). And Sec. 1(b)(4) of the Model Contract—where the payment of funds is once again subject to an “availability” clause—reinforces the *plaintiffs’* interpretation of the statute by clearly recognizing the distinction between the Secretary’s ability to “make funds available” and the underlying obligation of the government for the full amount of contract support specified in the Act and the contract. *See* Pls. Partial Summ. J. Br. at 35 n.31.

Oddly, the defendants also briefly rely on subsection (2) of § 450j-1(b). Gov’t Opp. Br. at 51. This provision simply prevents IHS from reducing funding under a self determination contract “in subsequent years” except under certain specific circumstances. Through some undisclosed leap of logic the defendants conclude that this provision protecting all tribal contract funding levels somehow excuses the government for not providing sufficient contract support costs. But since the provision in no way, either implicitly or explicitly, sets any conditions on, or limits, the plaintiffs’ right to contract support costs, and because the plaintiff have never suggested that IHS should or could provide their contract support cost entitlement by cutting funding to other tribal contractors, this subsection is but an irrelevant distraction.

In summary, although the defendants dutifully cite authority stressing the importance of looking to a statute’s plain language, they fail to take that lesson to heart and actually consider the text of the provisions on which they so heavily rely (as well as those they so studiously avoid).

one recent event that both supports the interpretation and drives the final nail into the fanciful notion that tribal contract support cost rights are “conditional.”

In the very same legislation enacted last year that contains Section 314, Congress acted on the necessary assumption that contract support costs are not “conditional *at all*, and that once a contract is signed the United States *is* obligated to pay. Why else would Congress in Section 328 of the FY 1999 Omnibus Appropriations Act, Pub. L. 105-277, 112 Stat. 2681, 2681-291 - 2681-292 (Pls. Exh. 76 at 7), deliberately withdraw the Secretary’s authority “to enter into any new or expanded self-determination contract or grant or self-governance compact pursuant to the [ISDA]?”<sup>21</sup> Indeed, the moratorium on new or expanded contracts was specifically enacted to curb increases in contract support cost requirements and thus be “fiscally responsible.” *See, e.g.*, H.R. Conf. Rep. No. 105-825, 1998 WL 751396, at \*2595 (1998) (Pls. Exh. 78 at 3) (describing the new contracting “moratorium” language adopted from Section 329 of the House bill); H. Rep. No. 105-609, 1998 WL 915496, at \*221 (1998) (Pls. Exh. 77 at 3) (discussing at length the history of rising contract support cost requirements, and explaining that in light of that history the moratorium “is the fiscally responsible course of action”). If, as the

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<sup>21</sup> The full first sentence of section 328 provides that:

Notwithstanding any other provision of law, *none of the funds in this Act may be used to enter into any new or expanded self-determination contract* or grant or self-governance compact pursuant to the Indian Self-Determination Act of 1975, as amended, for any activities not previously covered by such contracts, compacts or grants.

(Emphasis added.) *See* Pls. Exh. 76 at 7.

defendants urge, the government's underlying contract support obligation truly is subject to the availability of appropriations, the specific "not to exceed" cap in the FY 1999 Appropriations Act of \$204 million would have been sufficient, 112 Stat. at 2681-279 (Pls. Exh. 76 at 3),<sup>22</sup> and the Section 328 moratorium on new contracting utterly unnecessary.

Recall that under the defendants' view, all Congress need do to limit the government's liability is to limit contract support cost payments to a specifically capped, earmarked amount—which for IHS it has been doing since fiscal year 1998 (and for the BIA it has done ever since FY 1994). As a "fiscally responsible" mechanism to control contract support costs liabilities, the moratorium only makes sense if it presupposes a requirement under which, in its absence, the Secretary would be required "to enter into" a new or expanded contract and to thereby obligate the United States to pay additional contract support costs above and beyond those specified in the Appropriation Act's earmark. And that is precisely what the relevant committee reports say Congress intended to stop. Of course, the government here ignores Section 328 for it too, like so much else contained in or related to the ISDA, simply does not square with the government's "conditional right" defense.<sup>23</sup>

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<sup>22</sup> The FY 1998 Appropriations Act provided in part that "not to exceed \$203,781,000 shall be for payments to tribes . . . for contract or grant support costs . . ." Pls. Exh. 76 at 3.

<sup>23</sup> The Section 328 moratorium also squares with the plaintiffs' and the courts' understanding of the ISDA as conferring on the Secretary "contracting authority" to bind the United States to a sum certain. If Congress then desires to cut off the ability to create any new obligations, the proper course of action (short of amending the ISDA itself) is to simply forbid the Secretary from using his contract authority and signing any new contracts. And that is precisely what Section 328 does. (Pls. Exh. 76 at 7.)

**2. The Case Law Interpreting 25 U.S.C. § 450j-1 Rejects the Government's Position.**

In advancing their “plain meaning” interpretation of the Act, the defendants also manage either to ignore or to casually dismiss the several decisions that have *without exception* rejected the very arguments pressed again here.<sup>24</sup> Gov’t Opp. Br. at 50 n.18. In doing so they seek to avoid the obvious dilemma: if the defendants’ interpretation of § 450j-1 is so “plain” and unambiguous that it needs no support from textual analysis or legislative history, why has judge after judge rejected the government’s interpretation? Pls. Partial Summ. J. Br. at 24-25, 27-31, 32-33, 39. To hide from these cases is to simply concede their force here.

Perhaps most oddly, the defendants never even once cite, much less discuss or attempt to distinguish, the Tenth Circuit’s *Ramah Navajo Chapter* decision involving the Bureau of Indian Affairs, where this Circuit held that the ISDA (including the Sec. 106(b) proviso):

*mandate[s] that tribes executing self-determination contracts receive full funding for all reasonable contract support costs associated with self-determination contracts. Although this directive gives defendant discretion to determine which contract support costs are reasonable and necessary to carry out a particular contract, it does not give defendants discretion to deprive a tribe of the full amount of contract support costs which are deemed reasonable and necessary.*

112 F.3d at 1463 (emphasis added) (footnote omitted). The defendants’ utter silence with regard

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<sup>24</sup> Incredibly, the defendants also completely ignore the legislative history of § 450j-1 and all the other sections of the Act on which they so heavily rely. As thoroughly discussed in the plaintiffs’ opening brief, to the extent that the plain language of the statute admits of an ambiguity (and putting aside the “Indian” canon of construction), this legislative history provides decisive support to plaintiffs’ position that the ISDA and the plaintiffs’ contracts guarantee full funding of contract support costs. Pls. Partial Summ. J. Br. at 41-45.

to this controlling authority is telling.<sup>25</sup>

Although the defendants do cite and quote the D.C. Circuit's opinion in *Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338, 1345 (D.C. Cir. 1996), they fail to read it with care. There the circuit court interpreted the statute precisely as outlined by plaintiffs. Pls. Partial Summ. J. Br. at 32-33. Indeed the very passage quoted by the defendants drives home the point that the § 106(b) proviso deals only with the Secretary's ministerial duty to distribute funds, not the United States' liability for the full amount of funding:

[W]e read the subject-to-availability-of-funds provision to mean precisely what it says: *the Secretary need only distribute the amount of money appropriated by Congress under the Act, and need not take money intended to serve non-[contract support] purposes under the ISDA in order to meet his responsibility to allocate [contract support funds].*

87 F.3d at 1345 (emphasis added).

When confronted with its greatest defeats on the precise issues at hand—*Appeals of Alamo Navajo School Bd., Inc. and Miccosukee Corp.* and *Appeals of Cherokee Nation of Oklahoma*—the government simply dismisses the decided cases as “contrary to” the Act, and not “binding,” even though in one case (*Alamo*), the government conceded defeat and took no appeal. Gov't Opp Br. at 18, 50-51.<sup>26</sup> Although it lamely asserts that the Interior Board of Contract

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<sup>25</sup> As noted earlier, *supra* at 6 n.7, the government has already paid over \$80 million in pre-FY 1994 damages in the *Ramah* litigation, with more pending.

<sup>26</sup> The Court may take note that the IBCA specializes in cases involving government contracts, and has been recognized by the Federal Circuit Court of Appeals as possessing a particular expertise in that area. *See, e.g., Al Johnson Constr. Co. v. United States*, 854 F.2d 467, 471 (Fed. Cir. 1988) (noting the value of a Contract Appeals Board's “legal conclusions” given the Board's “expertise” in contracting law). The IBCA also has a long history of involvement with disputes involving ISDA contracts. *See, e.g., Appeals of Alamo Navajo School Bd. Inc. and*

Appeals erred for not considering § 450j(c) and (g), it is *the government* which has until now never viewed them as sufficiently probative to even merit being raised. Indeed, the defendants themselves do not mention these supposedly key provisions until the very end of their argument, and then only cursorily (perhaps because even the government must recognize that they have nothing to do with this case).<sup>27</sup>

### **3. The Plaintiffs' Compacts and AFAs Do Not Support the Government's Position.**

The terms of the plaintiffs' compacts and AFAs incorporate their ISDA statutor entitlement to contract support cost funding, giving them a right to no more—*but no less*—than provided under the Act. Thus, the defendants' position that these contracts confer only a

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*Miccosukee Corp.*, IBCA Nos. 3453-3466, 3560-3562 (Dec. 4, 1997) (decision as to Miccosukee Corp. on appeal); *Rock Point Community School Bd.*, IBCA Nos. 3008, 3010, 1992 WL 390992 (Dec. 30, 1992); *Navajo Community College*, IBCA No. 1834, 1986 WL 20155 (modified on other grounds), 1987 WL 40896 (May 8, 1987); *Devil's Lake Sioux Tribe*, IBCA No. 1953, 1987 WL 40770 (Mar. 25, 1987).

<sup>27</sup> Generally a plaintiff would be able to foreclose a defendant from constantly re-litigating an issue that the defendant previously litigated and lost in a court of competent jurisdiction against another party. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.4 (1979). Here, for example, application of this principle of “offensive non-mutual collateral estoppel” would ordinarily bar relitigation of the issues decided in the *Alamo Navajo School Board* case—which held that tribes are entitled to full contract support cost funding in years when Congress has not specifically provided a maximum cap on the agency's contract support payments. *See also supra* at 6 n.7 (discussing *Ramah* settlement of lump sum year claims). (The government has appealed the IBCA's ruling in the companion *Miccosukee* case, sustaining such claims even when there *is* an appropriations cap on the agency.) Unfortunately, the Supreme Court has held that for purely prudential reasons offensive non-mutual collateral estoppel is not generally available against the federal government. *United States v. Mendoza*, 464 U.S. 154, 162 (1984). *But see, Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 666 F.Supp. 1475 (D. Colo. 1987), on reconsideration, 669 F.Supp. 1044 (D. Colo. 1987), appeal dismissed, 848 F.2d 200 (10<sup>th</sup> Cir. 1988).

meaningless “conditional right” fails for precisely the same reasons as their statutory argument. Just like the § 106(b) proviso, the compacts make clear that it is the Secretary’s ministerial duty to disburse funds that is “subject to the availability appropriations,” not the plaintiffs’ right to the total amount of contract support funding.<sup>28</sup>

At the same time (and contract support costs aside), a contracting tribe is only entitled to the “Secretarial amount,” which is the amount the Secretary would have had to directly operate a given program in the absence of a contract. 25 U.S.C. § 450j-1(a)(1). But since (1) the program amount the Secretary will have in a given year cannot be known until the appropriations

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<sup>28</sup> The government seems to suggest that the Shoshone-Paiute Tribes may have somehow “signed away” their statutory right to contract support. Gov’t Opp. Br. at 23. This fails for at least four separate reasons. *First*, the AFA provision defendants rely on at most only acknowledges that IHS would pay funds through the queue system; it in no way shows any agreement to waive or impair the Tribes’ right to full contract support funding. Indeed, in a serious misquotation unbecoming the government, counsel fails to inform the Court that the funding agreement only references “ISDM 92-2” to the extent not inconsistent with sections 106(a) and (b) of the Indian Self-Determination Act.” Pls. Exh. 23 at 12. Certainly the Tribes did not agree to any aspects of IHS policy that, as now twice determined by the *Shoshone-Bannock* and *Cherokee Nation* decisions, were contrary to section 106 of the ISDA.

Second, even if the defendants could somehow construe the provision as a waiver, it would be contrary to the ISDA, which requires the agency to include full contract support cost funding as a mandatory term in all self-determination contracts, and forbids it from requiring tribes to comply with agency policies such as ISDM 92-2. 25 U.S.C. § 450l(c), §§ 1(b)(4) (second sentence), 1(b)(11).

*Third*, any attempt by the agency to argue that it has managed to trick a tribe into giving up its statutory rights by agreeing to ambiguous contract terms not only reflects poorly on the agency but is void as violative of the IHS’s trust responsibility to tribes as expressly incorporated in the ISDA and its implementing regulations. *See* Pls. Partial Summ. J. Br. at 40 n.37. *Finally*, interpreting the contractual terms against the Tribes would violate the Indian canon of construction that governs such matters. *See id.* at 39-40.

Act for that year has been enacted, and since (2) compact and contract funding agreements are necessarily executed well before the fiscal year begins (and in the case of both plaintiff “self-governance” Tribes, at least “ninety days in advance of the proposed effective date of the agreement,” 25 U.S.C. § 450f note, Title III, § 303(a)(9)), funding agreements like the Shoshone-Paiute’s invariably set forth the next best funding information, namely the expiring year’s funding levels. They then contain an adjustment clause so that program funding levels can be adjusted once the new year begins. That is both the literal and real-world meaning of the contract clause written by IHS and now relied upon by the government to instead evade liability for contract support costs. Gov’t Opp. Br. at 22-23. But the government cannot escape from either the Act or the funding agreements’ language expressly committing the United States to pay the Tribes their full negotiated “approved and agreed” contract support cost entitlement. Pls. Partial Summ. J. Br. at 18; *see also* Pls. Exh. 1, setting forth Pls. Statement of Material Facts ¶ 48, at 11-12 (undisputed in defendants’ response).

**4. Case Law Dealing with Government Contracts, Including Contracts Pursuant to Statutes Similar to the ISDA, Defeat the Government’s Position.**

The defendants seek to distinguish the “contract authority” cases cited by plaintiffs with the unfounded assertion that none of these cases “involved a situation in which a federal statute expressly restricted the government’s authority to pay contractual obligations in excess of Congressional appropriations.” Gov’t Opp. Br. at 42. This is flatly wrong. First, *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966), *To the Chairman, House Committee on Merchant Marine and Fisheries*, No. B-211190, 1983 WL 207412 (April 5, 1983), Pls. Exh.

15-C at 11), and *District of Columbia v. Potomac Elec. Power Co.*, 402 A.2d 430 (D.C. 1979), *all* 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. Pls. Partial Summ. J. Br. at 47-49 & n. 45.<sup>29</sup>

Second (and as the defendants themselves point out earlier in their brief), the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A), specifically prohibits government officials from making “an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure.” Gov’t Opp. Br. at 31. This federal statute thus “expressly restricted the government’s authority to pay contractual obligations in excess of Congressional appropriations” in every single case cited by plaintiffs involving contract authority. Gov’t Opp. Br. at 42. Yet, that fact did not overcome the plaintiffs’ rights to damages in the event of insufficient payment.

Indeed, in discussing the *New York Airways* line of cases, the government unwittingly makes the plaintiffs’ point by acknowledging that the cited cases “involve statutes that affirmatively require the government to incur obligations *regardless* of appropriation.” Gov’t Opp. Br. at 43 (emphasis in original). That is precisely why they are relevant here: Just like the statutes in the cited cases, the ISDA affirmatively requires the government to enter into contracts

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<sup>29</sup> Indeed, from the government’s point of view, the *New York Airways* statute presented a more compelling argument than the ISDA, by appearing to limit the plaintiffs’ payment “out of appropriations made to the [agency] for that purpose.” 369 F.2d at 745. Nonetheless, the court made clear that such language only limited what the agency could pay, and not the total amount the plaintiff was entitled to receive from the United States.

with tribal contractors for a specified amount of contract support regardless of subsequent appropriations.

The fact that the ISDA contains this statutory mandate explains why the government's attempt to reach the same result here as was reached in cases such as *Shipman v. United States*, 18 Ct. Cl. 138 (1883) and *Sutton v. United States*, 256 U.S. 575 (1921), must fail.<sup>30</sup> The lesson of these cases, like the other cases cited by plaintiffs, is that the terms of the authorizing statute must be carefully examined before determining whether the government's obligation is subject to subsequent appropriations. As the *Shipman* court itself cautioned, the case before it was "different from those cases which frequently arise wherein Congress passes an act authorizing officers to construct a building or do other specified work, without restriction as to cost, and then makes an appropriation inadequate to do the whole of it or makes none at all." 18 Ct. Cl. at 146; *see also New York Airways*, 369 F.2d at 745-49 (examining statutory language at length to determine whether it allowed the agency "to pay subsidies only to the extent that Congress appropriates money to it for that specific purpose," or whether it "merely defines the ministerial responsibility of the two agencies for disbursement of service and subsidy payments").

In *Shipman* and similar cases, the obligation was based "wholly upon an appropriation" without any other statutory authority. *Id.* at 146. Indeed, the contract at issue provided that "the work to be done and the materials to be furnished under this agreement shall

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<sup>30</sup> The defendants unsuccessfully pursued this same flawed argument before the Interior Board of Contract Appeals, which after thorough analysis soundly rejected it. *Alamo*, slip op. at 28-30 (Pls. Exh. 14).

*be restricted to the amount allowed by Congress for this purpose.*” *Id.* As the IBCA has twice correctly ruled, *see, e.g., Alamo* at 28-30, there is nothing in the ISDA or the contracts in this case that directs contractors to restrict the services they provide in accord with appropriations, or that limits the tribes’ responsibility or the government’s liability in such a way. And to be clear, the contractual obligation here is based on the statutory authorization of the ISDA, and “not wholly upon an appropriation.” In commenting on statutes similar to the ISDA, the *Shipman* court thus rejected the very position now advanced by the government, noting that such “liability on the part of the Government . . . is not avoided by the omission on the part of Congress to provide the money with which to discharge it.” *Shipman*, 18 Ct. Cl. at 147.

Similarly, in *Sutton* Congress appropriated a specific dollar amount, and the agency *subsequently* entered into a contract under that appropriation; in such instances, “those dealing with [the government] must be held to have had notice of the limitations upon his authority.” *Sutton*, 256 U.S. at 565; *see also Alamo* at 29-30. Indeed, even the defendants’ characterization of the case captures the limits of its holding: “[T]he *Sutton* contract contained an injunction that *contract work* was to be kept ‘within the limits of available funds,’ and was coupled with a federal statute excluding *any obligation for work* in excess of appropriations.” Gov’t Opp. Br. at 43 (emphasis added). Again here, in contrast, the government entered into a contract with the plaintiffs under separate statutory authority and under contracts that expressed no limit on “contract work” or on the government’s “obligation” prior to Congress’s appropriation. (Moreover, in at least FY 1996 and FY 1997 Congress actually appropriated sufficient funds to fully fund those contracts, and the plaintiffs in turn fully performed their part of the bargain.)

Despite the defendants' attempt to twist the language of the ISDA to fit their position, the limited holding of *Sutton* simply does not apply.

**B. Assuming, *Arguendo*, That The Plaintiffs' Underlying Statutory And Contractual Rights Could Somehow Be Construed as Conditioned on The Availability of Appropriations Despite Contrary Precedent, The Plaintiffs Would Be Entitled to Full Contract Support Costs in Fiscal Years 1996 And 1997 And Other "Lump Sum" Years Because The Appropriations Acts For Those Years Contained No Caps on Contract Support Funding**

As explained above and in the plaintiffs' opening brief, the right to full funding of contract support—and thus the government's liability in this case—is simply not contingent on the “availability of appropriations.” But even if the availability of appropriations was relevant, the government's defense would still fail for the simple reason that they have not shown (and cannot show) that in most years appropriated funds were not legally “available,” as that term is used in appropriations law, to pay contract support costs.

As defendants would conveniently have it, the term “available appropriations” simply means any appropriations that the agency fails—eventually—to spend on something else. Thus, defendants claim that to show that “no funds were available in 1996 or 1997 to pay tribes the full amount of CSC” they need only demonstrate that the agency eventually spent all its money.

That is not the law. Rather, as all of the tribunals to consider the issue have uniformly held, the term “available” refers to appropriated funds the agency may lawfully use to meet its obligations because no statute (including the appropriations act itself) provides otherwise. *See* Pls. Partial Summ. J. Br. at 26-31 and cases cited therein. Indeed, despite frequently misusing

the term “earmark” and hinting obliquely that “Congress” somehow restricted the use of it appropriation,<sup>31</sup> the defendants concede (as they must) that insofar as contract support cost expenditures are concerned, Congress never imposed any restriction on the use of the agency’s lump-sum appropriation during fiscal year 1996 and fiscal year 1997 (or for that matter, during or any year covered by this case prior to fiscal year 1998).<sup>32</sup> Gov’t Opp. Br. at 13 (acknowledging that “\$7.5 million earmarks were originally *not statutory caps*,” but only “represented Congress’ *suggestion* [in fact, merely two committees’ suggestion] as to how IHS should allocate it appropriations”)(emphasis added).<sup>33</sup>

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<sup>31</sup> The defendants’ deliberate misstatements suggesting that Congress did enact statutory caps occur throughout their brief. *See e.g.*, Gov’t Opp. Br. at 3 (referring to “fixed appropriations”); 4 (referring to \$7.5 million as “available allocation”); 9 (“fixed appropriations” for self-determination contracts); and *id.* (“Congress designates a certain amount each year specifically for all contract support costs;” contrast with next sentence acknowledging implicitly that it is the total appropriation that was “fixed,” not the amount for contract support). In the years addressed by the defendants *none* of these statements is true.

<sup>32</sup> Although the government takes to criticizing the IBCA’s *Alamo* decision as “wrongly decided” and in violation of the ISDA, *e.g.*, Gov’t Opp. Br. at 50, far more telling is the fact the government did not appeal the portion of the decision finding the agency liable for years when contract support amounts were payable out of a lump-sum appropriation. (The government only appealed the *Miccosukee* portion of the decision, which found the government liable in years when the agency’s contract support payments were limited by a statutory earmark). *See also* discussion *supra* at 6 n.7 (\$80 million *Ramah Chapter* settlement for the BIA’s failure to pay full contract support costs during five lump sum years). Even more telling, in the *Shoshone-Bannock* litigation *the same defendants agreed* that in FY 1996 “the \$7.5 million for the ISD Fund is not an “earmark” or cap on the amount the Secretary can pay for CSC, but is intended to segregate such funds for “no year” status which has no fiscal year limitation or expiration date.” *Shoshone-Bannock I*, 988 F. Supp. at 1330.

<sup>33</sup> The argument in this section of our brief addresses only the contention that the plaintiffs’ right to contract support costs was conditional on the availability of appropriations made for each contract year at issue, *e.g.*, fiscal years 1996 and 1997, long prior to the passage of § 314. The defendants’ even more extreme position that the right to contract support costs was

To be clear, in fiscal year 1996, in fiscal year 1997 and in all other years prior to fiscal year 1998, Congress did not place a cap on the amount the agency could lawfully spend out of its lump-sum appropriation, and no amount of conversation about “committee reports” and “suggestions” can change that fact.<sup>34</sup> Congress, of course, knows *precisely* how to enact such a cap when it wishes to, as it did in the fiscal year 1998 and fiscal year 1999 Appropriations Acts. *See* Pub. L. No. 105-83, 111 Stat. 1543, 1583 (FY 1998 Appropriations Act) (Pls. Exh. 75 at 2) (providing that *not to exceed* [a stated sum] shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts entered into with the Indian Health Service prior to fiscal year 1998, as authorized by the [ISDA]”) (emphasis added); Pub. L. No. 105-227, 112 Stat. 2681, 2681-279 (FY 1999 Appropriations Act) (Pls. Exh. 76 at 3) (providing that *not to exceed* [a stated sum] shall be for payments to tribes and tribal organization for contract and grant support costs associated with contracts, grants, self-governance compacts or annual funding agreements between the Indian Health Service and a tribe or tribal organization pursuant to the [ISDA]”) (emphasis added).<sup>35</sup>

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conditional on any congressional act that might be enacted years later is discussed in the plaintiffs' reply brief in support of their motion for declaratory judgment.

<sup>34</sup> *See, e.g.*, Pub. L. No. 103-332, 109 Stat. 2499, 2527-28 (1994) (FY 1995 Appropriations Act) (Pls. Exh. 72 at 2); Pub. L. No. 104-314, 110 Stat. 1321, 1321-189 (1996) (FY 1996 Appropriations Act) (Pls. Exh. 73 at 2); and Pub. L. No. 104-208, 110 Stat. 3009, 3009-212 - 3009-213 (FY 1997 Appropriations Act) (Pls. Exh. 74 at 2).

<sup>35</sup> As explained in Part III-A above, *supra* at 11-27, since a “cap” only affects the agency’s § 450j-1(b) ability to pay, and not the government’s underlying obligation, the presence of contract support cost caps in FY 1998 and FY 1999 ultimately has no impact on the government’s liability for that portion of the tribal class claims arising in those years. *See also* Pls. Partial Summ. J. Br. at 46-49.

In attempting to confuse this issue, the defendants repeatedly cite snippets of *Lincoln v. Vigil*, 508 U.S. 182 (1993) out of context. Gov't Opp. Br. at 13, 45, 51. But that case squarely supports the plaintiffs' position, and offers no refuge for the government.<sup>36</sup> *Lincoln* involved a situation somewhat of the converse to that presented here: individual Indians brought suit against IHS to force the agency to continue providing a program that, while it received favorable mention in committee reports, was never authorized by statute (much less a statute that required the agency to enter into binding contracts with the beneficiaries). *Id.* at 185-88. The Court rejected the Indians' claim for injunctive relief, reiterating the well-established principle that:

where "Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and *indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on*" the agency.

*Id.* at 192 (emphasis added) quoting *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975).

*Lincoln* thus directly contradicts the defendants' argument that committee "suggestions" in FY 1996 and FY 1997—what the government liberally calls "Congress'" suggestions—somehow restricted the availability of agency funding for contract support costs in those years, Gov't Opp. Br. at 13, or that the agency was bound in those years by the so-called "appropriations structure," *id.* at 44-45. At the same time, it supports the plaintiffs by cautioning that:

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<sup>36</sup> In *Shoshone-Bannock I* the defendant again rested the bulk of its defense on *Lincoln*, a case the district court bluntly found not "particularly helpful because it involved different statutes and a different issue." 988 F. Supp. at 1306.

an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes (though not, as we have seen, just in the legislative history).

*Lincoln*, 508 U.S. at 193. And here Congress did precisely that in one of the “operative statutes”: in § 450j-1 of the ISDA. In light of this mandate “circumscrib[ing]” the “agency[’s] discretion,” IHS was required by law to meet these binding obligations, for as noted in footnot appropriations were certainly legally available.<sup>37</sup>

Beyond these points regarding basic appropriations law, *Lincoln* becomes largely irrelevant to the ISDA. As the *Shoshone-Bannock* court pointed out, the case “is not particularly helpful because it involves different statutes and a different issue. *Lincoln* addressed a truly

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<sup>37</sup> Congress in FY 1996 and FY 1997 also circumscribed the agency’s discretion in various other ways, including in the Appropriations Acts themselves, such as by carving out of the lump-sum appropriation certain minimum amounts for “contract medical care,” the “Indian Catastrophic Health Emergency Fund,” and the IHS “loan repayment program.” See, e.g., 110 Stat. at 3009-213 (FY 1997) (Pls. Exh. 74 at 2). Significantly—and decisively for this alternative argument—Congress in those Acts never specified either minimum or maximum amounts that were available to pay contract support cost obligations.

The amount of the unrestricted lump sum appropriation available to meet mandatory obligations such as contract support costs can be readily determined each year by deducting all specifically earmarked funds. Thus, for instance, in fiscal year 1996 the unrestricted lump sum “Indian Health Services” available appropriation was \$1,373,972,000 (including the \$7.5 million ‘no-year’ funds for “transitional costs”) (*i.e.*, \$1,747,842,000; less \$12 million set aside for catastrophic health needs, \$350,564,000 set aside for contract medical care to be purchased from the private sector, and \$11,306,000 set aside for IHS’s loan repayment program. 110 Stat. at 1321-189 (Pls. Exh. 73 at 2). In fiscal year 1995 the comparable available amount so calculated was \$1,338,191,000 (including the \$7.5 million ‘no-year’ funds for “transitional costs”), 109 Stat. at 2527-28 (Pls. Exh. 72 at 2), and in fiscal year 1997 the comparable amount so calculated was \$1,426,238,000 (including the \$7.5 million ‘no-year’ funds for “transitional costs”), 110 Stat. at 3009-213 - 3009-213 (Pls. Exh. 74 at 2).

discretionary program . . . [which] IHS had for years funded . . . out of the annual lump-sum allotment without any specific directive from Congress.” 988 F. Supp. at 1331. The court went on to contrast that program with the ISDA, which “sharply limits the Secretary’s discretion” and mandates full funding of contract support.<sup>38</sup> *Id.* Thus, *Lincoln’s* ultimate holding—that individuals may not compel an agency to continue a discretionary program to which they have no statutory or contractual right—has nothing to do with plaintiffs’ damage claims here, where the agency is bound to provide contract support funding *both* by the operative statute and by contract, and where Congress has expressly provided a damages remedy for any failure to provide that funding.

Because the “availability of appropriations” issue turns on statutory restrictions—if any exist—and not on the agency’s discretionary allocation of its budget, IHS’s lengthy discussion of its discretionary use of its lump-sum appropriation, along with its “factual showing” as to the colloquial ‘availability’ of funds to pay contract support, is likewise irrelevant.<sup>39</sup> All that the Fitzpatrick Declaration and associated documents show is the unsurprising fact that the agency eventually managed to spend almost all of its funds. Fitzpatrick Declaration, ¶ 16 at 7-8. But again, the relevant question (assuming *arguendo* that the availability of appropriations is relevant

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<sup>38</sup> Indeed, in awarding attorneys’ fees to the plaintiffs under the Equal Access to Justice Act, the *Shoshone-Bannock* court found that IHS’s “position on nonpayment of CSC was not substantially supported by either law or fact,” and on that basis awarded full fees and costs against the government. *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, No. CV-96-459-ST (D. Or. 1999) (Opinion and Order on Attorneys’ Fees dated Oct. 16, 1998) (Pls. Exh. 84 at 6).

<sup>39</sup> Indeed, the defendants acknowledge elsewhere that the “availability” of funds is not a factual question at all, but a legal question. Defs. Statement of Undisputed Material Facts, Section I, ¶¶ 10 & 11 (both stating that whether funds were “available” for contract support costs “constitutes a legal conclusion rather than a factual assertion”).

to liability at all) is whether any “statutory restriction” limited the legal “availability” of the two appropriations to pay the agency’s contract support obligations *when those obligations came due at the beginning of each fiscal year*. And on this key question the defendants are telling silent—for, in fact, there were no such restrictions at all. In short, the defendants have not shown, nor even attempted to show (nor *can* they now show, given their limited factual submission), that the agency lacked sufficient legally available funds at the beginning of each year to pay these obligations.<sup>40</sup>

Moreover, if the agency were able to avoid its contract support obligations simply by deciding to spend its funds in other ways, the mandatory provisions of the ISDA and the plaintiffs’ contracts would be meaningless; the agency would have absolute and unfettered discretion over contract support funding levels—in direct contravention of Congress’s intent in the ISDA’s 1988 and 1994 contract support reforms, and its corresponding decision to withhold from the agency any discretion *at all* over funding matters. Pls. Partial Summ. J. Br. at 7-10. Indeed, if the defendants are correct, so long as IHS eventually spends all its money some other way, *it need not provide any contract support funding to tribal contractors at all*. (After all, at this leve

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<sup>40</sup> Like defendants’ affiant Mr. Fitzpatrick, throughout our briefs we use the term “obligation” in its technical appropriations law sense as a binding and enforceable legal commitment of the United States. *See II Principles of Federal Appropriations Law* at 7-2 - 7-4 (1992). The defendants, however, are more casual, and thus incorrectly state that Mr. Fitzpatrick’s declaration supports the assertion that “all of [the agency’s] funds were *obligated* for Tribal purposes at the beginning of the fiscal years in question, with the exception of some minor unobligated funds.” Gov’t Opp. Br. at 44 (citing Fitzpatrick Dec., ¶ 3) (emphasis added). In fact, Mr. Fitzpatrick very carefully only states that IHS “obligated” most of its funds by the *end* of the fiscal year. Fitzpatrick Dec., ¶ 16, at 7-8. *See also* Pls. Opp. Br. at 3 n.2.

of analysis even the committees' contract support "suggestions" are not even binding on the agency, given *Lincoln*.) Taking the defendants' position to this logical yet absurd consequence reveals again that the government's position is simply untenable.<sup>41</sup>

The defendants also contend, apparently in the alternative, that even if the plaintiffs' have a right to full contract support funding, the Court would be prohibited from granting relief because to do so would violate the ISDA by "tak[ing] away funding from other Tribes or programs." Gov't Opp. Br. at 48-51. This argument is flawed because it is based on the incorrect assumption that the relief sought by the plaintiffs is an injunction requiring the agency to reallocate its lump-sum appropriation for the years in question.<sup>42</sup> But the plaintiffs do not seek any such relief. Instead, they seek only damages, as authorized by the ISDA, 25 U.S.C.

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<sup>41</sup> The very same gambit was tried and failed in *Shoshone-Bannock I*, with pointed response:

Permitting IHS to first allocate a certain amount of funding from its lump sum appropriation for CSC and then deny CSC 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.

988 F. Supp. at 1332, discussed in Pls. Partial Summ. J. Br. at 28.

<sup>42</sup> At the risk of redundancy (but out of an abundance of caution), the point in text is made only for the sake of argument and is premised on the assumption (wrong, under our reading of the law) that the sections relied on by defendants (25 U.S.C. §§ 450j-1(b), 450j(g) & (i), § 303(a)(7) and 306 of Title III, 25 U.S.C. § 450f note) should be understood as limitations on the government's underlying obligation for full contract support (rather than simply on the Secretary's ministerial duty to disburse whatever funding she has available). As discussed in Section III-A above and in the plaintiffs' opening brief at 31-50, the plaintiffs agree with the IBCA that these statutory provisions only refer to the latter duty and not the former, and are thus irrelevant to the ultimate outcome of this case.

§ 450m-1(a). *See* Pls. Decl. J. Reply Br. at 15. Because such damages may by law only be paid from the Judgment Fund, *see* Pls. Decl. J. Reply Br. at 13-14, and not from agency appropriations, granting relief in this case will not *and legally could not*, force the agency to deprive other tribes or programs of any funding, much less funding that has long since been spent.

To the extent that the “availability of appropriations” issue is relevant at all in FY 1996 and FY 1997, the issue is not whether the court may “reallocate IHS’ lump-su appropriation,” but whether IHS has the discretion to arbitrarily declare, with no statutory authority whatsoever, that a portion of its appropriation is simply “not available” for contract support. Given the mandate of the ISDA, the plaintiffs’ binding contracts, the legislative history of the relevant provisions, and basic principles of appropriations law, it clearly does not.

#### **IV. CONCLUSION**

For the foregoing reasons and the reasons set forth in the plaintiffs’ opening brief, the plaintiffs’ motion for partial summary judgment of liability on the first and second causes of action should be granted.

Respectfully submitted this 19<sup>th</sup> day of October 1999.

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